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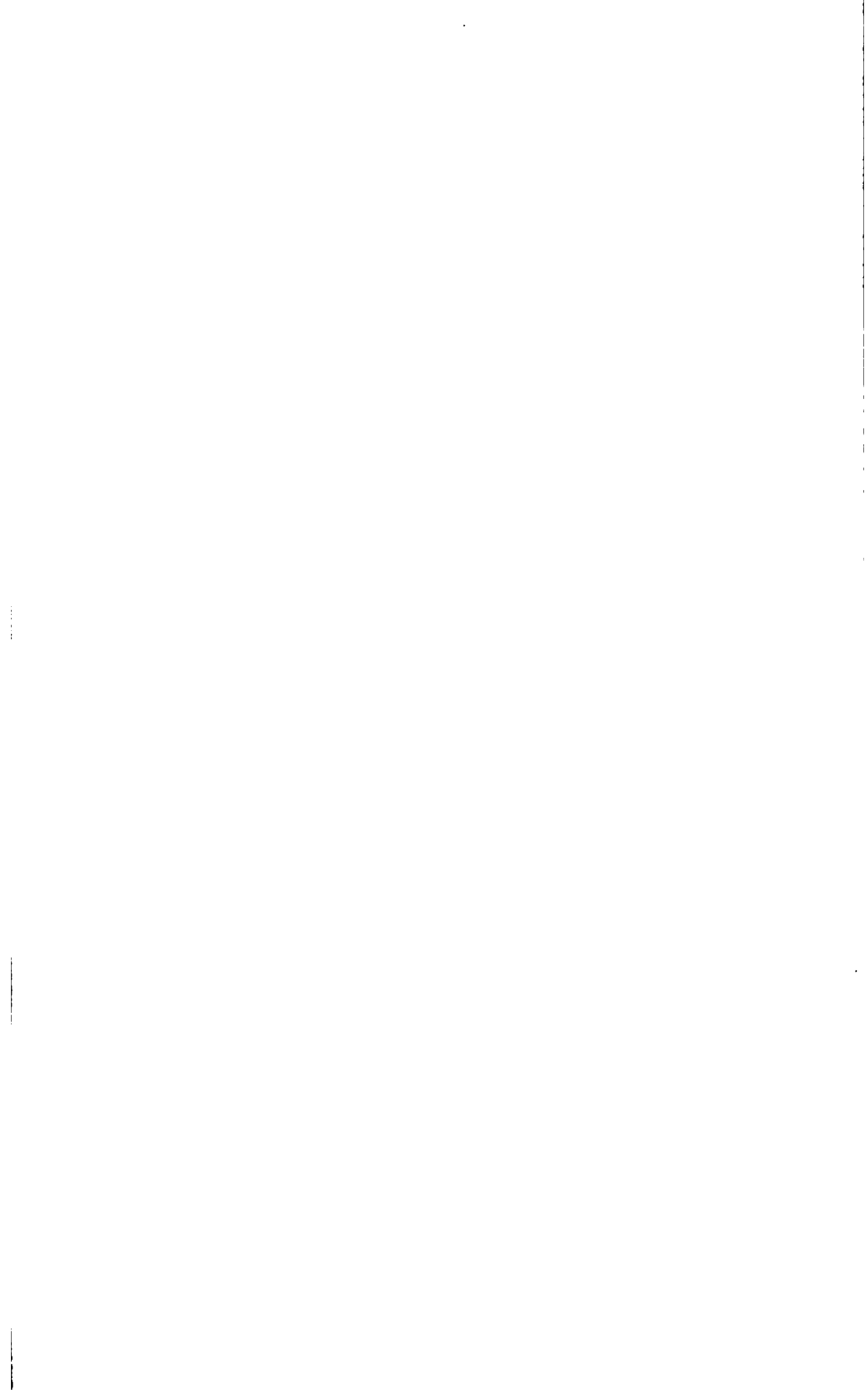
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THE
LAWYERS REPORTS
ANNOTATED

BOOK XVIII.

ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE WITH FULL ANNOTATION
BURDETT A. RICH, EDITOR, HENRY
P. FARNHAM, ASSISTANT.

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LAWYERS' REPORTS,

ANNOTATED.

KANSAS SUPREME COURT.

S. H. FULLERTON *et al.*, *Plffs. in Err.*,
v.

W. R. HILL, Impleaded, etc.

(.....Kan.....)

*1. A stranger to a promissory note, who writes his name across the back thereof before it is delivered to the payee, incurs, prima facie, the liability of the guarantor.

2. But parol proof may be received to

• Headnotes by STRANG, C.

show the exact liability of such indorser, by showing the agreement and understanding of the parties at the time of such indorsement.

(April 9, 1882.)

ERROR to the District Court for Graham County to review a judgment in favor of defendant in an action brought to enforce defendant's alleged liability on a promissory note. *Affirmed.*

The facts are stated in the commissioner's opinion.

NOTE.—*Liability of a stranger who indorses commercial paper before delivery.*

As to the nature of the liability of one who indorses a negotiable note before delivery to the payee there is considerable diversity of opinion among the courts of the different states. In some of the states such an indorser is prima facie regarded as a guarantor, in others an indorser, and in others a joint promisor.

In the following cases such an indorser is regarded as a guarantor: Perkins v. Catlin, 11 Conn. 212, 29 Am. Dec. 283; Rauson v. Sherwood, 26 Conn. 47; Rhodes v. Seymour, 26 Conn. 1; Thacher v. ens, 46 Conn. 586; Camden v. McKoy, 4 Ill. 427, 11 Dec. 91; Webster v. Cobb, 17 Ill. 459; Park v. Vail, 73 Ill. 245; Firman v. Blood, 2 Kan. 30; Arnold v. Bryant, 8 Bush, 688; Van Doren v. Jader, 1 Nev. 380, 90 Am. Dec. 498; Greenough v. Mead, 3 Ohio St. 415; Champion v. Griffith, 13 Ohio, 77; State v. Boring, 15 Ohio, 615; Watson v. Hurt, 6 Ill. 633; Orrick v. Colston, 7 Gratt. 189.

And in the following as an indorser: Riggs v. Waldo, 2 Cal. 487, 56 Am. Dec. 356; Jones v. Goodwin, 30 Cal. 493, 2 Am. Rep. 473; Feessenden v. Summers, 62 Cal. 436; Moore v. Cross, 19 N. Y. 227, 75 Am. Dec. 326; Bacon v. Burnham, 37 N. Y. 614; Phelps v. Vacher, 50 N. Y. 69, 10 Am. Rep. 423; Fear v. Dunlap, 1 G. Greene, 331; Slack v. Kirk, 67 Pa. 380, 5 Am. Rep. 438; Elbert v. Finkbeiner, 68 Pa. 247, 8 Am. Rep. 178.

While the following cases regard him as a joint maker, or surety: Killian v. Ashley, 24 Ark. 515, 91 Am. Dec. 519; Helise v. Bumpass, 40 Ark. 547; Gilpin v. Marley, 4 Houst. (Del.) 234; Massey v. Turner, 2 Houst. (Del.) 79; Collins v. Everett, 4 Ga. 273; Camp v. Simmons, 62 Ga. 73; Lawrence v. Oakley, 14 La. 226; Chor. v. Merrill, 9 La. Ann. 533; Collins v. Foist, 30 La. Ann. 348; Leonard v. Wilde, 36 Me. 235; Childs v. Wyman, 44 Me. 441, 69 Am. Dec. 111; Ives v. Bosley, 35 Md. 232, 6 Am. Rep. 411; Walz v. Alback, 37 Md. 404; Wetherwax v. Paine, 2 Mich. 559; Rothschild v. Griz, 31 Mich. 150, 18 Am. Rep. 171; Moynahan v. Hanaford, 42 Mich. 329; Pierce v. Irvine, 1 Minn. 377; Stein v. Passmore, 25 Minn. 256; Schneider v. Schiffman, 30 Mo. 571; Martin v. Boyd, 11 N. H. 283, 26 Am. Dec. 501; Currier v. Fellows, 27 N. H. 18 L. R. A.

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But one who indorses a note payable to the order of the maker and by him indorsed in blank becomes liable as indorser only; the rule that one not a party to the note who puts his name on it is presumed to have done so as surety, does not apply in that case, nor is it material that the note is discounted by the maker and the proceeds applied for the indorser. H. B. Claflin & Co. v. Feltleman, 44 La. Ann. —; Bigelow v. Colton, 13 Gray, 309, 74 Am. Dec. 663; First Nat. Bank of St. Charles v. Payne (Mo.) July 2, 1892; Williams v. Merchants Nat. Bank of Kansas City, 67 Tex. 606; Heidenheimer v. Blumenkron, 56 Tex. 308.

In Killian v. Ashley, 24 Ark. 511, 91 Am. Dec. 519, it was said that if the defendant indorsed the note at the time it was executed he was bound as security for the payment as fully as if his name had been written immediately under that of the principal. The mere fact that the name was written on the back of the instrument did not change the nature of the liability; it was not the making of a new contract, but simply becoming security for the payment of the one being made.

Of an indorser before delivery of a negotiable note, Shaw, Ch. J., in Chaffee v. Jones, 19 Pick. 283, says: "He is not liable as an indorser for the note is not negotiated, or title made to it through his indorsement, nor as guarantor, because there is no separate or distinct consideration; but he meant to give security and validity to the note by his credit, and promised to pay it if the promisor does not."

Messrs. W. W. Guthrie and W. F. Guthrie for plaintiffs in error.

Mr. Z. C. Tritt for defendant in error.

Strang, C., filed the following opinion:

This action was brought by the plaintiffs, as plaintiffs in the court below, upon a promissory note executed to them by A. L. Dunnwoody and Mary Dunnwoody, and indorsed by the defendant W. R. Hill. The action was also for the foreclosure of a real estate mortgage given by A. L. Dunnwoody and wife to secure, in part, said note. Hill answered and alleged that, at the time he indorsed the note, he did so only upon the special agreement with the plaintiffs and the other defendants that, if he would indorse the note, they would, when one half the amount of said note was paid, surrender said note, and take a new note for the balance, secured by a mortgage to be given

by the Dunnwoodys upon certain real estate. He also says that, subsequent to his indorsement of the note, one half of said note was paid, and the mortgage was given by the Dunnwoodys, and taken by the plaintiffs as agreed, but that, instead of surrendering the old note and taking a new one, the plaintiffs retained the old note and took the mortgage as security for the balance due thereon. A reply was filed, denying generally the allegations of Hill's answer, and the case went to trial on the issue made by Hill. Judgment was taken for plaintiffs against A. L. and Mary J. Dunnwoody for the balance due, and the mortgage was foreclosed. The trial was by the court, which found in favor of Hill, that he was not liable on the note, and he recovered judgment for his costs. Motion for new trial was overruled, and the plaintiffs bring the case here, and allege for error the overruling by the court of

and that upon the original consideration, and therefore he is a promisor and surety; and it is immaterial to this purpose on what part of the note he places his name."

The Massachusetts courts adopted a very stringent rule and held that one who indorsed a note before delivery was liable as an original promisor, and parole evidence was not admissible to show that such was not his real contract. *Way v. Butterworth*, 108 Mass. 509; *Union Bank of Weymouth v. Willis*, 8 Met. 504; *Brown v. Butler*, 99 Mass. 179; *Allen v. Brown*, 124 Mass. 77; *Gilson v. Stevens Mach. Co.*, 124 Mass. 546.

But by Mass. Stat. of 1874, chap. 404, it was provided that "all persons becoming parties to promissory notes payable on time by a signature in blank on the back thereof shall be entitled to notice of the non-payment thereof the same as indorsers."

Distinction between negotiable and non-negotiable instruments.

The New York courts have made a distinction between cases where notes have words of negotiability and where they have not, and whilst admitting the signer's liability as original promisor in the latter, they maintain that in the former he is only chargeable as indorser. *Dean v. Hall*, 17 Wend. 214; *Seabury v. Hungerford*, 2 Hill, 80; *Hall v. Newcomb*, 7 Hill, 416, 42 Am. Dec. 82; *Ellis v. Brown*, 6 Barb. 282; *Waterbury v. Sinclair*, 26 Barb. 456; *Phelps v. Vischer*, 50 N. Y. 69, 10 Am. Rep. 483.

In New York it is the settled law that a person making such an indorsement is presumed to have intended to become liable as second indorser, and that, on the face of the paper, without explanation, he is to be regarded as second indorser, and therefore not liable on the note to the payee. *Coulter v. Richmond*, 59 N. Y. 478.

In this case the defendant's intestate had indorsed the note at the request of the maker to enable the latter to purchase from the payee United States bonds. For three years prior to the making of this note the maker had borrowed the same bonds, giving as security on each occasion his note signed by the indorser as security. It was held a legitimate inference that the indorser knew the purpose of the note, and that it was given to obtain credit.

In *Bacon v. Burnham*, 37 N. Y. 614, it was held that where a person indorsed a note, payable to another or order, the legal presumption was that he stood in the position of a subsequent indorser to the payee; and that, there being no proof showing him in a different position, the payee could not recover against him, and further that no right of action could be acquired by transfer, from the payee.

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In *Hall v. Newcomb*, *supra*, the chancellor said: "The question for our consideration is whether a person who puts his name in blank upon the back of a negotiable note, which is drawn in such a form that he may be charged as indorser in the usual mode, if a demand is made and notice of non-payment given, can be charged as a general surety without such demand and notice, by parole evidence merely."

"Where a note is made payable to an individual or his order, and is indorsed by him in blank, and in that situation is presented to another person for his accommodation indorsement, who indorses it accordingly, the legal effect of his indorsement is to make him liable in the character of second indorser merely; and he can in no event be made legally liable to the first indorser. And if the maker, or the first indorser, or any other person into whose hands the note might subsequently come, should, without the consent of the second indorser, fill up the first indorsement specially, without recourse to such first indorser, so as to deprive the second indorser of his remedy over in case he should be compelled to pay the note, it would be a gross fraud upon him, if not a forgery. But when such a note is presented to the accommodation indorser, and is indorsed by him without having been previously indorsed by the person to whose order the same is made payable, the latter may, at the time he puts his indorsement upon it, indorse it specially without recourse to himself; so as to leave the second indorser liable to any person into whose hands it may subsequently come for a good consideration, and without any remedy over against the first indorser. Or, if the object of the second indorser was to enable the drawer, as in this case, to obtain money from the payee of the note, upon the credit of such accommodation indorser, he may indorse it in the same way without recourse; and by such indorsement may either make it payable to the second indorser or to the bearer. And such original payee may then, as the legal holder and owner of the note, recover thereon against such second indorser, upon a declaration stating such special indorsement by him and subsequent indorsement of the note to him by the second indorser. Or he may recover on the common money counts, under the statute, by serving a copy of the note, and of the indorsement so made thereon, with his declaration. But as the second indorser, if he has not waived notice of the demand of and non-payment by the maker, cannot be made liable upon his indorsement without proof of such demand and notice, the plaintiff at the trial must prove the same, or he cannot recover."

Judge Daniel in his work on *Negotiable Instru-*

the objection to the reception of evidence under the answer of defendant Hill. And, *secondly*, they allege that the court permitted Hill, over their objection, to introduce evidence in proof of a concurrent parol agreement limiting his written liability on the note sued on.

The first inquiry in this case is, What is the character of Hill's liability on the note sued on? Hill was a stranger to the note. What liability did he incur by writing his name across the back thereof? This question was settled, in this state, at a very early day. In the case of *Firman v. Blood*, 2 Kan. 497, this court declares that the liability incurred by an irregular indorsement of a promissory note, that is, the writing of his name by a stranger to the note across the back thereof, is *prima facie* that of a guarantor. Judge Kingman, delivering the opinion of the court, says: "If the note is designed for the payee, then he cannot

be held as an indorser. He is a stranger to the note. He must be held either as an original promisor or guarantor. Holding, then, that, in settling this question for the first time, it is well to follow those decisions that seem best to interpret the original understanding of the parties, we think, in the absence of proof, Wilder and Morrow should be held as guarantors." Wilder and Morrow, strangers to the note, had written their names across the back of said note. They sustained, *prima facie*, the same relation to the note sued on in that case that Hill does to the note sued on in this case. The case of *Fuller v. Scott*, 8 Kan. 25, follows the *Firman Case*. In that case it is said: "The indorsement of the name of a third person upon the back of a promissory note is *prima facie* evidence of a contract of guaranty." In the case of *Whittenhall v. Korber*, 12 Kan. 620, the *Firman Case* is again recog-

ments, § 714, says: "It would seem to us that such a party ought to be regarded as a first indorser. If he intended to be a second indorser, he should have refrained from putting his name in the note until it was first indorsed by the payee. By placing it first he enables the payee to place his own afterwards; and *prima facie* the facts would seem to indicate such intention. There is nothing in the objection that there is no title in him to indorse away. Prior parties could not be sued without payee's indorsement; but he being an indorser can be sued by any one deriving title under him. In fact, his position seems to render his liability strictly analogous to that of the drawee of a bill upon the maker in favor of the payee; and so to regard him simplifies, as it seems to us, a question which, unless such analogy be followed, is exceedingly complicated and difficult."

In Indiana, also, this distinction between negotiable and non-negotiable instruments is declared. In *Wells v. Jackson*, 6 Blackf. 40, the leading case in Indiana, it was held that where a third person wrote his name on the back of a note not negotiable as an inland bill of exchange, prior to or at the time of its inception, without any agreement expressing the real nature of the obligation intended to be assumed, he thereby conferred authority on the payee to treat him as a surety or joint promisor; while a similar act in respect to a note negotiable as an inland bill of exchange subjected the person so signing, presumably to the liability, as well as the privileges and immunities of an indorser.

The following cases sustain this rule and settle the law in that state: *Pool v. Anderson*, 1 L. R. A. 712, 116 Ind. 88; *Moorman v. Wood*, 117 Ind. 144; *De Pauw v. Bank of Salem*, 10 L. R. A. 46, 126 Ind. 553; *Kealing v. Van Sickle*, 74 Ind. 529; *Houck v. Graham*, 3 West. Rep. 670, 106 Ind. 196; *Good v. Martin*, 95 U. S. 95, 24 L. ed. 343; *Knopf v. Morel*, 10 West. Rep. 512, 111 Ind. 570.

In *Rothschild v. Grix*, 31 Mich. 150, 18 Am. Rep. 171, *Graves, Ch. J.*, criticised the rule which recognizes a distinction between negotiable and non-negotiable instruments, in the following words: "If not misapprehended, it makes the backer's undertakings, when entered into, assume the character of an indorser's contract, or that of the contract of an original promisor, according to whether the note does or does not contain words which permit the paper to be rendered negotiable, and it neither regards any extrinsic arrangement or understanding bearing on the quality of the undertaking, or the circumstances that when the backer's contract is complete, and defined by delivery to the payee, the words of negotiability still remain dormant, 18 L. R. A.

mant, and the note without an indispensable quality to make it presently negotiable. Now, the backer's contract takes effect simultaneously with that of the party who signs upon the face, and the right of the payee against each inures at the same time. The note, it is true, then contains words of negotiability, but they are without function. They have a potential force only. The note is still not in shape to be negotiable, and cannot be negotiable, until the payee, or one in his shoes, elects to indorse. The effect of putting in the words of negotiability not being to constitute the paper presently negotiable, but to convey to the payee and his privies the power, to be exercised at their election, to invest it with negotiability. Still, the contract relation of the backer to the payee is constituted at the outset. If the backer's attitude to the payee is not then that of indorser, it cannot grow into it by mere lapse of time. The possibility that the note may be made subject to an indorser's contract does not make it subject thereto when it is delivered. The payee may choose, under the right exclusively vested in him, not to indorse at all; and if such is his choice the paper will never come into a negotiable state."

In Connecticut the indorsement in blank of a negotiable note by a third person for the better security of the payee, *prima facie* imports the same contract as the blank indorsement of a note not negotiable. *Perkins v. Catlin*, 11 Conn. 213, 29 Am. Dec. 282; *Ranson v. Sherwood*, 26 Conn. 437.

Presumption as to date of signature.

An indorsement by a stranger, if without date, is presumed to have been made at the inception of the note. *Gilpin v. Marley*, 4 Houst. (Del.) 284; *Cook v. Southwick*, 9 Tex. 615, 60 Am. Dec. 181; *Webster v. Cobb*, 17 Ill. 459.

The defendant's signature on the back of the note had the same effect to make him an original promisor as if he had signed on its face, and there being no other date than the date of the note, the presumption is that he signed it when the maker did, or agreed to sign it, and subsequently did so, in pursuance of such an agreement. *Childs v. Wyman*, 44 Me. 453, 69 Am. Dec. 111; *Leonard v. Wildes*, 36 Me. 235.

But oral evidence is admissible to show when the indorsement was made. *Good v. Martin*, 95 U. S. 90, 24 L. ed. 341; *Essex Co. v. Edmonds*, 12 Gray, 275, 71 Am. Dec. 758.

Intention of the parties controls liability.

A stranger who writes his name on the back of a promissory note before it is delivered, whether

nized, and referred to as stating the law on this question. See also *Sarbach v. Jones*, 20 Kan. 497; *Withers v. Berry*, 25 Kan. 378; *Talley v. Burtie*, 45 Kan. 151, and cases there cited.

The liability of Hill being fixed, prima facie, as that of guarantor, instead of that of commercial indorser, parol testimony may be given to show his exact relation to the other parties to the note, and the exact liability assumed by him when he put his name thereon. *Firman v. Blood*, *supra*: "The difference is this: in Massachusetts he is presumed to be an original promisor, in Ohio he is presumed to be a guarantor; but in either state parol evidence is received to rebut the presumption, and show what liability it was intended he should assume, and what relation he should sustain to the paper." In *Fuller v. Scott*, 8 Kan. 25,

the court says: "The liability incurred by a stranger to a promissory note, by writing his name across the back thereof, is that of an implied guaranty unless the same is inconsistent with the understanding of the parties; clearly recognizing the right to show, by parol proof, the exact liability so incurred, according to the understanding of the parties, at the time of the indorsement and delivery of the note. In *Withers v. Berry*, *supra*, one, a stranger to a note, who had written his name across the back thereof, was permitted, when sued thereon, to show that, at the time the note became due, the maker thereof was solvent, and that the note could have been collected of him by the exercise of reasonable diligence but that afterwards the maker became insolvent;" and such showing was held a good de-

it be negotiable or non-negotiable, according to the law-merchant, does so in order to give the maker credit or the note currency, and with the intention to pledge himself in some shape for its payment. *Ellbert v. Finkbeiner*, 68 Pa. 243, 8 Am. Rep. 176; *Pool v. Anderson*, 1 L. R. A. 712, 116 Ind. 68.

It is sufficient that the indorser knows that a credit is to be obtained of the payee, and it is not necessary that he should know the precise nature of it. *Coulter v. Richmond*, 59 N. Y. 478.

The effect of an indorsement before delivery depends upon the party's intention. *Boteler v. Dexter*, 19 Wash. L. Rep. 874.

The liability of one whose name appears upon a promissory note, no matter when or where it is written or what the character of the note is, must depend upon a contract which is either expressed in words or implied by law. *Seymour v. Mickey*, 15 Ohio St. 515.

The act constitutes a contract which is to be construed in such a way as to render it available to carry into effect the intention of the parties, consistent with settled rules of law. *Good v. Martin*, 95 U. S. 90, 24 L. ed. 341; *Rey v. Simpson*, 63 U. S. 341, 16 L. ed. 260.

In *Rey v. Simpson*, *supra*, it was held that when a promissory note, made payable to a particular person, is first indorsed to a third person, such third person is held an original promisor, guarantor, or indorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place. If he put his name on the back of the note at the time it was made, as surety for the maker and his accommodation, to give credit with the payee, or if he participated in the consideration for which the note was given, he must be considered as a joint maker.

"Whether the contract was one of indorsement or suretyship depended, not upon the intent of one of the parties, but on the mutual understanding and intent of both." *Kealing v. Vansickle*, 74 Ind. 529.

The liability of one who places his name on the back of an inland bill of exchange, before its delivery, in order to give the maker credit with the payee, is, in the absence of any agreement to the contrary, that of an indorser entitled to notice of dishonor, and this liability can in no way be affected by any understanding or agreement between the maker and payee. *De Pauw v. Bank of Salem*, 10 L. R. A. 46, 126 Ind. 559.

Where a person indorses a note in blank and intrusts it to the maker to deliver to the payee, he does not clothe the maker with authority to change, by agreement with the payee, the liability of indorser to that of a surety. *Ibid*.

The liability of indorsers for a note in blank cannot be changed by the subsequent writing of a

guaranty above their names without their authority. *Peters v. Chamberlain*, 36 N. Y. S. R. 1000.

Intention may be shown by parol.

Parol evidence is admissible to show the liabilities intended to be assumed at the time of the transaction. *Ives v. Bosley*, 35 Md. 262, 6 Am. Rep. 411.

As between the parties to the real transaction it may be shown that one who signed his name was an indorser, but not as to a bona fide holder. *Schneider v. Schieffman*, 20 Mo. 871; *Houck v. Graham*, 106 Ind. 195; *Browning v. Merritt*, 61 Ind. 425; *Bronson v. Alexander*, 48 Ind. 244; *Nurre v. Chittenden*, 55 Ind. 462; *Roberts v. Masters*, 40 Ind. 461.

In *Seymour v. Mickey*, 15 Ohio St. 515, *Scott, J.*, said: "It is the well-settled law of this state . . . that the mere indorsement upon a note of the name of a stranger in blank is prima facie evidence of a guaranty. But if it be shown that such indorsement was made at the execution of the note, and the party making it has not prescribed the limits of his responsibility, he authorizes the holder to regard him as a maker, and he is to be treated simply as a surety. These ordinary presumptions may, however, be rebutted by parol proof of a different intention and agreement of the parties."

In *Collins v. Everett*, 4 Ga. 273, it was said that such an indorser was, according to the common law, a second indorser, and not liable as surety or promisor; and that if parol testimony could fix the liability of surety or promisor it could only be by proof of an agreement; and that such an agreement ought to be specially averred. In this case, however, under the Act of 1820, the indorser was liable as surety. The Act of 1826 excepts paper payable at chartered banks, and, therefore, paper so payable is under the operation of the common-law rule as laid down above. But even in such a case it is open, under Ga. Code, § 3808, to explanation by parol. *Neal v. Wilson*, 79 Ga. 733.

In Pennsylvania, prior to January 1, 1866, when the Act of April 23, 1855, went into effect it could have been shown by parol evidence that the intention of the irregular indorser was to guarantee the payment of the note to the payee. *Leech v. Hill*, 4 Watts, 448; *Taylor v. McCune*, 11 Pa. 460.

The effect of that act was to make parol evidence of such a guaranty unlawful. *Jack v. Morrison*, 48 Pa. 113.

"But surely, under the statute, a memorandum in writing, signed by the party, is admissible to show that the agreement upon which the indorsement was made was a guaranty that the note should be paid to the payee." *Ellbert v. Finkbeiner*, 68 Pa. 247, 8 Am. Rep. 176. A. P. W.

fense. In the case of *Talley v. Burtis*, 45 Kan. 147, the same principle is recognized. Counsel cite the case of *Doolittle v. Ferry*, 20 Kan. 230, 27 Am. Rep. 166, to show that oral testimony may not be received to affect the liability of an indorser on a note. The distinction between that case and this is that in this case Hill was a stranger to the note he indorsed, and in law became, prima facie, a guarantor thereof, while, in the case cited, Ferry and Watson were the payees in the note, and by their indorsement became liable as commercial indorsers. Their indorsement carried with it the title to the note, while in the case at bar Hill's indorsement did not in

any way affect the title to the note. A different rule prevails in the cases because of the different liabilities incurred by the indorsement of a note by the payees therein and by a stranger to the note. We think the defense of Hill was one that could properly be set up and proven in the case, and, the court having made a general finding in favor of Hill thereon, the case must be affirmed, and it is so recommended.

Per Curiam:

It is so ordered.

All the Justices concur.

Rehearing denied.

NEW YORK COURT OF APPEALS.

Charles ULRICH, *Appt.*,

v.

Edward ULRICH, *Exr.*, etc., of Barbara Ulrich, Deceased, *Resp't.*

(.....N. Y.)

There is no presumption of law against an agreement by a parent to pay a child for personal services where there is evidence tending to show such an agreement although if there is no such evidence there is a presumption that the services are gratuitous.

(*Andrews, Finch and O'Brien, JJ., dissent.*)

(November 29, 1892.)

APPEAL by plaintiff from a judgment of the General Term of the Superior Court for the City of New York affirming a judgment of the Trial Term in favor of defendant in an action brought to recover compensation for services alleged to have been rendered to defendant's intestate. *Reversed.*

The facts are stated in the opinion.

Mr. Nelson Smith, for appellant:

There is no presumption of law against any valid claim nor against any valid defense.

McQueen v. Babcock, 3 Abb. App. Dec. 132; *Barnett v. Meyer*, 10 Hun, 109; *Bank of Kinderhook v. Gifford*, 40 Barb. 659; *Union Nat. Bank v. Bassett*, 3 Abb. Pr. N. S. 359; *Grant v. McCaughin*, 4 How. Pr. 216.

All that the law presumes is that where there is no contract for services, there can be no recovery.

Mr. Edward W. S. Johnston, with **Mr. Edward P. Orrell**, for respondent:

In *Spraker v. Dow*, 16 N. Y. S. R. 297, the court held that claims of the nature of the one here asserted against the estate of deceased persons based upon no agreement clearly expressed or satisfactorily established by reliable evidence should be carefully scrutinized by the courts to the end that speculative or fictitious claims should not be encouraged.

Where there is near relationship between the

alleged promisor and promisee, it is the rule that transactions between them do not give rise to the ordinary presumptions that result from business dealings.

Collyer v. Collyer, 12 N. Y. S. R. 878.

In cases of this character the law does not imply a promise to pay for services rendered or for board and lodging furnished, but will presume that they were rendered and furnished gratuitously, and in order to overcome this presumption there must be an express promise to pay proved together with evidence showing that the parties expected to be paid, and payment.

Lynn v. Smith, 35 Hun, 275; *Roblee v. Galentine*, 19 N. Y. Week. Dig. 153.

Claims withheld during the lifetime of an alleged debtor, and sought to be enforced after his death, are always to be carefully scrutinized and only admitted upon satisfactory proof.

Kearney v. McKeon, 85 N. Y. 187.

In *Havens v. Havens*, 21 N. Y. S. R. 958, Pratt, J., says: "The fact that the plaintiff resided so long with his father and no accounting seems to have been had, renders it probable that plaintiff never intended to charge, and the father never expected to pay for, any of the items claimed."

See also *Ross v. Ross*, 6 Hun, 184; *Moore v. Moore*, 3 Abb. App. Dec. 303.

Mere performance of the services is not enough; it must affirmatively be shown that there was an agreement to pay an agreed recompense for them.

Carpenter v. Weller, 15 Hun, 184; *Hall v. Finch*, 29 Wis. 278; *Updike v. Titus*, 18 N. J. Eq. 152; *Griffin v. Potter*, 14 Wend. 210; *Lynn v. Lynn*, 29 Pa. 369; *Gaylord v. Gaylord*, 7 N. Y. S. R. 708; *Keller v. Stuck*, 4 Redf. 297; *Grandin v. Reading*, 10 N. J. Eq. 370; *Williams v. Hutchinson*, 3 N. Y. 319; *Sullivan v. Sullivan*, 6 Hun, 658; *Re Koecker's Estate*, 47 Phila. Leg. Int. 505; *Hall v. Finch*, 29 Wis. 236, 9 Am. Rep. 559; *Fisher v. Fisher*, 5 Wis. 472; *Mountain v. Fisher*, 23 Wis. 98; *Andrus v. Foster*, 17 Vt. 560; *Fitch v. Peckham*, 16 Vt. 150; *Shakespeare v. Markham*, 72 N. Y. 400; *Ikerd v. Beavers*, 106 Ind. 488;

NOTE.—The limits of the presumption as to gratuitous services to kindred are more sharply defined than usual by the above decision.

For cases illustrating the general rule, see *Ellis* 18 L. R. A.

v. Cary, 4 L. R. A. 55, 74 Wis. 176; *Harris v. Smith*, 6 L. R. A. 702, and note, 79 Mich. 64; *Murphy v. Murphy* (S. D.) 9 L. R. A. 820.

Ayres v. Hull, 5 Kan. 419; *Greenwell v. Greenwell*, 28 Kan. 675; *Wotherspoon v. Wotherspoon*, 17 Jones & S. 160.

Loose expressions of an infirm parent expressive of gratitude for the personal services of a child, and of a desire that compensation should be rendered after his death, are not in the least degree indicative of the term of a contract to pay therefor, and are insufficient for submission to the jury from which to find whether or not such a contract existed.

Ulrich v. Arnold, 120 Pa. 170; *Vansickle v. Furguson*, 122 Ind. 450; *Houck v. Houck*, 99 Pa. 552; *Hertzog v. Hertzog*, 29 Pa. 465; *Wright v. Senn*, 85 Mich. 191; *Hill v. Hill*, 121 Ind. 255; *Ellis v. Cary*, 4 L. R. A. 55, 74 Wis. 176; *Wiley v. Bull*, 41 Kan. 206; *Burgess v. Burgess*, 109 Pa. 312; *Re Kirkpatrick's Estate* (S. C.) July 28, 1891; *Zimmerman v. Zimmerman*, 129 Pa. 235; *Woods v. Land*, 90 Mo. App. 176; *Barhite's App.* 126 Pa. 404; *Lewis v. Trickey*, 20 Barb. 387.

The presumption of law is certainly against a claim of this kind and the courts have more than once said so. The presumption of law is against the liability for services of this character, and the courts have repeatedly so held.

Shakespeare v. Markham, 72 N. Y. 400; *Ulrich v. Arnold*, *supra*; *Spraker v. Dow*, 16 N. Y. S. R. 297; *Kearney v. McKeon*, 85 N. Y. 137; *Carpenter v. Weller*, 15 Hun, 134; *Harri-man v. Sampson*, 23 Ill. App. 159; *Lynn v. Lynn*, 29 Pa. 369; *Funk v. Lawson*, 12 Ill. App. 229; *Woods v. Evans*, 113 Ill. 186, 55 Am. Rep. 409.

Gray, J., delivered the opinion of the court:

The plaintiff brought this action against the executor of his mother's will to recover from her estate the value of services, which he alleged had been rendered by himself and his wife to his mother at her request. A jury rendered a verdict for the defendant, and the only question which demands our consideration, upon the plaintiff's appeal from a judgment affirming the defendant's recovery, arises upon the exception of the plaintiff to a part of the trial judge's charge. After stating what the action was for, the trial judge said: "As a general rule, children are bound to care for their parents in their old age, and filial affection should prompt children to do so. The consequence is that the presumption of law is against such a claim as has been advanced in this action." The plaintiff excepted to this portion of the charge, and insists that it was an erroneous instruction to the jury. The trial judge, it is true, continued by charging that "if the plaintiff has overcome the presumption by proof, and has clearly shown that the services sought to be recovered for were rendered by himself and his wife pursuant to his mother's express promise, . . . the plaintiff is entitled to recover." Under the facts of the case, as they had appeared in the evidence, the charge relating to the obligations of children, and as to the legal presumption, was such as possibly to convey to the minds of the jurors an erroneous understanding of the law. It may well be that the trial judge had before his own mind the moral aspect of the case, and did not intend that his observations

should have any other weight with the jury than as moral reflections; but the nature of the case, the sequence of the remarks, and the stage of the case, or the circumstances under which uttered, were such as, in my judgment, to require us to grant a new trial. There is no presumption of law against the maintenance of such a claim. If the plaintiff had established to the satisfaction of the jury the existence of an agreement between his parent and himself, under which he and his wife were to attend upon and to care for her, and she was to pay for such services, he was entitled to their verdict, as much as he would be upon any other valid claim.

A "presumption" has been defined to be a rule of law that courts and judges shall draw a particular inference from particular facts, or from particular evidence, unless and until the truth of the inference is disproved. *Steph. Dig. Ev. chap. 1, art. 1*. No presumption existed here as a presumption of law. The right to draw any presumption as to the fact of an agreement having been made from the other fact of the relationship between the parties was within the exclusive province of the jury. *Justice v. Lang*, 52 N. Y. 323. There is no rule of law which compels an inference, from the fact of such a relationship, against the existence of an agreement by the parent to compensate the child for services to be rendered. The law does presume, where there is no proof of a contract, under which the services were performed, that there was no promise or agreement to pay for them; that is, that they were gratuitous. That is the general rule. So far as the relation of parent and child is concerned, it is quite as competent for the parent to contract with his adult child for support and care, and a claim for the compensation due thereunder is quite as valid as it would be in any other case between individuals. The liability of a child to support its parents, who are infirm, destitute, or aged, was created in England and here by statute. The statute in that respect created duties unknown to the common law. *Reeve, Dom. Rel.* 284; 1 Bl. Com. 448; *Edwards v. Davis*, 16 Johns. 281.

Had the trial judge confined his observations to the suggestion that filial affection should prompt children to take care of their parents in their old age, I should find no reason for criticising the correctness of his charge. But the state of the case was such as that, with the moral sense alert, and naturally quick to respond to impressions adverse to the plaintiff's claim, the jury would readily attach great weight to all expressions of the judge presiding at the trial which cast a doubt upon the validity of the claim. In every case, to determine whether the error pointed out has been such as to prejudice the party, the court may consider the nature of the case, and how delicately the scales were balanced between the parties. Here the plaintiff had shown by the evidence of his wife that, after the death of her husband, the testatrix, who was very aged and feeble, told plaintiff and his wife to stay on with her, and that she would pay them for the work they did; that she gave as a reason her helpless condition; that they remained with her until her death, and during that time performed many more or less important services

in nursing and caring for her; and that she repeatedly said she would pay them, without mentioning any amount. Her evidence was more or less corroborated by that of witnesses who variously testified to hearing the old woman state that she made the plaintiff and his wife stay with and take care of her, and that she would pay them, or that she would "make it all right with them." In opposition, the defense gave evidence to show that plaintiff and wife received their board and lodging; that the deceased was an active woman, and not dependent upon others for services, or in need of care; that plaintiff was a shiftless fellow, and would occasionally drink to excess; and that, under the will of deceased, plaintiff received an equal interest in her estate with the other children. When the evidence was all in, and the case ready to be sent to the jury for their verdict, while the plaintiff's evidence of an agreement that they should remain and care for the deceased, and that their services were to be paid for, was uncontradicted by direct evidence, it was seriously attacked by evidence of facts which, if it did not make the agreement appear an improbable one, yet was of such a nature as might justify the jury in discrediting the evidence for the plaintiff.

On the one side was positive evidence which, if believed, entitled plaintiff to a verdict. According to the evidence given for the plaintiff there were no rambling expressions of a sense of obligation, or of promises to make compensation by testamentary provisions. There was a request to remain, and an agreement to pay for the work to be done. On the other side, there was circumstantial evidence negating or tending to negative the making of the alleged agreement, which the jury were at liberty to accept, and upon which they could base a verdict for the defendant. In that condition of things, the just balance of their minds might be disturbed, and their judgment easily led, by any suggestion from the trial judge which seemed to militate against the legality of plaintiff's claim, and which would seem to accord with an aversion of the moral sense. It appears from the record that at the

conclusion of the evidence but little time was left, and that the trial judge hastened, as he said, to "finish the case this evening" and he made a very brief charge, in which he left it to the jury to say whether the plaintiff had "made out a case which meets every requirement of the law as he had laid it down." He had in mind, I do not doubt at all, that he had previously merely commented upon the obligation from the child to parent, as such exists in nature, and not as having led them to believe that any rule of law stood in the way of such a claim in such cases. But I am constrained to the belief that prejudice may have been worked to the plaintiff's case by the observations of the trial judge. He had observed that it was "a general rule that children are bound to take care of their parents in their old age," and that "the consequence" of that rule, and of the promptings of filial affection, was "that the presumption of law was against such a claim as had been advanced in this action." Both statements were incorrect as legal propositions; for, of course, there is no such general rule of law, nor such a presumption. Coming from the lips of the judge, from whom they were to take the law applicable to the case, can we, and should we, say that they had no influence upon the minds of the jury, or that, if they did have, the error was cured by the subsequent instruction to the effect that, "if the plaintiff had overcome the presumption by proof," he might recover? I think not. This was essentially a case for decision by a jury upon the evidence before them, as they believed the facts and weighed the probabilities. They might well have understood that there was a rule of law, which amounted to a presumption, against the validity of such a contract and claim, and the plaintiff should therefore have a new trial, in which a verdict may be reached without the possible influence of an erroneous idea leading to its formation.

The judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event.

All concur, except *Andrews, Finch, and O'Brien, JJ.*, dissenting.

MICHIGAN SUPREME COURT.

William MANSFIELD et al., Appts.,
v.

William D. PLACE et al.

(.....Mich.....)

1. Courts should not give a construction to a deed in direct conflict with that which the parties have themselves put upon it, especially after a time long enough to create prescriptive rights thereunder.
2. A prescriptive right to the ice on the whole surface of a pond and not merely

to those portions of it from which ice has been out, is acquired by those who have exercised the right without objection from any one to cut and gather ice at any point or points they choose during a time long enough to create prescriptive rights under the Statutes of Limitation claiming the right under a deed which gave the right to the flowage by which the pond was created.

(November 18, 1892.)

APPEAL by complainants from a decree of the Circuit Court for Ionia County award-

NOTE.—As to property rights in ice generally, see *Gregory v. Rosencrans*, 1 L. R. A. 178, 72 Wis. 220; *Hill v. Munday*, 4 L. R. A. 674, 11 Ky. L. Rep. 248; *Brown v. Cunningham*, 12 L. R. A. 583, and *note*, 82 Iowa, 512, 18 L. R. A.

As to appropriation of ice, see *Barrett v. Rockport Ice Co.*, 16 L. R. A. 774, 84 Me. 155.

As to sale of ice, see *Morse v. Moore*, 13 L. R. A. 224, 83 Me. 473; *Murchie v. Cornell*, 14 L. R. A. 492, 155 Mass. 60.

ing defendants a portion of the ice of a certain pond, in an action brought to settle the rights of the parties to such ice. *Reversed.*

The facts are stated in the opinion.

Messrs. Mitchel & Hawley and John C. Blanchard, for appellants:

The entire use of the waters of Prairie Creek, with all the rents, issues, and profits thereof, was conveyed to John C. Dexter, his heirs and assigns forever.

This right is not a mere easement, but a grant of a right in fee.

See *Hall v. Ionia*, 38 Mich. 493.

The right to the ice which from year to year forms upon the waters of said pond, is a part of the issues and profits granted and conveyed by said deed.

The words "rents, issues, and profits," when they appear in a grant or devise, are given a very liberal construction, and may be extended beyond their natural meaning.

Schermerhorne v. Schermerhorne, 6 Johns. Ch. 70, 2 L. ed. 48.

The word "profits," says Sir Thomas Palmer in *Allen v. Backhouse*, 3 Ves. & B. 65, does *ex vi termini* include the whole interest, as a devise of the profits would pass the land itself.

And in *Earl v. Grim*, 1 Johns. Ch. 498, 1 L. ed. 220, the court said that a devise of the rents and profits of land is a devise of the land itself, is a rule acknowledged throughout the books.

Cromie v. Wabash & E. Canal Trustees, 71 Ind. 208, shows that the ice and the proceeds thereof are a part and parcel of the rents and profits to be derived from the building of the ice dam and the ponding of the waters.

Ice formed in water over the land of a private proprietor may, like the water in which it is formed, be taken and carried away by him, unless others have acquired paramount rights in it by agreement with him or by authority of law.

Paine v. Woods, 108 Mass. 160; *Cook v. Hull*, 3 Pick. 269, 15 Am. Dec. 208; *Storm v. Manchester Co.* 13 Allen, 10; *Cummings v. Barrett*, 10 Cush. 186; *Ham v. Salem*, 100 Mass. 350.

We call the court's special attention to *Huntington v. Asher*, 96 N. Y. 604, 48 Am. Rep. 652, where it was held that the right to cut and gather the ice upon a millpond passed as an appurtenance to land conveyed bordering on the margin of said pond.

Where it has been held that the riparian owner was the owner of the ice which formed upon the waters of the pond, the millowner in such case had simply the right to maintain the dam and flow the land for mill purposes.

See *Bigelow v. Shaw*, 65 Mich. 341; *Cummings v. Barrett and Ham v. Salem*, *supra*; *State v. Pottmeyer*, 38 Ind. 402, 5 Am. Rep. 224; *Edgerton v. Huff*, 26 Ind. 36; *Julien v. Woodmhall*, 82 Ind. 563; *Brookville & M. Hydraulic Co. v. Butler*, 91 Ind. 134, 46 Am. Rep. 582; *Paine v. Woods*, *supra*; *Stevens v. Kelley*, 78 Me. 445, 57 Am. Rep. 813; *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435; *People's Ice Co. v. The Excelstor*, 44 Mich. 229, 38 Am. Rep. 246; *Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 Am. Rep. 196; *Brooklyn v. Smith*, 104 Ill. 429, 44 Am. Rep. 90; *Dodge v. Berry*, 26 Hun, 246; *Marshall v. Peters*, 12 18 L. R. A.

How. Pr. 218; *Mill River Woolen Mfg. Co. v. Smith*, 34 Conn. 462; *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330; *Higgins v. Kusterer*, 41 Mich. 818, 32 Am. Rep. 160; *Myer v. Whittaker*, 5 Abb. N. C. 172.

When a party is in possession, pursuant to a state of facts which of themselves show the character and extent of his entry and claim, such facts, whatever they may be in a given case, perform sufficiently the office of color of title.

Buswell, Statute of Limitations & Adverse Possession, p. 866, § 264; *Gray v. Patton*, 2 B. Mon. 12; *Rannels v. Rannels*, 52 Mo. 108; *Bell v. Longworth*, 6 Ind. 273; *McCall v. Neely*, 3 Watts, 72; *Hughes v. Israel*, 73 Mo. 538; *McClellan v. Kellog*, 17 Ill. 496; *Bean v. Bachelder*, 74 Me. 202; *La Frombois v. Jackson*, 8 Cow. 589, 18 Am. Dec. 463; *Murphy v. Doyle*, 37 Minn. 113; *Carpenter v. Monks*, 61 Mich. 103.

If a man enters into possession in good faith, claiming title thereto, and believing that he is the owner thereof, his possession is under color of title and is coextensive with the supposed limits of his grant, and no matter how defective his deed, or even if it fails to convey any title whatever, or whether he has any deed or not, if he enters in good faith, believing that he has title, it is all the law requires, providing the facts and circumstances in connection therewith indicate the extent of his claim.

Our adverse possession covers the whole entire pond.

La Frombois v. Jackson, *supra*.

If one stands by and encourages another, though but passively, to lay out money under an erroneous opinion of title, or under the obvious expectation that no obstacle will afterwards be interposed in the way of its enjoyment, the court will not permit any subsequent interference with it by him who formerly promoted and encouraged these acts.

Herman, Estoppel & Res Judicata, pp. 1303, 1304, § 1169; *Rochdale Canal Co. v. King*, 16 Beav. 680; *Erie R. Co. v. Delaware, L. & W. R. Co.* 31 N. J. Eq. 288; *Blake v. Cornwell*, 65 Mich. 467.

Complainants would have the right under the deed to bring this water to the city of Ionia to supply its inhabitants. They therefore own the waters of the pond, and have the right to use it for any purpose they see fit, and instead of bringing it to the city in ditches or pipes, they can allow the same to freeze into ice and bring it in wagons, as they have done for the last twenty years.

Morrill v. Mackman, 24 Mich. 279, 9 Am. Rep. 124; *Hall v. Ionia*, 38 Mich. 493; *Hathaway v. Mitchell*, 34 Mich. 164; *Dryden v. Jepherson*, 18 Pick. 385; *Hurd v. Curtis*, 7 Met. 94; *Pettee v. Hawes*, 13 Pick. 323; *Cary v. Daniels*, 5 Met. 236, 41 Am. Dec. 532; *Goodrich v. Eastern R. Co.* 87 N. H. 149; *Borst v. Empie*, 5 N. Y. 33; *Goodrich v. Burbank*, 12 Allen, 459; *Owen v. Field*, 102 Mass. 90; *Emerson v. Mooney*, 50 N. H. 815; *Fitch v. Constantine Hydraulic Co.* 44 Mich. 74.

Where the right conveyed is of that kind and character, that in order that the full and complete benefit of it may be enjoyed by the grantee, he must have the possession and dominion over the lands affected by such convey-

ance, in such case, the fee of the land itself, at least to the extent necessary for the full enjoyment of such right, is conveyed. But where the nature of the right conveyed, in order to its full beneficial enjoyment, does not deprive the grantor of the possession and dominion over the lands to be affected thereby, but simply gives to the grantee certain rights and privileges on the lands of the grantor, of a nature which does not deprive the grantor of the possession and beneficial enjoyment of the same, in such case, an easement, and not a fee, is conveyed.

Forbush v. Lombard, 18 Met. 109; *Blake v. Clark*, 6 Me. 436; *Johnson v. Rayner*, 6 Gray, 107; *Wooley v. Groton*, 2 Cush. 305; *Greenwood v. Murdock*, 9 Gray, 20, 49 Am. Dec. 272; *Owen v. Field*, 102 Mass. 90; *Nellis v. Munson*, 108 N. Y. 453; *Vail v. Long Island R. Co.* 106 N. Y. 233, 60 Am. Rep. 449; *Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen, 159.

It is not necessary that the deed should in terms convey the land or thing intended to be granted, if such grant is implied from what is described.

3 Washb. Real Prop. pp. 332, 333; Co. Litt. 4b; *Calveell v. Fuiton*, 31 Pa. 484, 72 Am. Dec. 760; *Clement v. Youngman*, 40 Pa. 344.

Where a water right is granted in general or indefinite terms rendering the true construction doubtful, contemporaneous acts of the parties, giving a partial construction to the grant, will be deemed to express their intention.

Gould, Waters, p. 588, § 318a; *Stone v. Clark*, 1 Met. 378, 35 Am. Dec. 370; *Bannon v. Angier*, 2 Allen, 128; *Mudge v. Salisbury*, 110 N. Y. 413.

Where the uniform and continued acts of the parties for many years have placed a construction upon a contract or deed of conveyance the court will give effect to the contract or deed as the parties themselves have construed it.

Lyles v. Loscher, 108 Ind. 332; *Kingsland v. New York*, 45 Hun, 198; *Johnson v. Gibson*, 78 Ind. 282; *Reissner v. Oxley*, 80 Ind. 560.

If the use of the easement for twenty years is unexplained, it will be presumed to be under a claim of right and adverse, and be sufficient to establish a title by prescription, and it is incumbent upon the owner of the servient tenement to show that the use was under some license or special contract inconsistent with a claim of right.

Gould, Waters, p. 631, § 519; *White v. Chapin*, 12 Allen, 516; *Perrin v. Garfield*, 37 Vt. 310; *Hammond v. Zehner*, 21 N. Y. 118; *Melvin v. Proprietors of Locks & Canals*, 16 Pick. 137; *White v. Loring*, 24 Pick. 319; *Garrett v. Jackson*, 20 Pa. 331.

Durand, J., delivered the opinion of the court:

The bill is filed in this case for the purpose of settling the ownership of the ice forming from time to time on a body of water known as the "Prairie Creek Pond." On April 25, 1855, John P. Place and Laura Place, his wife, executed and delivered to John C. Dexter a warranty deed in the usual form, con-

vveying to him certain property mentioned in the deed, and described as: "The following described parcels of land in Ionia county, Michigan, on section 21, in township 7 north, of range 6 west; being all the land lying south of the center of the highway leading through said section 21 from Ionia county seat to Lyons, and north of the north line of Detroit & Milwaukee Railroad, which belongs to the said parties of the first part west of a point on said center of said highway thirty-five rods east of the center of Prairie creek, where the said highway crosses the same, embracing in the above the mill yard and location of the sawmill lately burned; also the right of building and maintaining a dam across Prairie creek on the said highway, or at any point or place north of same, sufficiently high to flow the lands of the said parties of the first part on said section 21, and on the south half of the southwest quarter, and the west half of the southwest quarter of the southeast quarter, of section 16, in said town, back to the north line of the last-described pieces, together with the right to flow said lands north of and on said highway; also embracing in the above rights all of the present mill race, together with the east bank of said race; also the right of making and maintaining a mill race on the east side of said creek, and north of the center of the highway, at any suitable point, together with the right of taking earth from the hill on the east side of the creek, and north of the center of the highway, so much of and as often as the same may be necessary to make, maintain, or repair said dam or mill race; also the right of entering upon lands adjoining said dam and race whenever it may be necessary to repair the same; also the right of keeping and floating logs in said pond or race; also the right of cutting timber in and clearing out the timber and logs in the pond; also the right of making and maintaining a race across the south half of the southwest quarter of section 16, in said town, along the high bank or hills on the west side of said creek at any height, and thence, in a straight line, to the highway, near where the said highway crosses the west line of said section 21, together with the right of entering upon lands adjoining said race only so much and so often as may be necessary to repair said race. The said parties of the second part and their heirs and assigns, are to make and maintain suitable bridges across the said race where necessary for crossing. Together with all and singular the hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits, thereof; and all the estate, right, title, interest, claim, or demand whatsoever of the said parties of the first part, either in law or equity, of, in, and to the above-bargained premises." Afterwards, through various conveyances to and from different persons, the title finally passed into the complainants, the same as that conveyed by the Dexter deed, and they have succeeded to all the rights granted to him under such deed. The defendants are heirs of John P. and Laura Place, and they have succeeded to all the rights formerly held by them, and which they had not disposed of or lost through their acts or omis-

sion to act in reference to the subject now in controversy.

In 1863 the owners of the Dexter title built a flouring mill and erected a dam which set back the water of Prairie creek, and overflowed the land mentioned in the deed, and thereby created the pond of water known as the "Prairie Creek Pond," and which is situated near the city of Ionia. At the time of the giving of the Dexter deed, Ionia was a small place, but in 1869 it had grown into a town of considerable size and importance; and during the winter of 1869 and 1870 one Norman S. Goodrich, under a lease from the then owners of the Dexter title, proceeded to put the pond in condition for the ice business, and begun to cut and harvest ice for sale to his customers in Ionia. This he continued to do during those years, and also during the winter of 1871. On January 30, 1872, in consideration of the sum of \$480 by him paid, he obtained from the owners of the Dexter title a lease for the period of ten years of all "the territory known as the 'Prairie Creek Mill Pond,' for the express purpose and benefits of the ice which shall or may accumulate thereon during the term of this lease, together with all and singular the benefits and liberties to the said premises for such purposes belonging." This lease was duly witnessed and acknowledged and recorded in the office of the register of deeds for Ionia county. Under this lease, Goodrich proceeded to build ice houses adjoining the pond upon land which he leased of Mrs. Laura Place for that purpose. He improved the pond by taking out stumps and trees, and cutting down the brush so as to make a clear field for the ice to form upon, and constructed a road to enable him to draw the ice, when cut, from the pond to the city. During all this time Mrs. Place occupied the farm and lived in sight of the pond,—knew all that was being done,—and her sons and hired man were employed by Goodrich at different times to assist him in conducting his ice business. Goodrich continued to operate the ice business under this lease for about eight years, when, finding he could not get an extension of it when it should expire, he sold out the business, including the balance of the term of the lease, to Isaac P. and Anson Hoag, for \$1,450. Before buying out Goodrich, they obtained a promise from W. D. Place, one of the defendants, who it appears was at that time managing the business for his mother, that if they bought out Goodrich they could obtain the title of the land upon which the ice house stood. The purchase was thereupon consummated, and the ice business was continued as before, Mrs. Place receiving \$10 per year as rent for the ice-house property for the remaining two years of the lease, and at that time she executed a deed of the same according to the evident understanding of all the parties for a consideration of \$800. The land conveyed was about one acre in amount, situated upon the bank of the pond, and the price received by her for it was evidently many times its actual value, and the large price paid for it was clearly because its value was enhanced by reason of the ice business, and for which use it was intended. The ice business, as established, was continued thereafter and with-

out objection from any one until near the time when the bill was filed in this case. The property acquired, as stated, for ice-house purposes, through different conveyances, also became vested in the complainants, including the rights conveyed to Isaac P. and Anson Hoag by Goodrich.

There has never been any concealment on the part of complainants, or on the part of any one from whom they have derived title, of the claim which they made and still make to the ice. Their occupation and use of the pond for that purpose has been open and notorious. The lease to Goodrich, as well as the conveyances in the chain of the Dexter title, under which the complainants claim, have been recorded from time to time in the office of the register of deeds for Ionia county; and in addition Laura Place, and at least some of her heirs, and who are defendants in this suit, were fully advised of all that was being done from time to time, as well as of the claims made by the owners of the Dexter title, and not only made no objection to it, but by leasing and selling property to be used in connection with the business as then established and being carried on, as well as by buying ice from and engaging in the employment of those who were conducting the business, acquiesced in the claim made by them to the exclusive ownership and use of the ice forming from time to time on the pond. Some of the conveyances were made with special reference to the value of the ice business, and the bill alleges that when complainant Mansfield purchased his one-half interest in the ice-house property and business, paying \$2,000 therefor, he did so with the honest belief and understanding that he thereby became the owner of the undivided one-half of all the ice which would form from year to year on the pond, as well as of one-half the ice business which had been established in connection therewith.

The bill also alleges that the defendants, as heirs of Laura Place, claim that, because they are the owners of the fee of the land covered by the waters of the pond, they are the owners of the ice forming from year to year upon its surface, and the court has asked for a decree settling the rights of the parties as to the ownership of the ice, and to restrain the defendants from laying claim to or interfering with it. The answer generally denies that the complainants, either through the Dexter chain of title or by long-continued use of the property in the manner stated, have any right or title to the ice, and deny that, under all the circumstances of this case, they are estopped from claiming that they, as the owners of the fee, are entitled to it. It may be considered as settled law in this state that the owner of the soil under the water is ordinarily the sole and exclusive owner of the ice forming upon such water, and that his riparian ownership of the bed of a stream will carry with it the right to the ice forming upon the surface of such stream, as far as his riparian right to the soil extends. This doctrine is fully established in *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 485; *People's Ice Co. v. The Excelsior*, 44 Mich. 229, 38 Am. Rep. 246; *Clute v. Fisher*, 65 Mich. 48; *Bigelow v. Shaw*, 65 Mich. 341. We reaffirm the principle established by these cases,

and this controversy could be easily disposed of if there were no other questions to be considered except the abstract proposition urged by the defendants,—that they, as owners of the land covered by the waters of the pond, are entitled to the ice forming upon its surface. But there are other and more serious contentions in reference to the extent of the grant in the Dexter deed, and the construction to be placed upon it, and also in reference to the prescriptive and other rights acquired by the complainants in the subject-matter of this suit, in consequence of the acquiescence of the defendants, and of those through whom they obtain title, in the claim which complainants have made for many years, and are now making, as to the ownership of the ice in question. These become important questions, which must be given fair consideration in the determination of the rights of the respective parties to this litigation.

Under our view of this case, as it appears to us in the light of all the facts and circumstances surrounding it, we are not called upon to construe the Dexter deed, or to decide upon the extent of the right conveyed by it. The parties have themselves construed it, and, except when there has been mistake or fraud or concealment of important facts, courts should not give a construction to a deed in direct conflict with that which the parties have themselves put upon it, especially after such construction has been in force and assented to by all the parties for a period of time long enough to create prescriptive rights and equities under the statutory limitations of the state. And this is so, even when the terms employed in the deed are doubtful. When a water easement is granted in general or indefinite terms, rendering the construction doubtful, contemporaneous acts of the parties, giving a practical construction to the grant, will be deemed to express their intention. Gould, Waters, § 318a and cases cited; *Mudge v. Salisbury*, 110 N. Y. 413-417. Where the uniform and continued acts of the parties for many years have placed a construction upon a contract or deed of conveyance, the court will give effect to the contract or deed as the parties themselves have construed it. *Johnson v. Gibson*, 78 Ind. 282; *Reisner v. Ozley*, 80 Ind. 580; *Kingsland v. New York*, 45 Hun, 198; *Lyles v. Lescher*, 108 Ind. 382. The same general doctrine is laid down in *Fitzsimons v. Foley*, 80 Mich. 518.

Applying this principle to the facts of this case, it is clear that the right to the ice forming on this pond from year to year is in the complainants. The evidence shows conclusively that, ever since the ice in question has been of any value, the owners of the Dexter title have always claimed the ice forming upon the pond, and have exercised the right to cut it and dispose of it as their own. They have done so openly and without opposition from any one. They exercised and enjoyed this right uninterruptedly for more than 15 years before the death of Laura Place, with her full knowledge and consent, and she rented and sold some of her own land at a large price, to furnish them with better facilities to carry on the ice business. Acting upon her open acquiescence in the right which complainants make to the ownership of the ice, a large amount of money was invested in the business.

Sales and transfers of portions of the ice business and property have been made from time to time with the fullest acquiescence on the part of Laura Place in the fact that the owners of the Dexter title were the owners of the ice forming on the pond, and no objection was at any time made by her to this claim. She would certainly be estopped from denying complainants' right, and her heirs have no more rights than she owned at the time of her death, and cannot be heard to assert a claim which she, if alive, could not assert.

In giving the construction to the deed which the parties gave to it, and for a period exceeding fifteen years, the complainants have acquired a prescriptive right to the ice in question. A grant to them is implied, for, in order to establish a right or easement in the lands or waters of another, it is only necessary that the enjoyment be adverse and under a claim of right, and with the knowledge of the owner. That it be contrary to the interests of the owner, and of such a nature that it is difficult to account for it, except on the presumption of a grant to him, and that it has continued in that manner for the period of limitation fixed by the statute; and the knowledge of the exercise of this right in the manner stated is binding, not only on the owner, but his grantee as well. The adverse and uninterrupted use and enjoyment of an easement of this character, in the manner stated, for more than fifteen years under a claim of right, and with the knowledge of the owner, is strong ground on which to found the presumption of a grant, and when unexplained, it is presumed to be under a claim of right, and adverse, and is sufficient to establish a title by prescription. Gould, Waters, §§ 334, 335, 341, and cases cited.

We cannot agree with the defendants' contention that complainants have, if at all, only acquired prescriptive rights in the ice forming on such parts of the pond as they have actually cut upon. It has never been treated in that way. They, and those from whom they derive title, have claimed the right as extending over the entire pond, and they have cut and gathered ice at any point or points they chose without objection from any one. This claim, too, has been made under color of title. The Dexter deed gave the right to the flowage which creates the pond, and, whether or not the deed conferred the right now contended for yet it would be idle to say in this case that it was not even a color of title, when it is clear that the parties themselves agreed that it was not only a color of title, but an actual title, and when able and learned lawyers, after much thought and attention, honestly disagree as to whether or not it actually conveys the right claimed for it by complainants. It is sufficient to say that the court must treat it as the parties themselves did, and which related to the entire pond, and not to any parts or portions of it.

It follows that the decree of the court below, dividing the ice upon different parts of the pond between the respective parties, must be reversed, and a decree will be entered here in accordance with this opinion, settling the ownership of the ice in the complainants, and restraining the defendants from interfering therewith, as prayed for in the bill. Complainants will recover the costs of both courts.

The other Justices concurred.

NEW JERSEY COURT OF ERRORS AND APPEALS.

John W. WARTMAN, *Pff. in Err.*,v.
William H. SWINDELL.

(.....N. J.....)

*1. If, in an action of tort, the defendant relies upon the defense that the act he did was by way of a joke, it is a question for the jury to decide whether the parties had been perpetrating practical jokes upon each other in such a way that the defendant had a right to believe that the plaintiff would accept his act as a joke.

2. The maxim "*de minimis non curat lex*" does not apply to the positive and wrongful invasion of another's property. The right to maintain an action for the value of property of which the owner is wrongfully deprived is never denied.

(November 14, 1892.)

ERROR to the Supreme Court at Circuit in favor of defendant in an action brought to recover damages for the alleged conversion of the lines from defendant's harness. *Reversed.*

The facts are stated in the opinion.

Mr. John W. Wartman, for plaintiff in error:

The right of property is an absolute right inherent in every Englishman and consists "in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."

1 Bl. Com. 138.

A fundamental right of the plaintiff was invaded, and he was entitled to establish in the action his right of property.

In an action of trespass, *Bronson, J.*, said: "If the plaintiff succeeded in showing an unlawful entry upon his lands, or that his fences or any portion of them were improperly thrown down and his fields exposed, he was entitled to a verdict for nominal damages at least. It was not necessary for him to prove a sum, or that any particular amount of damages had been sustained. Every unauthorized entry upon the land of another is a trespass, and whether the owner suffer much or little, he is entitled to a verdict for some damages."

Dixon v. Clow, 24 Wend. 188; *Carter v. Wallace*, 2 Tex. 206.

Even if the result of the trespass benefits the plaintiff, instead of damaging him, he is entitled to nominal damages.

Jewett v. Whitney, 48 Me. 242.

The maxim, *de minimis non curat lex*, is never applied to the positive and wrongful invasion of another's property.

Ashby v. White, 2 Ld. Raym. 948; *Seneca Road Co. v. Auburn & R. R. Co.* 5 Hill. 170; *Pullan v. Stearns*, 30 Vt. 443. See *Whittemore v. Cutter*, 1 Gall. 429.

That maxim has reference to the injury, and not to the resulting damage.

*Headnotes by VAN SYCKEL, J.

If a person has a right to vote at an election, and he is refused this right, he may have his action, even though the person for whom he proposed to vote should chance to be elected. *Ashby v. White*, 2 Ld. Raym. 938.

So if a sheriff neglect to return an execution the creditor may have his action for nominal damages, although no damages appeared to have resulted from the neglect.

Kidder v. Barker, 18 Vt. 454.

Where a clear right of a party is invaded, in consequence of another's breach of duty, he must be entitled to an action against that party for some amount, and there is no authority to the contrary.

Clifton v. Hooper, 6 Q. B. 467.

Actual, perceptible damages are not indispensable; they will be presumed to follow.

Barker v. Green, 2 Bing. 317; *Embrey v. Owen*, 6 Exch. 353. See also *Glanvill v. Stacey*, 6 Barn. & C. 543; *Paul v. Slason*, 22 Vt. 235, 54 Am. Dec. 75; *Case v. Dean*, 16 Mich. 12; *Cooley*, Const. Lim. 6th ed. 638, 639, and notes; *Bruch v. Carter*, 32 N. J. L. 554; *Hetfield v. Plainfield*, 46 N. J. L. 121.

In a case where the sum of one dollar and forty-seven cents was in question, *Van Syckel, J.*, said: "The deficiency was very insignificant, but the defendant has no right to withhold anything due the plaintiff."

Wright v. Belreue, 49 N. J. L. 415.

Court would not oust justice of jurisdiction where the verdict was half a cent above the limit fixed by statute.

Darnel v. Sheldon, 8 N. J. L. 523.

The fraction of an hour in the forbearance of a note is not a proper case for the application of the maxim in these practical times.

Hockenbury v. Meyers, 34 N. J. L. 346.

Messrs. Scovel & Harris, for defendant in error:

The objection that the value of the suit is too trivial to justify the court in taking cognizance of it, though not specially assigned as a ground of demurrer, may be taken advantage of by special motion to dismiss the bill, or the court may, of its own motion at the hearing, order the bill to be dismissed on this ground.

Swedish Evangelical L. Church of Swedesborough v. Shivers, 16 N. J. Eq. 457.

The case comes clearly within the maxim, *de minimis non curat lex*.

Though a wrongful act has been done against a person, yet if he has not sustained any damage from it, either actual or constructive, no action lies.

Nichols v. Valentine, 86 Me. 322; *Lambard v. Pike*, 38 Me. 141.

The policy of the law is to take no notice of trifling, vexatious, or vindictive suits.

Swedish Evangelical L. Church of Swedesborough v. Shivers, *supra*; *Paul v. Slason*, 22 Vt. 231, 54 Am. Dec. 75; *Williams v. Mostyn*, 4 Mees. & W. 145.

The law should hold out no inducement to useless or vindictive litigation.

NOTE.—The above decision as to the validity of a defense that an injury complained of was committed only by way of a joke makes an otherwise 18 L. R. A.

trifling case one of considerable importance as well as novelty.

Sedgwick, Damages, pp. 55, 56; *Paul v. Simon*, *supra*.

There is no fixed rule as to what exact amount the courts have held the maxim to be applicable.

Chenery v. Stevens, 97 Mass. 83.

The maxim was applied to a case where sixty-eight town orders for about \$2,000, were barred by the Statute of Limitations, when one order for \$15 was not so barred.

Schriber v. Richmond, 73 Wis. 5.

Also to a case where the plaintiff rightly recovered substantial damages for one cause of action, though nominal damages may have been improperly given for another cause of action.

Middleton v. Jerdee, 73 Wis. 39.

The maxim was also applied where an error as to the time when an item of \$3 became due is alleged.

Mortiz v. Larsen, 70 Wis. 569. See also *Knight v. Abert*, 6 Pa. 472, 47 Am. Dec. 478; Broom, Legal Maxims, 7th ed. p. 143.

The damages in trover and conversion is the extent of value of the thing converted.

Chitty, Pl. 16th Am. ed p. 164; *Cooper v. Chitty*, 1 Burr. 81, 1 W. Bl. 67; *Pierce v. Benjamin*, 14 Pick. 356, 25 Am. Dec. 396; *Parks v. Boston*, 15 Pick. 208; *Stone v. Codman*, 15 Pick. 297; *Greenfield Bank v. Leavitt*, 17 Pick. 1, 28 Am. Dec. 288; *Weld v. Oliver*, 21 Pick. 550.

The rule of damages for the conversion of a horse and carriage which have been returned to the owner, is their market value at the time of the conversion, less their market value at the time of the return.

Lucas v. Trumbull, 15 Gray, 306.

Van Syckel, J., delivered the opinion of the court:

In September, 1891, the clerk of the plaintiff in error, who was plaintiff below, drove the horse and carriage of the plaintiff to the sheriff's office in Camden, and there tied the horse to a post at the curb line of the street. While the clerk was in the sheriff's office, the lines, worth about three dollars or four dollars, were taken from the horse by the defendant in error, and the clerk was left without the means of driving the horse. He thereupon demanded the lines of the defendant, who refused to return them to him. The clerk then went to the office of the plaintiff, and informed him of the occurrence, and was instructed to return to the court-house, and again demand the lines

of the defendant. A second demand was made, and the defendant refused to comply with it. Thereupon the plaintiff brought suit against the defendant for damages. On the trial of the cause in the court below the plaintiff, after proving the facts above stated, rested his case. On the cross-examination of the plaintiff's clerk it appeared that the defendant said to him that the plaintiff had taken a small article from the defendant, and the clerk, in reply to the question whether the defendant did not take the lines by way of a joke, said he "supposed perhaps he did it in a joke, but he did not know what it was done for when it was first done." When the plaintiff had rested his case, the trial judge said: "If the defendant will make a tender of these lines now, I will dismiss this case upon the ground *de minimis non curat lex*." The defendant thereupon tendered the lines to the plaintiff, and the court dismissed the jury from the further consideration of it. This disposition of the case is the error complained of in this court. The trial judge acted upon the idea that the conduct of the defendant was intended as a joke, and that the matter involved was too insignificant to claim the attention of the court. If the defendant relied upon the fact that he removed the lines by way of a joke, it was a question for the jury to decide whether the parties had been perpetrating practical jokes upon each other in such a way that the defendant had a right to believe that the plaintiff would accept this act as a joke. That question could not legally be taken from the jury, and settled by the court; nor, in my judgment, was the maxim *de minimis non curat lex* applicable to this case. In *Seneca Road Co. v. Auburn & R. R. Co.*, 5 Hill, 175, *Mr. Justice Cowen* said this maxim is never applied to the positive and wrongful invasion of another's property. The right to maintain an action for the value of property, however small, of which the owner is wrongfully deprived, is never denied. A trespass upon lands is actionable, although the damage to the owner is inappreciable. The celebrated *Six Carpenters' Case*, reported in 8 Coke, 439, involved a trifling sum. But as the case in hand stood at the close of the plaintiff's testimony, I am not prepared to say that a verdict for substantial damages would not have been justifiable.

In my opinion, the trial court erred in dismissing this case, and the judgment below should, therefore, be reversed.

WISCONSIN SUPREME COURT.

S. S. KILVINGTON *et al.*, *Respts.*,

v.

City of SUPERIOR, *Appt.*

(.....Wis.....)

1. A village board may contract for a cremating furnace to consume garbage or

animals, etc., as a means of conserving the health of the inhabitants under the general power conferred to prevent and abate nuisances.

2. The fact that the mode of building a cremating furnace is patented will not make the contract of a municipal corporation for its construction void when the contract for performing the work and furnishing the materi-

NOTE.—Municipal contracts for work or articles which embody a patented invention.

The decisions as to the effect of a charter or statutory requirement that a municipal contract

must be let to the lowest bidder in cases where the contract will require the use of a patented invention are in sharp conflict; but there is no conflict as to the position of the court in the main case.

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als is let to the lowest bidder with the understanding that the patentee would allow the use of his patent and superintend its construction in consideration of a certain specified sum paid him by whoever secured the contract.

(October 25, 1892.)

A PPEAL by defendant from an order of the A Circuit Court for Douglas County overruling a demurrer to the complaint in an action brought to recover the amount alleged to be due upon a contract for the erection of a crematory. *Affirmed.*

Statement by Pinney, J.:

This action was brought upon a contract made between one McCann and the village of Superior, organized under chapter 40 of the Revised Statutes and Acts amendatory thereof, for the erection of a crematory according to the Kilvington patent for the destruction of garbage, dead animals, etc. The work was let to the lowest bidder, but prior thereto Kilving-

ton, the owner of the patent for building the crematory, appeared before the village board while in session, and agreed he would allow it and its legal successor the use of his patent and improvements as long as it should be operated by it for a total sum of \$1,500, and he would superintend the construction if they would pay his expenses to Superior and while there superintending the work; also that any contractor who took the contract of erecting the crematory could have his said patent and services at the same rate; that such facts were generally known and publicly stated both before the board and throughout the village, and were generally known among contractors in that kind of work. McCann, having been the successful bidder, entered into contract to build the crematory according to said patent and improvements for \$4,500, upon premises to be designated by the village. On the day of making the contract Kilvington entered into a contract with McCann to furnish the patent, render services, and superintend the erection of

Substantially the same decision was made in *Hastings v. Columbus*, 42 Ohio St. 555, in which the fact that contractors owned a patent which must be used in executing the contract was held immaterial where before the contract was let the city had acquired the right to secure at a reasonable cost the right of the patent with respect to the improvement for any successful bidder for the work so that the bidders were placed in this respect on substantially equal terms.

But in the absence of any such arrangement the fact that one person or company has a monopoly of the right to use a patent in a city where a contract is to be performed is held by the decisions in New Jersey, Louisiana, and California, as well as Wisconsin, to prevent letting a contract which shall require the use of such patent where the law requires municipal contracts for that class of improvements to be let to the lowest bidder. *State v. Elizabeth*, 35 N. J. L. 351, citing the unreported case of *Coar v. Jersey City*; *Burgess v. Jefferson*, 21 La. Ann. 143; *Nicolson Pave. Co. v. Painter*, 35 Cal. 699; *Bean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205.

The same decision was made in *Dolan v. New York*, 4 Abb. Pr. N. S. 397. But this decision cannot be regarded as authority in New York state, as exactly the contrary is decided by the court of appeals. *Re Dugro*, 50 N. Y. 513.

In *Re Eager*, 46 N. Y. 100, the objection that a contract for a patented pavement could not be let where the charter required it to be let to the lowest bidder had not been properly raised and so was not decided, but the court held that a single contract could not be let for several kinds of work which could be separately done if some only were covered by a patent.

The decisions in Michigan as in New York hold that a municipal contract let to the lowest bidder is not invalid because the performance of the contract will require the use of a patent. *Hobart v. Detroit*, 17 Mich. 246, 97 Am. Dec. 185; *Motz v. Detroit*, 18 Mich. 515.

The same doctrine is also established in Missouri and the fact that no competition is possible will not prevent letting a contract for a street pavement covered by a patent under the charter requiring such contracts to be let to the lowest bidder. *Barber Asphalt Pav. Co. v. Hunt*, 8 L. R. A. 110, 100 Mo. 22.

In *People v. Van Nort*, 65 Barb. 331, it was held that a provision for letting contracts to the lowest bidder did not apply where the subject of the con-

tract was patented and could be obtained from one party only.

The same rule is declared in *Baird v. New York*, 96 N. Y. 537, although in that case the court held that the provision for letting the contract to the lowest bidder had been in fact repealed by implication.

But in *Worthington v. Boston*, 41 Fed. Rep. 23, it was held that the necessity of advertising for proposals, etc., as required by law was not obviated by the fact that a pumping engine purchased by a city waterworks board embodied a patented attachment. This case may be distinguished from the New York cases just mentioned in the fact that the patented attachment was only a portion of the thing to be purchased.

The sharp conflict between the courts of California, Wisconsin, Louisiana, and New Jersey on the one hand, and those of New York, Michigan, and Missouri on the other hand, can hardly be explained away, but in California and Wisconsin the fact that abutting owners have an option under the statutes to do the contract work themselves seems to be regarded as of some importance, while in the Louisiana case the provision as to letting the contract to the lowest bidder was contained in a particular section authorizing the improvement on petition of the owners of one fourth the frontage of the street to be improved while the city had full authority in the exercise of its general powers under other charter provisions to lay the patented pavement so that it was not debarred by the decision from the use of patented improvements.

In *Yarnold v. Lawrence*, 15 Kan. 123, Judge Brewer inclines toward the Michigan and New York doctrine, but holds that the statute in question did not require in fact a letting to the lowest bidder.

Somewhat analogous to the cases as to patents is a decision in *Harlem Gaslight Co. v. New York*, 33 N. Y. 324, that a city contract for gas with a gas company which has a legislative monopoly is not within a statute requiring a contract for supplies to be let to the lowest bidder. The court says the other construction would lead to the absurd result of giving a gas company power to extort whatever price it chose.

Also a decision in *People v. Flagg*, 17 N. Y. 584, that such a provision as to letting contracts for "work" does not apply to a contract for the services of a surveyor which require scientific knowledge and professional skill.

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the crematory for the sum of \$1,500, as he had promised. A place for erecting it was designated, and the work was commenced. The city of Superior was organized in the year 1889, and succeeded to all the liabilities and rights of the village. McCann continued the work until the 22d of April, 1889, and was willing to go on with it, but the board of public works refused to permit him to proceed to complete the contract; and he had expended and become liable for \$2,091.39, and his profits on the completion of it would have been \$900. He assigned over his claim against the city on said contract to the respondents, Kilvington and Paden, and they presented it to the common council, when it was disallowed, and the respondents appealed to the circuit court, where they filed a formal complaint on the said contract, and claimed damages, as above stated. The defendant demurred to the complaint. The court overruled the demurrer, and the city appealed to this court, and claimed (1) that the contract was void, on the ground that the village board had no power, express or implied, to contract for the erection of a garbage crematory; (2) that, if it had such power, then the work of building it according to the Kilvington patent could not be let to the lowest bidder in the mode prescribed by law, because it was a patented method, and could not be the subject of competition in bidding for the work.

Mr. Phil H. Perkins for appellant.

Messrs. Reed, Grace, Rock & Reed, for respondents:

Corporations may resort to the usual and convenient means of executing the powers granted.

Mills v. Gleason, 11 Wis. 470, 78 Am. Dec. 721; *State v. Madison*, 7 Wis. 688; *State v. Milwaukee*, 25 Wis. 122; *Farnum v. Johnson*, 62 Wis. 620; *Miller v. Milwaukee*, 14 Wis. 699; *Benson v. Waukesha*, 74 Wis. 32.

Courts in construing statutes may consider surrounding circumstances, the condition of things, the evils to be remedied, the objects to be attained.

Clark v. Janesville, 10 Wis. 136.

A town having authority "to make by-laws for managing its prudential affairs" has power to erect a market house.

Spaulding v. Lovell, 23 Pick. 71; *Caldwell v. Alton*, 33 Ill. 416, 75 Am. Dec. 282; *Gale v. Kalamazoo*, 23 Mich. 844, 9 Am. Rep. 80; *Ketchum v. Buffalo*, 14 N. Y. 356.

Where power was granted to the city "to appoint market places and regulate the same," it had power to build and repair a market house.

Smith v. Newbern, 70 N. C. 14, 16 Am. Rep. 766; *French v. Quincy*, 8 Allen, 9; *People v. Harris*, 4 Cal. 9.

Under a general welfare clause there is power to supply water by an artesian well, as a sanitary regulation.

Livingston v. Pippin, 31 Ala. 542; *Rome v. Cabot*, 28 Ga. 50.

To erect public hospitals to preserve the cleanliness and salubrity of the city.

Milne v. Davidson, 5 Mart. N. S. 410 16 Am. Dec. 189.

To establish cemeteries.

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Charleston v. Wentworth Street Baptist Church, 4 Strobb. L. 303. See also *St. Louis v. Schoenbusch*, 85 Mo. 618; *Western & A. R. Co. v. Young*, 81 Ga. 397.

Dean v. Charlton, 23 Wis. 590, was decided by a divided court, *Justices* Cole and Paine holding the contract for the Nicolson pavement void while C. J. Dixon dissented and contended it was valid.

The following courts have arrived at the same conclusion as this court did:

California: *Nicolson Pav. Co. v. Painter*, 35 Cal. 699 (Nicolson pavement); Louisiana: *Burgess v. Jefferson*, 21 La. Ann. 148 (Nicolson pavement).

The dissenting opinion of *Judge* Dixon has been sustained by the following courts:

In Michigan:

Hobart v. Detroit, 17 Mich. 246, 97 Am. Dec. 185 (Nicolson pavement); *Molz v. Detroit*, 18 Mich. 515 (Nicolson pavement); *Atty. Gen. v. Detroit*, 26 Mich. 278.

In Kansas:

Yarnold v. Lawrence, 15 Kan. 126 (Wyckoff pavement).

In New York:

Re Dugro, 50 N. Y. 513 (Nicolson pavement); *Baird v. New York*, 96 N. Y. 567 (water meters). See also *State v. Elizabeth*, 85 N. J. L. 851.

The case at bar differs from *Dean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205, in the following particulars: First, in this case there were competitive bids; second, the patent was but one third of the cost; third, it would be paid for out of the general fund and bind the city at large; fourth, the owners of the patent were willing to sell, and did sell the patent as proposed; fifth, the plaintiffs are only seeking to recover for materials and labor furnished, and not for the patented article.

Where a city or municipality receives the benefit of money, labor or property, upon a contract made with due formality, or which it had no power to make, and which it refuses to execute, it will nevertheless be liable to the person conferring the benefit to the extent of the value of what has been received and appropriated, unless the contract was prohibited by the statute or in violation of public policy.

Schipper v. Aurora, 6 L. R. A. 318, 121 Ind. 154.

Pinney, J., delivered the opinion of the court:

The village of Superior was a public corporation created for purposes of local civil government. All its powers "not specifically given some other officer" were vested in its village board. The contract, for a breach of which this action is brought against the city of Superior, the successor in interest and liability of the village, was entered into by and between the board of trustees of the village of Superior and McCann, the assignor of the plaintiff, for the construction, at a designated place, of a furnace known as the "Eagle Garbage Cremating Furnace," with Kilvington improvements, and all processes for consuming by fire manure, garbage, and dead animals, as a means of conserving the health of the city, and of abating nuisances, and preventing sickness and disease. The authority of the village to make

the contract is denied. It is urged that the village board had no power, express or implied, for that purpose. Aside from what may be fairly considered within the general powers of the village to carry out the public purposes for which it was created, the village board had express power "to appoint a board of health,

to declare what are nuisances, and to prevent or abate the same; . . . and to prevent persons from bringing, depositing, or leaving within the village any putrid carcass or other unwholesome substance; to require the owners or occupants of lands to remove dead animals, stagnant water, or other unwholesome substance from their premises;" and "to ordain and establish all such ordinances and by-laws for the government and good order of the village . . . and the promotion of health, not inconsistent with the Constitution and laws of the United States or of this state, as they shall deem expedient." Rev. Stat. § 892, subds. 20, 26. The powers vested by subdivision 26 were to be exercised by ordinances and by-laws, and, being for the enactment of general and permanent rules, cannot, it is contended (and many authorities are cited to that effect), be exercised in any other manner; while the powers conferred by subdivision 20 may be exercised "by ordinance, resolution, law, or vote." Section 892. The power "to prevent or abate nuisances"—that which occasions public hurt or inconvenience—is necessarily a very broad and comprehensive one, and essential, if not indispensable, to the purpose for which the village was created. It would hardly be questioned by any one that if garbage, manure or dead animals were found within the village, in the interest of good order, cleanliness, and public health, the board of trustees would have power to abate such nuisances by removing or otherwise making suitable disposition of them. To this end it might provide for destroying them instead of fouling the waters of a lake or stream of water with them, to be again cast up, to the prejudice of the public, or depositing them where they would create a new nuisance. To this end, if a garbage crematory becomes necessary, the board may, within a fair and bona fide exercise of their discretion, contract for its construction, and the village will be bound by the contract. Speaking of the powers of such corporations in *Spaulding v. Lowell*, 23 Pick. 74, Shaw, Ch. J., says: "They can exercise no powers but those which are conferred upon them by the Act by which they are constituted, or such as are necessary to the exercise of their corporate powers or duties, and the accomplishment of the purposes of their association." *French v. Quincy*, 3 Allen, 12. This rule has often been affirmed in this state with the just qualification that such corporations may resort to the usual and convenient means of executing the powers granted; that is to say, as applied to this case, that the village, in order to prevent or abate nuisances, might resort to such means as were usual and convenient. *Mills v. Gleason*, 11 Wis. 510, 78 Am. Dec. 721; *Gilman v. Milwaukee*, 61 Wis. 592; *Bell v. Platteville*, 71 Wis. 142; *Meinzer v. Racine*, 68 Wis. 241. The power to prevent and abate nuisances is an express grant of power, and not an implied one; and "it has

long been an established principle in the law of corporations that they may exercise all the powers within the fair intent and purpose of their creation which are reasonably proper to give effect to powers expressly granted. In doing so, unless restricted in this respect, they must have a choice of means adapted to ends, and are not confined to any one mode of operation," and their discretion in this respect cannot be revised or interfered with by the courts, except where the substantive power is exceeded, or fraud is shown, or there is a manifest invasion of private rights. 1 Dill. Mun. Corp. §§ 91, 94, and cases cited; *Benson v. Waukesha*, 74 Wis. 32; *Kelley v. Milwaukee*, 18 Wis. 88; *Schanck v. New York*, 69 N. Y. 444; *Spaulding v. Lowell*, *supra*.

It was not necessary, therefore, that there should have been express power conferred on the village to build, or contract for building, the crematory. The village board might contract for it as a means adapted to the end of preventing or abating nuisances and as a health measure, and so within the general purpose for which the village was organized.

2. Upon the authority of *Dean v. Charlton*, 28 Wis. 590, 99 Am. Dec. 205, it is contended that, as the mode of building the crematory was a patented one, the contract was void, on the ground that there could not be fair competition in bidding for the work, which by the charter was required to be let to the lowest bidder. Rev. Stat. § 921. The case of *Dean v. Charlton* was decided by a divided court, and there was a vigorous and able dissenting opinion by Chief Justice Dixon. The Legislature subsequently validated the assessment so held void in that case. *Mills v. Charleton*, 29 Wis. 400, 9 Am. Rep. 578; *Dean v. Borchsenius*, 30 Wis. 286, — in which cases the validity of this legislation was sustained. Since that time the direct question involved in that case, which was in respect to assessments against abutting lots for paving the street, has not been before the court; but in *Dean v. Charlton* the majority of the court, after commenting upon the case of *Harlem Gaslight Co. v. New York*, 38 N. Y. 309, expressly disclaimed deciding whether the city might not have contracted for laying such pavement at its own expense, under its general municipal powers, which is really the question here presented. In view of the legislation which followed *Dean v. Charlton*, and the fact that it was decided by a divided court, and the general tenor of subsequent decisions, and the further fact that patented methods and processes now enter so largely into various classes and kinds of public work, we are not disposed to extend the rule of that case beyond the particular point there decided. In *Hobart v. Detroit*, 17 Mich. 246, 97 Am. Dec. 185, and *Molz v. Detroit*, 18 Mich. 515, decided at about the same time, a contrary conclusion was reached; and in *Nicolson Pave. Co. v. Painter*, 3 Cal. 699, and *Burgess v. Jefferson*, 21 La. Ann. 143, the rule of the majority of the court in *Dean v. Charlton* was sustained. Since then, in *Re Dugre*, 50 N. Y. 518, the question has been decided in conformity with *Hobart v. Detroit*, *supra*, and other like cases, and in *Yarnold v. Lawrence*, 15 Kan. 129, Brewer, J., notices the diversity of judicial opinion on the ques-

tion, and is inclined to favor the views of the courts of Michigan and New York. *Baird v. New York*, 96 N. Y. 567.

In the present case there was a definite, well-settled price for the patent and specifications, at which it was held and offered to the city and all contractors, which would limit the recovery of the patentee, so that in fact there was free competition for the work and materials, and all else except the patent. The city had the benefit of all the competition of which the nature of the work admitted; and in such cases, where the entire work is done at the general expense of the city, the statute ought not to be so construed as to exclude the city from availing itself of desirable patented works or improvements, as to which there is but one price, and for which there can, in the nature of the case, be no competition, and when, for performing the work and furnishing

materials, the advantage of competition is secured. While the rule of *Dean v. Charlton* may be upheld as applied to assessments charged against abutting lots where the lot-owners have the right secured to them to construct in front of their property the improvement for or in which a patented method or process is used, we cannot see that there is any good reason to hold that the statute applies to the patents, mode, or process, when in respect to all else the statutory requirement of competition is secured. Under any other theory a municipal corporation would be obliged to forego the purchase and use of all patented implements, modes, or processes,—a result which we cannot think the Legislature contemplated.

For these reasons the order of the Circuit Court must be affirmed.

MISSISSIPPI SUPREME COURT.

F. M. LEIGH, *Appt.*,

v.

Thomas HARRISON *et al.*

(.....Miss.....)

Creditors cannot reach the interest of a debtor under a will creating a trust for his support during life and providing that the trustee shall make quarterly payments to him until his death, at least where it does not appear that there is any accumulation of the income over and above the sum needed for his support.

(March 28, 1892.)

APPEAL by complainant from a decree of the Chancery Court for Lowndes County in favor of defendants in a proceeding brought to compel satisfaction of a judgment which had been obtained by plaintiff against Thomas Harrison out of a fund held in trust for his support. *Affirmed.*

The facts are stated in the opinion.

Mr. R. C. Beckett for appellant.

Messrs. J. A. Orr and *B. H. Lee*, for appellees, in support of the will and to establish the validity of the trust, cited —

Pope v. Elliott, 8 B. Mon. 61; *Leavitt v. Beirne*, 21 Conn. 8; *Hill v. McRae*, 27 Ala. 175; *Garland v. Garland*, 18 L. R. A. 212, 87 Va. 758; *Jourdain v. Massengill*, 86 Tenn. 81; *Lampert v. Haydel*, 3 L. R. A. 118, 96 Mo. 430; *Barnes v. Dow*, 59 Vt. 580; *Smith v. Towers*, 69 Md. 77; *Grothe's App.* 185 Pa. 585.

Per Curiam :

The appellant is a judgment creditor of Thomas Harrison, and has sued out execution of his judgment, which has been returned *nulla bona*. He then exhibited his bill in the chancery court of Lowndes county against his debt-

or, and against Mrs. Regina Lee, executrix of the last will and testament of Mrs. Regina Harrison, and trustee thereunder for said Thomas Harrison, and against James T. Harrison, who under the will of Mrs. Harrison was devised an undivided interest in certain lands, the other interest therein having been by said will devised to Mrs. Lee for the life of Thomas Harrison upon the trust which appears. As to James Harrison the only relief sought is partition of the lands as is directed by the will. The will of Mrs. Harrison is as follows:

"I, Regina Harrison, make and publish this, my last will and testament. Item 1st. My residence, and the lot on which it is built, being square 17, north of Main street, in the city of Columbus, I give to my two daughters Regina L. Lee and Mary B. Harrison. All of the personal property, such as books, furniture, etc., in and about the house and on the lot I give to my daughter Mary B. Harrison, except my silver plate, and that will be equally divided by and between my said daughters; and to them I give my lot in the cemetery. Item 2. I give to my daughter Regina L. Lee, in trust for the life of my son Thomas, with the remainder to her, three thousand dollars, and two thirds of my plantation in Leflore county, being the same owned by my husband; and for further description of the land I refer to the deed which vested the title in him; the land to be divided so that the improvements are to be on the two thirds of the number of acres in the tract given her. She will rent the land and lend the three thousand dollars to the best advantage, and use the rents and interest on the three thousand dollars for the support of Thomas during his life, making quarterly payments to him until his death. Then the money at the death of Thomas to vest in my daughter Regina, or, if she is not living, in her son

NOTE.—For prior cases in this series on the subject of spendthrift trusts, see *Lampert v. Haydel*, 2 L. R. A. 118, and *note*, 96 Mo. 430; *Wales v. Bowditch*, 4 L. R. A. 619, 61 Vt. 23; *Slattery v. Wason*, 7 L. R. A. 303, 151 Mass. 203; *Haycraft v. Bland*, 9 L. R. A. 680, 12 Ky. L. Rep. 532; *Billings v. Marsh*, 10 L. R. A. 18 L. R. A.

764, 153 Mass. 811; *Ghormley v. Smith*, 11 L. R. A. 565, 129 Pa. 594; *Bull v. Kentucky Nat. Bank*, 12 L. R. A. 37, 12 Ky. L. Rep. 536; *Day v. Slaughter*, 13 L. R. A. 212, and *note*, 15 Va. L. J. 450; *Roberts v. Stevens (Me.)* 17 L. R. A. 263.

Blewitt H. Lee, Mary, James T., and A. B. Harrison in equal parts. Item 3. I give to my son James T. Harrison three thousand dollars, and the remaining one third in acres of the tract of land described in item 2; the tract will be divided by metes and bounds. Item 4. At the death of Thomas, the two thirds of the place described in item 2 to be divided between my daughters Regina and Mary and my son A. B. Harrison, in this proportion: Regina, or her son Blewitt H. Lee, if she at the time of the death of Thomas is not living, is to have one half, and the other half given in trust to Thomas is to be divided equally between my daughter Mary and my son A. B. Harrison. Item 5. I give to my daughter Regina three thousand dollars in trust for my son A. B. Harrison, the interest to be used by him during his life. Item 6. My daughter Regina can appoint a successor in her trust created in item 2. Item 7. The residue of my estate, not herein bequeathed, I give to, and to be divided equally between, my five children, the shares of Thomas and A. B. Harrison to be held in trust for them, as is provided in the above items. At the death of Thomas, his share is to be divided equally between my other heirs. A. B. Harrison can dispose of his as he wishes at his death. Item 8. I appoint my daughter Regina L. Lee executrix to this will, and direct that she be not required to give any kind of security as executrix or trustee. This will written wholly and entirely in my handwriting, and signed and sealed by me on this, the 27th day February, A. D. 1890. [Signed] Regina Harrison."

The defendants demurred to the bill and the demurrer was sustained, and the bill dismissed.

The question presented for decision is whether, under the will of his mother, Thomas Harrison took such an interest in the property devised to Mrs. Lee in trust for him as that the property or its income can be subjected by his creditors to their demands. It is argued for the appellant that, by the will of Mrs. Harrison, there was conferred upon Thomas the right to the income of the land and the interest on the money, and whatever was given to him will be subject to his creditors. It is contended that the law will not permit an estate to be given to one, to be by him beneficially enjoyed, and yet so hedged about and defended that it cannot be subjected to the payment of his debts. It is also said that if it be conceded that the testatrix might, by apt provisions, have protected the benefit intended to be conferred, she did not do so; and that the provisions of her will in which she directs Mrs. Lee to pay the income arising from the land and the money to Thomas in quarterly payments evidence a clear purpose of the testatrix that he should have such income absolutely and unconditionally. For the appellees it is contended that Mrs. Lee is by the will made trustee in an active, as distinguished from a dry or passive, trust; that the devise is to Mrs. Lee, coupled with an obligation to afford to Thomas a support during his life; but that a discretion is vested in Mrs. Lee as to how and when that support should be given; and whatever remains of the income over and above his support belongs to the trustee; that

the provision for the payment of the income quarterly was only introduced to save Thomas the humiliation of having his bills for his support presented to the trustee; and while it would be her duty to make quarterly payments to him in sums sufficient for his support, that duty would cease whenever he should cease to use them for that purpose, and the trustee could thereafter personally supervise the disbursement of the fund in his maintenance; that Thomas could not anticipate the fund or assign it or devote it to the payment of debts, because to do so would defeat the scheme and intention of the testatrix. The appellees contend that there is no reason why the testatrix might not do as she pleased with her own estate, denying that the creditors of Thomas have any just cause of complaint because Mrs. Harrison made such disposition of her estate as debarred them of access thereto; and also contend that the provisions of the will are not unlawful. The industry of counsel for appellant has supplied us with a very great number of cases in support of the proposition that whatever beneficial interest in property is secured to a man may be taken by his creditors in payment of their demands against him. It must be admitted that the decisions in England are almost uniformly in support of appellant's contention, and that in America the decisions preponderate in his favor. But we think the American courts have followed those of England without sufficient appreciation of the radical difference wrought by our registry laws, and the broad public policy disclosed by the homestead and exemption laws of our states, and have failed to observe the difference between equitable interests and legal estates. An examination of the English cases (in many of which the provision for the support of the debtor was subjected to his creditors) disclose that they rest on the following propositions: (1) That the limitation of the use or enjoyment of property to the person of the grantor or devisee is a restraint, repugnant to and inconsistent with the estate granted; and that the liability of an estate *in invitum* to the debt of the owner is a necessary incident thereto. (2) That it would be a fraud upon creditors to withhold from liability to their claim the estate of the debtor, upon the faith of which credit may have been extended. (3) That it is against public policy that one should be permitted to have, own, and enjoy an estate to which his creditors cannot resort. The reason first noticed, while of very general application to legal estates, has never, even in England, been held to control equitable estates of a certain class, i. e., trusts for the separate use of married women. In reference to such trusts Mr. Perry says: "It was at first thought to be an infringement upon marital rights for a stranger to confer property upon a wife, independent of the husband, upon the ground that the donor of the property, being the absolute owner, has the absolute right to dispose of it to such person and upon such conditions and limitations, not contrary to the law, as he chooses; and as the husband has no rights in such property, it is depriving him of no rights to confer none upon him. Thus it becomes a mere question of public policy, whether rights should be conferred upon a wife independent

of her husband. Public policy in regard to the matter has settled down upon the propriety of conferring separate property rights upon married women. Equity has taken one other step in favor of married women, which is not generally permitted in favor of men or unmarried women. In general, conditions or limitations forbidding the alienation of property by persons *sui juris* cannot be maintained. But courts of equity early sustained a condition or limitation of property upon married women, forbidding them to anticipate the income in any way; that is prohibiting them in any way from settling the property or its future produce for a present sum in hand." 2 Perry, Tr. 646. The equitable rule, then, announced by Mr. Perry, and supported by citations from numerous cases, is, so far as we are advised, universally recognized, and, in so far as at least trusts of this character are involved, it appears that the restraint upon the power of alienation is not repugnant to the estate, nor against public policy, nor forbidden because some third person (the husband,) who, but for the restriction, might have secured a benefit, is by it excluded therefrom. The manifest justice of the equitable rule in relation to trusts for married women commended it for application in other cases, and under its operation trusts for persons *sui juris* have in several of the states been upheld as against creditors of the beneficiary seeking to subject his interest to their debts in opposition to the will of the donor. Of the decisions sustaining the rights of the donor to exclude by the terms of the trust the creditors of the beneficiary, the following may be noted as containing exhaustive examinations of the principle involved, and vigorous arguments in vindication of the right: *Pope v. Elliott*, 8 B. Mon. 56, *Nichols v. Eaton*, 91 U. S. 716, 23 L. ed. 254; *Broadway Nat. Bank v. Adams*, 183 Mass. 170, 43 Am. Rep. 504; *Lampert v. Haydel*, 96 Mo. 439, 2 L. R. A. 118. It was settled at a very early day in Pennsylvania that limitations of this character were valid, (*Fisher v. Taylor*, 2 Rawle, 83,) and they have since been frequently upheld, (*Ashhurst v. Given*, 5 Watts & S. 828; *Holdship v. Patterson*, 7 Watts, 547; *Brown v. Williamson*, 86 Pa. 388.) So in Vermont, (*White v. White*, 80 Vt. 388,) Maryland, (*Smith v. Towers*, 69 Md. 77,) Connecticut, (*Leavitt v. Beirne*, 21 Conn. 1,) and Virginia, (*Garland v. Garland*, 87 Va. 759, 13 L. R. A. 212.) In England the right of the donor to provide for the determination of the estate or interest of the beneficiary upon bankruptcy or insolvency, if there be a limitation over to a third person of the estate or benefit, is recognized and upheld. The denial is of their right to so tie up the estate as that that remaining to the donee may not be taken by his creditors. *Cooper v. Wyatt*, 5 Madd. 489; *Rez v. Robinson*, Wightw. 898; *Shoe v. Hale*, 18 Ves. Jr. 406; *Brandon v. Robinson*, 18 Ves. Jr. 432. The English rule considered as one in the interest of creditors of the donee, is inconsistent, and affords no protection to them, for the donor has but to provide for the determination of the interest of the beneficiary upon his bankruptcy or insolvency, and, this being done, the creditors take nothing. They could not take less if the estate should be left

in the beneficiary free from their claim. Considered as a rule established in the interest of creditors, the effect seems to be to secure to them only the benefit—if it is a benefit—of having a third person take the estate free from the claim, rather than permit the debtor to retain it in the same manner. We confess our inability to perceive how a creditor can be said to be injured or defrauded by the recognition of power in a donor to limit his bounty according to his own will. The creditor has no right to the property in the hands of the donor, and no equity that we can perceive in any disposition which the owner may make of it. If Mrs. Harrison had given Thomas nothing, upon what principle could his creditors complain? How are their rights (if they had none) infringed by any limitations she chose to impose upon the bequest she did make? It must be admitted that the right to make a will is not a natural right, and that no unlawful disposition may be made of the property devised. But what law is violated by disposing of property with a limitation which confines its benefit to the person of the donee? It cannot be said that it is against public policy for a testator to provide a support for a spendthrift child, for the interest of the public is that such child should not become a public burden. Our statutes upon the subject of exemptions indicate a clear public policy that exemption from personal pauperism is of greater concern than the right of creditors. A donation by will or deed, with limitations against liability to debts of the donee, cannot invite to undue credit being given to the donee, for such instruments are required to be recorded, and third persons may by examination of the public records learn the terms upon which the bounty is to be enjoyed. The reason sometimes, if not universally, given, that the limitation is inconsistent with the estate given, presents the most serious objection to the validity. But, as was said by Mr. Justice Miller in *Nichols v. Eaton*, 91 U. S. 716, 23 L. ed. 254: "We do not see, as implied in the remark of Lord Eldon, that the power of alienation is a necessary incident to a life estate in real property, or that the rents and profits of real property, and the interest and dividends of personal property, may not be enjoyed by an individual without liability for his debts being attached as a necessary incident to such enjoyment. The doctrine is one which the English chancery courts have ingrafted upon the common law for the benefit of creditors, and is comparatively of modern origin. We concede that there are limitations which public policy in general statutes imposes upon all disposition of property, such as those designed to prevent perpetuations and accumulations of real estate in corporations and ecclesiastical bodies. We also admit that there is a just and sound policy, peculiarly appropriate to the jurisdiction of courts of equity, to protect creditors against frauds upon their rights, whether they be actual or constructive frauds. But the doctrine that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though they may soon deprive him of all

the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court."

In *Lampert v. Haydel*, 96 Mo. 489, 2 L. R. A. 113, Judge Sherwood, in an instructive opinion, showed that the doctrine that a restraint upon alienation is inconsistent with the estate granted has no application in principle to an equitable estate; that courts of equity dealing with one class of trusts, *i. e.*, those created for the benefit of married women, have uniformly upheld limitations against alienations to effectuate the intention of the author of the trust, and declare that "it is difficult to see why, with a like object in view, *i. e.*, the effectuation of the gift just as the author intended it to be effectuated, such court may not lay down and declare a rule in such a case as this, which shall be equally effectual in preventing the intention of the donor from being thwarted,—a rule which injures or defrauds no one, which violates no rule of public policy, and which gives stability and protection to a provision which originating in the warmest ties of affection, seeks to afford the beneficiary a sure and unfailing relief against the vicissitudes of fortune." The argument in favor of the validity of the limitation impresses us as both sound and conservative. Our statutes against perpetuities would seem to express the whole legislative will on the subject, and to fix the limit which may not be exceeded, but within which restraints against alienations may be lawfully imposed, at least upon equitable estates for life which, whatever may be the rule as to legal estates, either in fee or for life, would seem not to be subject to the objection that the limitation is in derogation of the estate. We can perceive no reason why courts of equity, whose principles and administration give rise to and protect these estates, should not so mold and preserve the trusts declared as to protect and give effect to trusts for improvident and spendthrift persons who are objects of solicitude to their parents and friends. It is not more generally true that married women need the intervention of equity to protect their estate from the avarice or improvidence of husbands than that the unfortunate class called "spendthrifts" require like restraint from the consequence of their own vice and extravagance. The affection of parents may be relied on to prevent the imposition of such limitations except in cases in which the interest of the individual and the public will be subserved.

But it is said that the devise in favor of Thomas Harrison is subjected to the demands of creditors by section 1204 of Rev. Code, which is as follows: "Estates of any kind, holden or possessed for another, shall be subject to like debts and charges of the person to whose use, or for whose benefit, they are holden or possessed, as they would have been subject to if the person had owned the like interest in the thing holden or possessed, as he may own in the uses or trusts thereof, whether the trusts be fully executed or not, and may be sold under execution at law, so as to pass whatever interest the *cestui que trust* may have; and before a sale under a mortgage or deed of

trust the mortgagor or grantor shall be deemed the owner of the legal title of the property conveyed in such mortgage or deed of trust, except as against the mortgagee and his assigns, or trustee, after breach of condition of such mortgage or deed of trust." The effect of this statute is to subject equitable estates to sale under execution at the law; but since the complaint is a proceeding in a court of equity, in which such estates might always have been subjected, we do not perceive that anything can be added to his position by invoking the statute. The statute can have no operation upon the estate of the trustee, nor subject it to the debts of the *cestui que trust*, unless he has an equitable estate in the property of which the trustee has the legal title. It is uniformly held that, when an active, as distinguished from a dry or passive, trust is created, the Statute of Uses does not apply. It is equally well settled that the use remains a mere equitable estate when an agency, duty, or power is imposed on the trustee to collect and pay the rents, income, and profits to the beneficiary. *Mott v. Buxton*, 7 Ves. Jr. 201; *Wheeler v. Newhall*, 7 Mass. 189; *Chapin v. First Universalist Soc. in Chicopee*, 8 Gray, 580; *Garth v. Baldwin*, 2 Ves. Sr. 646; *Anthony v. Rees*, 2 Crompt. & J. 75; *Vail v. Vail*, 4 Paige, 817, 3 L. ed. 452; *Silvester v. Wilson*, 2 T. R. 444. Under the will of Mrs. Harrison, it is clear that Mrs. Lee has imposed upon her certain duties, the performance of which requires the execution of the legal estate in her. She is to divide the land in Leflore county, and thereafter rent the portion set apart to her, and collect the rents; she is to lend the money, and use the income arising from land and money in the support of Thomas Harrison. The manifest purpose of the testatrix is that Thomas shall have assured to him an annual support, to be personally supervised and applied to his use by the trustee. It is true that, by the clause of the will directing that the trustee shall make quarterly payments to Thomas during his life, an apparent inconsistency is presented, and it is this claim which creditors have seized upon as transferring the income absolutely and unqualifiedly to Thomas, by reason of which a liability to their debts is claimed. To subject the whole income to the debts of Thomas would be to nullify the scheme of the testatrix, because of a mere defect in the mode of its administration. The paramount purpose of the testatrix was that Thomas should have from year to year a fixed and sufficient support. He was insolvent when the will was made, and when the testatrix died, as fully appears in the bill and exhibit. Mrs. Harrison must be presumed to have known his condition, and to have acted with reference to it. She knew that, unless the fund should be protected from the creditors, a devise to him would be in effect a devise to them, and, for the manifest purpose of securing a support to him, she vested the fund in the hands of a trustee, who was to use the same in the support of Thomas, making quarterly payments to him during his life. The office of courts is to discover the will of testators, and it being found, if lawful, to effectuate it. We are now asked to seize upon a clause inconsistent with the general scheme, and, by construction, use it as a lever to over-

throw the whole structure. This we cannot do. It is our duty to uphold the whole will, and, to do so, we should disregard subordinate and administrative provisions, rather than enlarge their effect, to the destruction of the whole scheme. We do not construe that clause which directs the trustee to make quarterly payments to Thomas as excluding the power and duty of the trustee to apply so much thereof as may be necessary to his comfortable support and maintenance according to his condition in life. As long as the fund may be in that manner applied in accordance with the will of the testatrix, it is permissible, for the trustee so to disburse it, but when, and if, either by reason of willful misapplication by Thomas, or a diversion of it by the act of his creditors, the scheme of the testatrix is or may be frustrated, it is within the power and duty of the trustee to intervene, and so control and apply a sufficiency thereof as to afford to Thomas the support contemplated by his mother. There is no averment in the bill that the fund is more than sufficient for the support of the beneficiary. We have, therefore, dealt with the question on the assumption that it is

not. What we have said has application to so much of the income as may be necessary to effectuate the scheme of the testatrix. If in the course of time it may appear that there is an accumulation of the income over and above the sum needed for the support of Thomas, such excess would seem to be liable to creditors by reason of the fact that the whole income is given to him, and as to such excess the direction to the trustee to pay it to him quarterly would be absolute and unconditional. We cannot concur in the suggestion of counsel for appellees that Mrs. Lee would take beneficially such excess. The authorities relied on by them are found to be cases in which the bequests have been made to the widow for the education and maintenance of children, and proceeding upon the presumed intention of the testator to supply a fund for the maintenance of the family, and that the widow, as the head of the family, should take the surplus. *Hadow v. Hadow*, 9 Sim. 438; *Berkeley v. Swinburne*, 6 Sim. 618; *Browne v. Paul*, 40 Eng. Ch. 92.

Affirmed.

MARYLAND COURT OF APPEALS.

Charles B. OLMSTEAD, *Appl.*,

v.

Henry BACH, JR., *et al.*

(.....Md.....)

A satisfied judgment for one week's wages in a suit brought after wrongful dismissal from service is not a bar to a subsequent suit for wages thereafter accruing under the same contract where the employé continues ready to work and his employment was "at a salary of \$50 per week payable weekly" although there was an express provision that the contract should continue for one year.

(November 18, 1892.)

A PPEAL by plaintiff from an order of the Baltimore City Court sustaining a demurrer to plaintiff's reply in an action brought to recover wages alleged to be due and unpaid. *Reversed.*

The facts are stated in the opinion.

Argued before Alvey, *Ch. J.*, and Robinson, Bryan, McSherry, Fowler, Roberts, and Page, *JJ.*

Messrs. C. Marshall and William L. Hodge for appellant.

Messrs. Thomas M. Lanahan and Frank Gosnell for appellee.

Page, J., delivered the opinion of the court:

The *narr.* in this case alleges that the appellees, by their contract in writing under seal, agreed to pay the plaintiff "a salary of fifty dollars per week, payable weekly, as a

compensation for the services of the plaintiff as a cutter;" the said contract to "continue in full force and virtue for one year from February 1, 1892, to February 1, 1893;" and that the plaintiff performed service thereunder until the 5th day of April, 1892, when the defendants refused to permit him to further perform his part of the contract, or to pay him the salary to which he is entitled after the 9th of April, 1892. It further sets out that the plaintiff is, and has always been, ready and willing, and has offered, and still offers, to perform his part of the contract, but the defendants have refused, and do still refuse, to permit him so to do, or to pay him his salary of \$50 a week, "since the 9th day of April, 1892." To the first four of the defendants' pleas the plaintiff joined issue. The fifth and sixth pleas set up as a bar to this action that, after the dismissal of the plaintiff, and before the institution of the present proceeding, he brought suit before a justice of the peace upon a cause of action in the following words: "Charles B. Olmstead vs. Henry Bach, Jr., and Joseph A. Myers, partners trading as Henry Bach & Son, for one week's pay as cutter, as per written contract, week ending 16th of April, 1892." That the written contract referred to is the same mentioned in the declaration in this case, and that upon trial the plaintiff recovered judgment, which was paid before the present suit was instituted. To these pleas replication was entered that the plaintiff "presented and offered himself to the defendant as ready and willing to perform his part of the contract," and "continuously" so offered; that he "did not quit the service of

NOTE.—For rights and remedies of a discharged servant, see *note* to *Keedy v. Long* (Md.) 5 L. R. A. 759.

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As to measure of damages for wrongful discharge, see *Larkin v. Hecksher*, 3 L. R. A. 137, and *note* 51 N. J. L. 133.

the defendant by reason of the pretended dismissal," but has always been "ready and willing to perform his part; and that the suit mentioned in said plea was to recover his salary for one week under said contract." The defendants demurred, and, upon the demurrer being sustained, and judgment entered thereon, the plaintiff appealed.

The single question involved in this case is whether, under such a contract as is set out in the declaration, the recovery of a judgment for one week's salary, followed by a satisfaction of the judgment, is a bar to this suit for salary for subsequent weeks, no part of the salary now sued for having been due at the time of the institution of the suit in which the judgment was rendered. It was strenuously contended at the argument that the decisions in the cases of *Keedy v. Long*, 71 Md. 885, 5 L. R. A. 759, and *Keedy v. Crane*, 71 Md. 895, are decisive here. These cases presented "identically the same defense," and were determined upon the "reasons assigned in the *Long Case*." *Keedy v. Crane*, 71 Md. 896. In *Long's Case* the plaintiff was employed for a year as a music teacher, at a specified salary, payable weekly. She was discharged before the expiration of two months, having been paid one month's salary prior to her discharge. She then sued, and recovered judgment for the value of her services from the end of the first month to the time of her discharge, being a period of twenty days. After this judgment was paid, she brought an action to recover damages for a breach of the contract. Upon this state of fact this court held that "a servant wrongfully discharged has two remedies open to him at law: . . . First, he may treat the contract as continuing, and bring a special action against the master for breaking it by discharging him, and this remedy he may pursue whether his wages are paid up to the time of his discharge or not; or, secondly, if his wages are not paid up to the time of his discharge, he may treat the contract of hiring as rescinded, and sue his master on a *quantum meruit* for the services he has actually rendered. . . . If he elects to sue upon a *quantum meruit*, he must treat the contract as rescinded (*Bull v. Schubert*, 2 Md. 57); and he will not be allowed to maintain afterwards an action for damages, which action is founded on the assumption of the continuance of the very same rescinded contract. And so, conversely, where he treats the contract as a continuing one by suing for a breach of it, occasioned by his having been wrongfully discharged, he cannot be permitted to recover also upon a *quantum meruit*, when a recovery presupposes the total rescission of the agreement." 71 Md. 890, 891. Inasmuch, therefore, as the suit pleaded in bar was brought by Long on a *quantum meruit*, and the judgment thereon had been paid, the plaintiff had elected to pursue that remedy, which was founded on the assumption that the contract was rescinded, and she was therefore precluded from resorting afterwards to a special suit, which presumed the continuance of the contract. In the case now under consideration there is no such rescission of the contract, either express or im-

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plied. The suit before the justice of the peace was not brought on a *quantum meruit*. Nor did the act of the defendants, in dismissing the plaintiff, work a rescission. To rescind a contract requires the concurrence of both parties. *Franklin v. Miller*, 4 Ad. & El. 599. The refusal of a contractor to perform his part of a contract is not sufficient to work such a result; though, if he do so refuse, or render himself unable to perform his part of the contract, the other contractor may, if he please, rescind; such act or refusal being equivalent to a consent to the rescission. 2 Smith, Lead. Cas. 6th ed. p. 87 (notes on Cutler and Powell and authorities there cited). The cause of action filed with the justice of the peace, on which the judgment set out in the plea was obtained, was, in this case, for one week's pay "as cutter, per written contract, week ending 16th April, 1892." The recovery, therefore, was under the contract and assumed its continuance. In *Keedy v. Long* the suit pleaded in bar was founded upon the assumption that the contract was at an end, and for that reason the plaintiff could not maintain an action which rests upon an assumption exactly the contrary. In this case the plea set out a proceeding founded upon the assumption of a continuance of the contract, and for this reason is not within the decision in *Long's Case*. Notwithstanding this, however, it is well-settled law that only one action can be maintained for the breach of an entire contract, and the judgment obtained in one suit may be pleaded in bar of any second proceeding; but if an "agreement embraces a number of distinct subjects, which admit of being separately executed and closed, the general rule is that it shall be taken distributively, and each subject be considered as forming the matter of a separate agreement after it is closed." *Dugan v. Anderson*, 86 Md. 585, 11 Am. Rep. 509. So in *Keedy v. Long*, *supra*, "we are not to be understood as questioning the well-settled law that, where the contract is divisible, a judgment recovered for the breach of one separate and independent provision does not bar a subsequent suit for a distinct breach of a different condition." 71 Md. 894. Is the contract set out in the declaration a divisible one? In *Keedy v. Long* this question did not arise. The plaintiff in that case having elected a form of action in the first suit which presumed a rescission of the contract, she was precluded from bringing another action, whether the contract was divisible or not. The court has stated in express terms that what they meant to decide "is this: Where the master wrongfully discharges the servant, the servant has two alternative remedies, . . . and that the pursuit of one of these remedies will prevent the other from being invoked." The agreement in that case, however, differs in some respects from the one set out in the *narr*. In this case. There the contract was for a yearly hiring, payable weekly; here it is for a weekly hiring, payable weekly. Here the *narr* alleges that the appellee "agreed to pay to the said plaintiff a salary of fifty dollars per week, payable weekly, as

a compensation for services of said plaintiff as cutter," etc., and "that said contract . . . should continue in full force and virtue for one year." The terms of the hiring are entirely distinct from that part of the agreement which provides for a continuance of the contract. As long as the contract continued, and the plaintiff performed service according to its terms, or, being ready and willing to do so, was prevented by the act of the defendants, the sum of \$50 became due and payable to the plaintiff at the end of each week. "A contract for the payment of distinct sums of money at different periods is very much in the nature of distinct contracts. An action of debt lies for each sum as it becomes due, and when the sum is paid the debtor or contractor is forever discharged from the contract to pay it." *Chief Justice Marshall, in Faw v. Marteller*, 6 U. S. 2 Cranch, 10, 2 L. ed. 191.

With respect to installments of money due at successive days under the same contract, if the action be covenant or assumpsit, the action may be for each successive installment as it becomes due. *Bendernagle v. Cocks*, 19 Wend. 207, 32 Am. Dec. 448; *Badger v. Titcomb*, 15 Pick. 414, 26 Am. Dec. 611. In *Rodemer v. Hazlehurst*, 9 Gill, 204, there was a stipulation in the contract for graduating a section of a railroad for a monthly estimate by the defendant's agents of the quantity and value of the work, four fifths of which value were to be paid immediately, and it was held "that a separate assumpsit arises, and an action could be sustained at each of these monthly periods respectively," etc. See also *Secor v. Sturges*, 16 N. Y. 548. Here the plaintiff bound himself to devote his time and attention to the business of the defendants, and as a compensation for his services he was to be paid \$50 per week. The value of the services were definitely determined by the express terms of the contract, and were due and payable, not as an aliquot part of a year's salary, but as compensation for one week's work. In *Dugan v. Anderson*, *supra*, this court laid down a rule for determining in what cases the contract is entire or divisible when it stated that "courts must be guided by a respect to general convenience, and by the good sense and reason-

ableness of the particular case." Applying this rule, we think this contract is a hiring by the week, and that each week's work was to be paid as the party earned it, and that by another and independent stipulation it was further agreed that the contract should continue in force for one year; or, in other words, that the defendants would give the plaintiff work for a full year, and pay for it on the terms stated. "A severable contract," says *Judge Story*, "is a contract the consideration of which is, by its terms, susceptible of apportionment on either side, so as to correspond to the unascertained consideration on the other side; as a contract to pay a person the worth of his services so long as he will do certain work." 1 *Story, Cont.* (ed. 1847) § 21; *Perkins v. Hart*, 24 U. S. 11 Wheat. 251, 6 L. ed. 467.

The contract being divisible, and the suit before the justice of the peace being founded upon a continuance of it, the full measure of damages the plaintiff was entitled to recover therein was the one week's wages due at the time it was brought. It is true, the plaintiff possibly could have brought an action for an entire breach of the contract, claiming that "the eventual non-performance may therefore, by anticipation, be treated as a cause of action." This is what was attempted in *Dugan v. Anderson*, *supra*, under the authority of *Hochster v. Delatour*, 20 Eng. L. & Eq. 157, but the court did not then find it necessary to determine that question. Or he might have waited until all the installments were due, and included them in a single suit. But he was not bound to do either. He had the right to treat the contract as still subsisting, and could maintain an action for each installment as it fell due. It has been so held in the following cases: *Isaacs v. Davies*, 68 Ga. 169; *Armfield v. Nash*, 31 Miss. 861; *Colburn v. Woodworth*, 31 Barb. 831; *Thompson v. Wood*, 1 Hilt. 97; *Fowler v. Armour*, 24 Ala. 199.

Being of opinion that the fifth and sixth pleas do not present a sufficient defense, the court below erred in sustaining the demurrer, and the judgment must accordingly be reversed.

Judgment reversed, and new trial ordered.

OREGON SUPREME COURT.

Ludwig S. NICHOLS, *Respt.*,

v.

SOUTHERN PACIFIC CO., *Appt.*

(.....Or.....)

1. Each portion of a "coupon ticket" issued by a railroad company for itself and also

as agent for other lines to be passed over is a separate contract so far as to be transferable, although the ticket is sold at a reduced rate, where there are no words of limitation or restriction thereon as to the person entitled to use it.

2. A ticket inspector's declaration as his only reason for rejecting a ticket which he has demanded for inspection that the

NOTE.—Assignability of railroad ticket.

In *Hudson v. Kansas Pac. R. Co.*, 3 McCrary, 249, a coupon of a ticket issued for transportation over several roads as in the above case was held assignable in the absence of any express restriction of the right to transfer.

Similar in principle is the decision that the return coupon of a round-trip excursion ticket limited as to time but without any provision against trans-

fer may be assigned and used by the assignee on the return trip. *Carsten v. Northern Pac. R. Co.*, 9 L. R. A. 688, 44 Minn. 454; *Hoffman v. Northern Pac. R. Co.*, 45 Minn. 53.

But an express restriction in a railroad ticket against transfer is valid. *Post v. Chicago & N. W. R. Co.*, 14 Neb. 110, 45 Am. Rep. 100; *Drummond v. Southern Pac. R. Co.*, (Utah) Feb. 3, 1891; *Grauler v. Louisiana W. R. Co.*, 43 La. Ann. 880; *Cody v. Cen-*

holder cannot ride upon it because he is not the original purchaser is admissible in an action for wrongful ejection from the train for the purpose of raising an implication that the ticket was authorized originally and genuine.

3. Evidence tending to show that defendant had recognized as valid tickets such as that held by plaintiff when he was ejected from defendant's train is admissible in an action to recover for such ejection.

(October 31, 1892.)

A PPEAL by defendant from a judgment of the Circuit Court for Multnomah County in favor of plaintiff in an action brought to recover damages for the alleged wrongful ejection of plaintiff from defendant's train. *Affirmed.*

The facts are stated in the opinion.

Messrs. Bronaugh, McArthur, Fenton & Bronaugh, for appellant:

Statements made by an agent relating to a transaction are admissible only when part of such transaction, and when relevant to the issues made.

Luby v. Hudson River R. Co. 17 N. Y. 132.

The execution of a contract apparently made by an agent cannot be proven without calling the parties who signed or witnessed the same, or one of them; and, if there be a subscribing witness, he must be first called if in the state, and living, and can testify.

Hill's Code, §§ 754-761.

A person having no contract with a carrier for his passage at the time is not a passenger.

Hutchinson, Carr. 2d ed. §§ 554, 555; *Lillis v. St. Louis, K. C. & N. R. Co.* 64 Mo. 475, 27 Am. Rep. 255; *Wyman v. Northern Pac. R. Co.* 34 Minn. 210; *Kerrigan v. Southern Pac. R. Co.* 81 Cal. 251.

A written contract made by a carrier to transport a particular person for a single fare over its road and other connecting roads, and to furnish such transportation as one passage, upon certain written conditions and at a reduced rate, is an entire contract as to such person and as to each road, and such passage can be demanded only by such person, upon his showing that he is the contracting party. Nor is such contract assignable.

Hutchinson, Carr. 2d ed. §§ 575, 577, 580, a-d; *Pennsylvania R. Co. v. Connell*, 112 Ill. 297, 54 Am. Rep. 238; *Granier v. Louisiana Western R. Co.* 42 La. Ann. 880; *Wyman v. Northern Pac. R. Co. supra*; *State v. Oerton*,

tral Pac. R. Co. 4 Sawy. 114; *Robostelli v. New York, N. H. & H. R. Co.* 33 Fed. Rep. 796; *Walker v. Wabash, St. L. & P. R. Co.* 15 Mo. App. 333, 16 Am. & Eng. R. R. Cas. 380.

This restriction is valid as to coupons of a through ticket over different roads. *Cody v. Central Pac. R. Co.*, *Post v. Chicago & N. W. R. Co.*, and *Drummond v. Southern Pac. R. Co. supra*.

And the fact that the purchaser of the ticket did sign it as provided by the terms of the ticket makes no difference in respect to the validity of such restrictions. *Drummond v. Southern Pac. R. Co. supra*.

The restriction against transfer of a commutation ticket is also valid. *Granier v. Louisiana W. R. Co.* and *Robostelli v. New York, N. H. & H. R. Co. supra*.

But a passenger presenting a nontransferable 18 L. R. A.

24 N. J. L. 435, 61 Am. Dec. 671; *Cheney v. Boston & M. R. Co.* 11 Met. 121, 45 Am. Dec. 190, 192, notes; *Drummond v. Southern Pac. R. Co.* (Utah) Feb. 3, 1891; *Roberts v. Koehler*, 30 Fed. Rep. 96, 12 Sawy. 252; *Drew v. Central Pac. R. Co.* 51 Cal. 425; *Walker v. Wabash, St. L. & P. R. Co.* 15 Mo. App. 333, 16 Am. & Eng. R. R. Cas. 385; *Churchill v. Chicago & A. R. Co.* 67 Ill. 391; *Hatten v. Newark & J. C. R. Co.* 39 Ohio St. 375, 13 Am. & Eng. R. R. Cas. 54; *Cody v. Central Pac. R. Co.* 4 Sawy. 117.

In attempting to prove the execution of a contract purporting to be executed by another as agent, the reasons assigned by or the silence of another agent of the alleged principal at the time the pretended contract is sought to be enforced cannot be shown, either to prove the execution in fact of such contract or the authority of such alleged agent.

Stewart v. Huntingdon Bank, 11 Serg. & R. 267, 14 Am. Dec. 632, and notes; 1 Morawetz, Priv. Corp. 2d ed. § 540; *Huntingdon & B. T. M. R. & Coal Co. v. Decker*, 82 Pa. 123; *Tripp v. New Metallic Pack Co.* 137 Mass. 499; *Pratt v. Ogdensburg & L. O. R. Co.* 102 Mass. 562; *Southwestern R. Co. v. Atlantic & G. R. Co.* 53 Ga. 401; *Svenson v. Aultman*, 14 Kan. 273; *Henry v. Northern Bank*, 63 Ala. 527; *Randall v. North Western Telegr. Co.* 54 Wis. 146, 41 Am. Rep. 17; *Northwestern U. Packet Co. v. Clough*, 87 U. S. 20 Wall. 540, 22 L. ed. 408; *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 92, 80 L. ed. 299; 1 Phillips, Ev. 381; 1 Greenl. Ev. 118; *Olunie v. Sacramento Lumber Co.* 67 Cal. 818.

Proof that other contract tickets, purporting to have been executed by an alleged agent in the name of a principal, have been seen or sold by a stranger to such alleged agent and principal, and that such contract tickets were never returned to such stranger, is not competent to prove the execution of the contract in issue or the authority of such agent.

Atchison, T. & S. F. R. Co. v. Roach, 85 Kan. 740, 57 Am. Rep. 199; *Hill v. Syracuse, B. & N. Y. R. Co.* 73 N. Y. 351, 29 Am. Rep. 163.

The silence of the agent, or his statement at the time an alleged contract ticket is tendered to such agent, does not estop such principal to deny the making of such contract, or the authority of the selling agent.

Boice v. Hudson River R. Co. 61 Barb. 613; *McClure v. Philadelphia, W. & B. R. Co.* 34 Md.

commutation ticket issued to another is when his right to ride upon the ticket is recognized entitled to the same care and protection as other passengers. *Robostelli v. New York, N. H. & H. R. Co. supra*.

The invalidity of a nontransferable ticket in the hands of an assignee does not give the conductor of a train the right to retain it without allowing the passenger to ride upon it. *Post v. Chicago & N. W. R. Co.* and *Drummond v. Southern Pac. R. Co. supra*.

A train check given in exchange for a ticket which shows on its face that it is good for a continuous passage only between two places named cannot entitle one who purchases it at an intermediate point to use it for the remainder of the journey. *Walker v. Wabash, St. L. & P. R. Co. supra*. B. A. R.

323, 6 Am. Rep. 348; Hutchinson, Carr. 2d ed. § 380, note 6; Mechem, Ag. §§ 714-717; Cincinnati, H. & I. R. Co. v. Carper, 112 Ind. 20; Luby v. Hudson River R. Co. 17 N. Y. 132; Busley v. San Jose Fruit Packing Co. 92 Cal. 288; Bank of Northern Liberties v. Davis, 6 Wall. & S. 290; People v. Vernon, 85 Cal. 40, 85 Am. Dec. 57-73, notes; Moore v. Bettis, 11 Humph. 67, 53 Am. Dec. 778, notes.

If this contract is assignable, then it enables the carriers to violate the Interstate Commerce Act. Such construction would authorize each of these carriers to charge less for the longer than the shorter haul, in the same direction to one passenger than to another.

§ Rorer, Railroads, p. 938.

A contract ticket accepted by the first holder creates a contract with such holder whether signed by him or not.

Pennock v. Cunard S. S. Co. 153 Mass. 553; Quimby v. Boston & M. R. Co. 150 Mass. 805; Jones v. Cincinnati, S. & M. R. Co. 80 Ala. 270; Drummond v. Southern Pac. R. Co. (Utah) Feb. 3, 1891; Mosher v. St. Louis, I. M. & S. R. Co. 127 U. S. 391, 32 L. ed. 240.

Messrs. McGinn, Sears & Simon, for respondent:

The cause of action is clearly for trespass in ejecting respondent from the train.

An allegation merely that the appellant, at specified time and place, assaulted respondent, would have sufficed to found a recovery upon. Superfluous allegations vitiate nothing.

1 Addison, Torta, § 834; Eddy v. Beach, 7 Abb. Pr. 17; Shaw v. Jayne, 4 How. Pr. 119; 3 Chitt. Pl. title, Declarations in Torta, Trespass, 10th Am. ed. 614; 1 Estee, Pl. 558.

The contract was entire as to a passage over the line of each road, which, when begun, must be completed. It was severable as between the different roads. It was a distinct contract as to each road. It follows, therefore, that it was assignable, in the absence of any prohibition thereon, though there is no evidence that the ticket was ever purchased by one other than respondent.

Averbach v. New York Cent. & H. R. Co. 89 N. Y. 281, 42 Am. Rep. 290; Carsten v. Northern Pac. R. Co. 9 L. R. A. 688, 44 Minn. 454; Hutchinson, Carr. § 578; Brooks v. Grand Trunk R. Co. 15 Mich. 322.

When the ticket was tendered on the train by respondent, Blue, in the line of his duty, was required to accept or reject. He was also required to assign the grounds of his rejection of the ticket tendered, and no other objections than those named could be employed afterwards.

Hill's Or. And. Laws, § 854.

Lord, Ch. J., delivered the opinion of the court:

This was an action to recover damages from the defendant for ejecting the plaintiff from his car. The judgment was for the plaintiff, from which the defendant has brought this appeal. As appears from the evidence, the ground upon which the defendant ejected plaintiff from his car was that he was not the original purchaser of the ticket upon which he claimed the right to ride on his car from Portland to San Francisco. With the exception hereafter noted, the ticket was as follows:

10 L. R. A.

Stromborg Pat. May 8, 1878, Rand, McNally & Co., Agents.

ISSUED BY		99	98
BALTIMORE & OHIO R. R.		97	96
One Passage of Class Indicated to Point on		95	94
SOUTHERN PACIFIC COMPANY (PACIFIC SYSTEM)		93	92
BETWEEN PUNCH MARKS.		91	90
When Officially Dated, Stamped and Presented with Coupons Attached.		1800 and	
Subject to the following Contract:		30	31
1st. In selling this ticket and checking baggage hereon this Company acts as Agent, and is not responsible beyond its own line.		28	29
2nd. It is subject to the stop-over regulations of the lines over which it runs, and may be exchanged by Conductors at any points for tickets or checks conforming to such regulations.		26	27
3rd. THIS TICKET IS NOT VALID after date indicated by 1 punch cancellation on margin, and if more than one date is canceled it shall be void.		24	25
4th. If this Contract and its Coupons bear no cancellation or stamp other than the ordinary dating stamp, the holder is entitled to an unlimited first-class passage, otherwise, the unpunched figure above or below the word CLASS on this Ticket and its Coupons indicate its class.		22	23
5th. Any alteration whatever of this ticket renders it void; and if more than one station is designated as the terminal point, it will be honored only to that station indicated by punch marks nearest the starting point of final coupon.		20	21
6th. BAGGAGE LIABILITY is limited to wearing apparel, not exceeding \$100.00 in value.		18	19
7th. None of the lines named in this ticket will be held liable for damages on account of any statement not in accordance with this Contract made by any employé of Baltimore & Ohio R. R.		16	17
8th. It is especially agreed and understood by the holder that no Agent or employé of any of the lines named in this Ticket has any power to alter, modify, or waive in any manner any of the conditions named in this Contract.		14	15
CHAS. O. SCULLER, General Passenger Agent.		12	13
In consideration of the reduced rate at which this ticket was sold, I agree to the above Contract.		10	11
L. S. NICHOLS, Purchaser.		8	9
WITNESSES:		6	7
J. P. BLISS, Agent.		4	5
41	Form X 0000	2	3
ISSUED BY		DAY	1
BALTIMORE & OHIO R. R.		DEC.	NOV.
SOUTHERN PACIFIC CO. (Pac. Sys.)		OCT.	SEP.
To points between Punch Marks.		AUG.	JUL.
		JUN.	MAY
		APR.	MAR.
		FEB.	JAN.
		1st class if 1st not punched, other-wise class 2nd unpunched.	
		Inco.	
		No. mited	
		ch	
		S. L.	
Via GN, CP, CPNCo, NP, SPCo.			

On its back was stamped these words: "Baltimore and Ohio Railroad Company, April

8, 1891, Columbus Ohio, City Ticket Office." The evidence shows that the plaintiff bought this ticket on the 20th day of April, 1891, in Seattle, for \$12, and there signed it; that he was not in Columbus, Ohio, on the 8th day of April, 1891, when the ticket purports to have been issued; that the ticket is just as it was when plaintiff bought it, with the exception of his signature, and the coupon slip, entitling him to ride from Seattle to Portland, which the conductor detached during his passage between these places, on the 20th of April, 1891; that the plaintiff went aboard of defendant's cars at Portland on the night of the 21st of April, 1891, in continuation of his journey to San Francisco, and that soon after the train started, and when only a short distance from Portland, Mr. Blue, the ticket inspector, demanded to see the plaintiff's ticket, which he produced and handed to him, it being the same ticket as the above, who, after examining it and requiring the plaintiff to write his name on the back of it, informed the plaintiff that he was not the original purchaser of the ticket, and that he must pay his fare or get off of the train, and at the same time put the ticket in his pocket, and refused to return it to the plaintiff, when he subsequently demanded it before leaving the train; that the plaintiff, finding when the train reached Oregon City that force would be used to expel him unless he paid his fare, and not having sufficient money for that purpose, got off of the train, and came back to Portland the next day.

Substantially upon this state of facts the trial court charged the jury, in effect, that "if the plaintiff was in possession of the ticket within the time limited upon its face when it should be used, and went on board of the cars of the defendant, and presented this ticket as an evidence of his right to ride, and he was put off the car upon the ground that he was not the original purchaser of the ticket, then the expulsion of the plaintiff from the car was wrongful, and the plaintiff would have a right to recover;" that "the holder of the ticket was not precluded from transferring it to another at the end of any particular section of this journey, which the ticket indicated that the holder might perform, and that there was no prohibition in law or in fact against the transfer of such ticket as this, at the end of any particular part of the journey indicated by the coupons which made up the ticket originally, and it was no valid objection to this man's riding upon the train that he was a different person from the person to whom the ticket was originally delivered when first purchased;" that "if there had been a stipulation on the face of this contract that the ticket was not transferable, the rule would have been different. That would be a valid and sufficient contract, and the party taking the ticket would be bound by it, and, if not, the original purchaser would have no reason to complain, if put off the train."

While there are some other assignments of error arising out of exceptions taken to the evidence, and to other instructions of the court, some of which include the same objection, and to which we shall presently advert, the main ground of contention is based upon the alleged error contained in the instructions referred to

above. This contention is that the ticket or contract is entire and personal, and not assignable. Upon its face the contract indicates that the ticket was issued by the Baltimore & Ohio Railroad Company, as principal as to its own lines of railroad, but as agent as to the lines of other railroads to be passed over, including the defendant company's road. The contract was entire as to a passage over the line of each road, which, when begun, must be completed, but was severable as between the different roads. It was a distinct contract as to each road. Each company, through the agent selling the ticket, made a contract for passage over its road. Between tickets of this sort, usually denominated "coupon tickets," which entitle the holder, not only to passage over the line of the company issuing them, but also over connecting lines to reach his destination, and the ordinary ticket, which entitles the holder to passage only over the line issuing it, there is usually this distinction: that, in the absence of a contract for a continuous passage only, or through transportation, the holder of a coupon ticket is not bound to continue his passage without intermission when once begun, but may stop off at the end of each line for a reasonable time without losing his right to resume it, while the holder of an ordinary ticket cannot temporarily discontinue his passage when once begun without losing his right to resume it, unless otherwise agreed. *Hutchinson, Carr.* §§ 577, 578.

In cases of this last sort, both parties are held to a continuous performance, when the transportation is once begun, until it is completed. As Walker, J., said: "When the company has entered upon the performance of their contract, the passenger has a right to insist that it shall continue until completed. On the other hand, the right is reciprocal. When the passenger presents his ticket, and the road has entered upon the fulfillment of their contract, they have an equal right to insist that it shall be continuous till completed; that they shall not be required to perform it in fragments." *Churchill v. Chicago & A. R. Co.* 67 Ill. 893. But in cases of coupon tickets, where the first carrier acts as agent for the succeeding carriers, the contract does not contemplate a continuous passage over connecting lines when once begun, unless such tickets so stipulate on their face, or there are circumstances from which such stipulation will be implied; otherwise the holders of them will be entitled to stop-off privileges at the end of each line represented by such tickets. This goes to show that such contracts or tickets as the above set out are not entire, but several, as between the different roads. It is only entire as to the passage over the line of each, which, when begun, must be completed. In *Little Rock & Ft. S. R. Co. v. Dean*, 43 Ark. 530, 51 Am. Rep. 584, it was held that a purchaser of such ticket over several connecting lines of railroad was not bound to make a continuous trip from the starting point to the place of destination, but that, when he started on his journey over any of the connecting lines, he was bound to continue without stop to the point of that line named in his coupon. See also *Auerbach v. New York Cent. & H. R. Co.* 89 N. Y. 281, 42 Am. Rep. 290; *Brooke v. Grand Trunk R.*

Co. 15 Mich. 332. Nor is there anything in *Walker v. Wabash, St. L. & P. R. Co.* 15 Mo. App. 333, in conflict with our position. There it was expressly stipulated on the face of the ticket that it was good only for a continuous passage, and necessarily, when the journey was once begun, it required that the passenger should pursue it continuously or without intermission. Hence the court held that the holder of such ticket is not, after beginning the journey, entitled to stop off at an intermediate point, and subsequently resume the journey. In such case, the transit is an entire thing, and necessarily not assignable. As Thompson, J., well observed: "If the contract does not allow the passenger the privilege of stopping off at a particular place, it is still more difficult to understand any principle upon which he is entitled to stop off at such place, and then, instead of resuming the journey himself on a subsequent train, to introduce some one else in his stead, and compel the carrier to complete the contract by carrying such other person on a subsequent train." Hence the court held that a purchaser of a "train check" issued to another person upon a limited ticket, and expressed to be good only for a continuous passage, is not entitled to subsequently pursue the journey begun by the purchaser of the ticket.

But it is argued that the ticket in question is not assignable, for the reason that its terms purport a sale at a reduced rate. But it is not perceived how that alters the nature of the obligation. The general rule is that a railroad ticket issued without limitations or restrictions is transferable; that the property in it passes by delivery, and entitles the holder to ride upon it. Nor is there anything in the fact that a railroad ticket is issued and sold at a reduced rate to alter the nature of the obligation, so as to affect its assignability, unless it is expressly conditioned that, in consideration of such reduced rate, it shall not be transferable. Nor do any of the authorities cited by counsel hold any different view. In all of them there were words of limitation or restriction upon the tickets which affected their assignability, and made their transfer unauthorized, and not binding upon the company. It will only be necessary to refer to a few of them to illustrate this, and show their inapplicability to the case in hand. In *Drummond v. Southern Pac. R. Co.* (Utah), 25 Pac. Rep. 733, the tickets were sold at Blue Rapids, Kan., by an agent of the Union Pacific Company, and used to Salt Lake City, and there sold to the ticket broker, who sold them to the plaintiff and his wife for the remainder of the trip to San Diego, Cal. Those tickets contained this condition: "(3) . . . Or, if presented by any other person than the original holder, this ticket is void, and the conductor will take it up and collect full fare." The court says: "The purchaser, when he bought these tickets, knew that he had no right to ride part way upon them, and sell them for the rest of the way; and the plaintiff knew, by the terms of the tickets, he had no right to buy them." In *Cody v. Central Pac. R. Co.*, 4 Sawy. 115, the ticket contract was for "one continuous emigrant passage from Omaha to San Francisco," and, among other limitations, that it was "not

transferable," and was signed by the purchaser. Necessarily the court held that the contract was to carry the same person through the entire route, and that the assignee of it could not ride upon it. In *Granier v. Louisville W. R. Co.*, 42 La. Ann. 880, the following agreement was across the face of the ticket, viz.: "This ticket is good only for persons named hereon, and when presented for or by any other will be taken up and returned to the general ticket office." These cases have no application to the case at bar. There are no words of limitation or restriction upon the ticket in question. It vested in the purchaser of it the evidence of his title to a passage over the line of the company issuing it, and also over the connecting lines represented by the coupons. The obligation of such carriers was only to carry according to its terms. These contained no words restricting the transportation to the original purchaser, nor inhibiting his assignee from riding upon it.

The ticket had been issued and the consideration received for it, and in such case, what principle is violated in requiring the carriers to perform the obligation to carry, whether the carriage or transportation be of A. or B., when the parties have put no restrictions upon its transfer? It is wholly a matter of contract, and to be determined upon like principles which govern other contracts. In *Hoffman v. Northern Pac. R. Co.*, 45 Minn. 58, it was held that after an "excursion" railroad ticket had been used by the holder in going one way over the route, it was valid, in the hands of a purchaser from the original holder, for the return trip, there being no condition in the contract to the contrary. See also *Carsten v. Northern Pac. R. Co.* 44 Minn. 454, 9 L. R. A. 683. As there is nothing in the terms of the ticket in question indicating that it shall not be transferable in consideration of a reduced rate or other thing, there does not seem to be any substantial reason why it should not be transferable and valid in the plaintiff's hands. As the judgment is conceded to be reasonable, if the plaintiff was improperly expelled from the cars, and the object of the appeal is mainly to secure a decision upon the question of the entirety and assignability of the contract, it is hardly deemed necessary by us, nor do counsel urge us, to consider other assignments of error to any great extent. The evidence shows that Mr. Blue, the ticket inspector, regarded the ticket as genuine and duly issued, and that the only objection that he made to it, and the reason that he required the plaintiff to pay his fare or leave the cars at Oregon City, was because the plaintiff was not the original purchaser of the ticket. Both by exceptions to evidence and instructions, it is claimed to be error to have permitted the declarations of Mr. Blue to be given in evidence as to what he said at the time of the examination of the ticket tending to show that it was genuine and authorized originally. These declarations referred to his reasons for rejecting the ticket, and were made in the line of his duty. He was charged with the duty and clothed with the authority of passing upon the validity of tickets, issued like the one in question. When he demanded the ticket, it was for the purpose of inspecting it, and ascertaining whether the plaintiff had the right

to ride upon it; he was required in the discharge of his duties to accept or reject it; and when he assigned, as his only reason for rejecting it, and refusal to allow the plaintiff to ride upon it, that he was not the original purchaser, the defendant ought to be bound by that determination, and the implication arising from it that the ticket was authorized originally and genuine.

There was some evidence tending to show that the defendant had recognized the issu-

ance of such tickets as valid, to which exceptions were taken when allowed as evidence, and also to the instructions in respect to it. In view of other facts to which such evidence was allied, we do not think there can be any doubt of its admissibility, or even without them.

Upon an examination of the whole case, we think there was no error, and that *the judgment must be affirmed.*

Rehearing denied.

MAINE SUPREME JUDICIAL COURT.

Elbridge G. YORK, Admr., etc., of Ida M. York, Deceased,

MAINE CENTRAL R. CO.

(84 Me. 117.)

1. **The jury may properly find a railroad company guilty of negligence in making a flying switch across a highway** from which the view of its tracks is somewhat obstructed; especially where the trainmen saw a top carriage approaching the crossing at which there was no means of warning the traveler, and the tracks formed an acute angle with the highway so that the train came up behind the carriage.
2. **The jury may properly find due care on the part of a traveler on a highway** who, upon nearing a railroad crossing, becomes aware of the approach of a train thereto, although after seeing the engine and several cars cross the highway he attempts to cross the tracks without looking out for other cars which may have been cut off from the train for the purpose of making a flying switch.
3. **The judge presiding at the trial may properly suggest to the jury possible methods of harmonizing seemingly contradictory evidence,** although counsel do not allude to such explanation and it might not without such suggestion have occurred to them.

(December 18, 1891.)

EXCEPTIONS by defendant to a ruling of the Supreme Judicial Court for Penobscot County made during the trial of an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence, which resulted in a verdict in favor of plaintiff, and also motion for new trial. *Overruled.*

The facts are stated in the opinion.

Messrs. Wilson & Woodard, for defendant:

Plaintiff was guilty of contributory negligence.

Chase v. Maine Cent. R. Co. 78 Me. 346; *Hooper v. Boston & M. R. Co.* 81 Me. 260; *Allen v. Maine Cent. R. Co.* 82 Me. 111.

If an opinion is expressed by the judge upon a question of fact on trial before a jury, the

court may, in its discretion, grant a new trial if the opinion was incorrect.

Curl v. Lowell, 19 Pick. 25.

Anything in the remarks or instructions of the presiding judge to the jury, even if it does not constitute a valid ground of exception, can be made available under a motion to set aside the verdict when it appears upon a report of the whole case that the verdict was manifestly wrong and that the suggestions of the judge may have misled the jury.

Stephenson v. Thayer, 63 Me. 143.

Mr. Jasper Hutchings for plaintiff.

Emery, J., delivered the opinion of the court:

This is an action of the case counting on the defendant's negligence in running a train past a highway crossing at East Newport, whereby the plaintiff's intestate, a traveler upon the highway, was injured. The verdict of the jury was for the plaintiff, and the defendant has moved to set aside the verdict as against evidence, and has also excepted to one ruling of the presiding justice.

From the evidence reported the following facts may be gathered: The crossing is a short distance west of the East Newport station. The railroad and the highway (from Newport to Stetson) approach the crossing in gradually converging lines, and for half a mile or more before reaching the crossing are nearly parallel. Near the crossing the railroad curves gradually to the south, and crosses the highway at an angle of about 33 degrees. The grade of the railroad is descending all the way. The grade of the highway is nearly level to the brow of a hill about 800 feet from the crossing. It there descends to within about 50 feet of the crossing, where it again becomes nearly level. The drop from the top to the bottom of the hill is about 15 feet. About 20 rods west from the crossing, and between the highway and the railroad, is the dwelling house of Mr. Colcord.

A traveler on the highway going east had a near and plain view of the railroad on his left for upwards of half a mile before reaching the Colcord house. Near that house the view became more or less obstructed by an orchard, the house and outbuildings, bushes, wood piles, and high land, the railroad and the highway both running somewhat in a cut down

NOTE.—The question as to the liability of a railroad company for injuries caused by a flying switch or detached cars moving by their own momentum 18 L. R. A.

is the subject of a note to the case next following in which, as in the above case, that question is presented.

the hill. At a point on the highway some 75 feet west of the crossing the traveler could plainly see back on the railroad track some 800 feet westerly.

Such being the situation, Miss York, the plaintiff's intestate, was alone in a top carriage driving along this highway, easterly towards this crossing. The defendant's freight train of twenty-three cars came along at the same time at a speed of about 15 miles an hour. She undoubtedly heard the whistle, and the train coming up behind her. She may not have looked back, but she was clearly apprised of the train's approach to the crossing. She drove on at a gentle trot down the hill past the Colcord house, and presently saw the locomotive and several cars pass on ahead of her over the crossing, and leave the crossing clear. But some 400 feet back from the crossing the defendant's servants in charge of the train severed the train in order to make a flying or running switch at East Newport station. The locomotive and tender with four cars passed rapidly on and the remaining cars followed more slowly, impelled only by gravity and the momentum, and uncontrollable except by the ordinary hand brake. When the first section of the train passed the crossing the rear section was from 100 to 175 feet behind. No necessity was shown for making this flying switch across the highway.

Miss York evidently did not see or hear this rear section, for after the passage of the first section she drove along to the seemingly clear crossing, to pass it. The rear section, however, rushed on from behind upon the crossing causing the horse to suddenly swerve to the right and throw out Miss York, to her injury. There were no gates nor flagmen at this crossing. The brakeman on the rear car of the first section testified to making signs to Miss York of the danger of crossing there; but it does not appear that she understood, or even saw, these signs. There was also evidence of other minor circumstances which it does not seem to us necessary to state.

Two questions, of course, were directly involved in the trial of this case: (1) Was it negligence in the defendant company to separate its train to make a flying switch over that crossing? (2) Was it contributory negligence in Miss York, the plaintiff's intestate, not to look back up the track for possible cars or trains when she arrived at the crossing?

Negligence may consist of the doing an act which a reasonable and prudent man, mindful of his own conduct, and of the safety and rights of others, would not ordinarily have done under all the circumstances of the situation; or it may consist of the omission to do an act which such a person under the existing circumstances would ordinarily have done. The duty to do or not to do is measured by the usual conduct of reasoning, prudent men, and by the exigencies of the occasion. The standard of duty is what thoughtful, prudent men, mindful of themselves and of others, might reasonably be expected to do or not to do under all the circumstances of the particular case. The type is not the very prudent, the very circumspect man, but the man who answers to the popular conception of a prudent, reasonable man. The thing to be done or left undone

is what would seem to such men to be suggested by all the appearances, probabilities, and other circumstances of the time, place, and events.

All such circumstances may be undisputed, and in such case the only question is whether the act or omission under consideration comes up to the above-stated legal standard of duty, or falls below that standard, and into the class of negligent acts or omissions. In our system of jurisprudence the determination of this last question is within the province of the jury. Not only is it the duty of the jury to ascertain what was done or omitted, and all the attendant circumstances, but it is also the duty of the jury to determine whether under all those circumstances, the act or omission was up to the standard or was negligent. The theory is that 12 men of the average of the community, conversant with every-day affairs, and with what men do and don't do; more or less familiar in their own experience with similar circumstances and conditions and with the usual conduct of men under them; coming together into consultation from various modes of life, occupations, and points of view, and applying their separate experiences and observations,—can by their unanimous conclusion form the best attainable judgment upon such a question. Twelve men of affairs, such as juries are supposed to be composed of, would naturally have a wider experience and broader observation in such matters than any single judge, however learned.

In some cases, however, the act or omission, under all the circumstances, may be so plainly and indisputably negligent or otherwise, that there can be no need to ask for the judgment of the jury upon the question. As said by the *Chief Justice in Lasky v. Canadian Pac. R. Co.*, 83 Me. 470, when the facts are undisputed, and the conclusion to be drawn from them is indisputable, the question may be determined by the court.

For instance, if a railroad company should make a flying switch across a frequented street in the night-time, without providing any signal of danger, or giving any notice or the approach of the rear section, such an act, measured by the standard, would be unmistakably and indisputably reckless or negligent. *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 467, 35 L. ed. 218. Again, if a traveler upon a highway approaching a railroad crossing, where there are no indications that a train may be expected, should omit to look or listen for a train, his omission, unexplained, would be so clearly negligent, the court would not hesitate to take the case from the jury. *Chase v. Maine Cent. R. Co.* 78 Me. 846.

To apply these principles to the facts above stated:

1. The railroad and the highway being nearly parallel for some distance, and crossing at an acute angle, the train came up behind the traveler, so that a traveler near the crossing would have to look back over his shoulder to see what was coming on the track. There was more or less obstruction to the view from a point 50 feet distant from the crossing back some 800 feet on the highway. The highway was a thoroughfare between two towns, one of them at least of some importance. The men

in charge of the train saw the traveler in a top carriage approaching the crossing. There was no flagman or other means of giving warning at the crossing.

Was it a prudent act, under these and all the other circumstances, for the train men to make that flying switch at that time and place? Would a prudent man be reasonably expected to do that act, assuming him to be reasonably prudent and mindful of the rights of others? The jury under full, clear, and correct instructions have answered in the negative.

2. The plaintiff's intestate, Miss York, had presumably seen and heard the train as it came up behind her. She saw a locomotive and several cars pass on across the highway and leave the crossing clear. She could rightfully suppose that the railroad company did not permit trains to follow within five minutes of each other. Such, indeed, is the well-known rule. Seeing the crossing cleared by the passing train, she drove on in her turn. By turning her head partly around to look over her left shoulder she could have seen the rear section of cars also approaching the crossing. She did not so look back. Was it contributory negligence in her not to do so? Was there any reason to apprehend the passing of another train, or section of train, at that moment, one having but just passed? Would a reasonably prudent person, under all the circumstances, be reasonably expected to look back? The jury has answered these questions also in the negative.

The question for us now is not whether, in our opinion, this conclusion reached by the jury is right. We may not ourselves think it right, but such an opinion alone would not authorize us to reject the jury's judgment. The question for us is whether this conclusion—this judgment—could be arrived at by fair-minded men by any reasonable inference from the evidence, even though other and contrary inferences might seem to us more reasonable. To set aside the verdict of the jury is to say that the inference drawn by the jury is indisputably wrong; that no such inference can be fairly drawn by any fair-minded men; that the contrary inference is not only the more reasonable inference, but is the only reasonable inference.

It seems to us that the very statement of the case and the question shows we ought not to assume so much. In *Delaware, L. & W. R. Co. v. Converse*, 189 U. S. 467, 85 L. ed. 218, above quoted, the justices of the United States Supreme Court declared that, in their opinion, the railroad company was plainly negligent in making a flying switch across a highway in the evening, and they declined to say that the traveler was negligent in not looking back for the rear section. In *Phillips v. Milwaukee & N. R. Co.*, 77 Wis. 349, 9 L. R. A. 521, the railroad crossed the street with its main track and some switch or side tracks. The plaintiff's intestate, approaching the railroad, saw a train of cars pass across the street to the west. He then started across the track, and was killed by two cars which had been "kicked" back without warning from the train just passed. He evidently did not look along the track to the west at the moment of crossing. The justices of the court declined to say that the jury drew wrong infer-

ences in returning a verdict for the plaintiff. *French v. Taunton Branch R. Co.*, 116 Mass. 537, was very similar in its circumstances to the case now at bar. The railroad company made a flying switch across a highway as a traveler was approaching the crossing. The traveler (a woman) saw the locomotive and some of the cars pass over the crossing, and then started to cross in her turn, without looking up or down the track, although she could have seen some distance either way. She was struck upon the crossing by the rear section of the train and injured. The court would not say that it was unreasonable for the jury to find the defendant guilty of negligence and the plaintiff free from contributory negligence. For further instances, see *Bonnell v. Delaware, L. & W. R. Co.* 89 N. J. L. 189; *Randall v. Connecticut River R. Co.* 183 Mass. 269; *Brown v. New York Cent. R. Co.* 82 N. Y. 603, 88 Am. Dec. 858; *Duane v. Chicago & N. W. R. Co.* 72 Wis. 523.

It is true that a traveler upon a highway, before crossing a railroad, should look and listen for approaching trains. It is usually clear, indisputable negligence in the traveler not to do so, as has been repeatedly held by this court. *Chase v. Maine Cent. R. Co.* 78 Me. 348, and cases cited. If nothing indicates to the contrary, trains of some kind, or at least locomotives, are liable to pass at any moment, and the traveler should be continually on his guard against them.

But sometimes there may be indications that nothing will pass along the railroad for some minutes at least. The gates (where there are gates) may be up,—a standing assurance to the traveler that no cars or engines are coming. *Hooper v. Boston & M. R. Co.* 81 Me. 260. The retiring of a flagman from the crossing may inform the traveler that he may now cross safely. In view of the well-known and necessary rule requiring considerable space and time between successive trains, the passage of one train may be an indication that no other will pass the same way for some minutes. These and other acts upon the part of the railroad may throw the usually prudent traveler off his guard, and free him from the reproach of negligence in attempting to cross at such a time.

The defendant's counsel strongly urges that the defense before the jury was unduly prejudiced by a suggestion made by the presiding justice in the course of his charge. It was one theory of the defense that Miss York's horse was frightened by the whistle and first approach of the train, and became unmanageable from the beginning, and, before she could get him under control, threw her out. This theory was based on the testimony of witnesses as to Miss York's statements to that effect after the injury, as no one seems to have observed that the horse was unmanageable. The testimony by these witnesses was that she said she heard the train and the whistle, and the horse heard the train, and started up, and she could not control him. The plaintiff's theory on this point was that the horse was not frightened until he encountered the rear section at the crossing. In support of this theory there was testimony that Miss York stopped the horse a little way from the crossing, and only started

him again when she saw the first section go by.

There was apparently a flat contradiction. If Miss York stopped the horse, according to some witnesses, it was exceedingly improbable that she made the precise statements testified to by other witnesses. An unskilled or unreflecting person might at first conclude there was perjury somewhere. But it was the duty of the court and jury to be cautious of inferring perjury from seeming contradictions. It was the duty of both to attribute such contradictions to mistakes and misunderstandings, rather than to dishonesty. In this case, upon this point, the presiding justice said: "If she made the statements claimed by the defense, to what time do they refer? Do they refer to the time when she was driving down the hill, or do they refer to the time when she started, if she did start, after stopping, and attempted to go across the crossing? It may be possible that her horse became uncontrollable after she stopped, if she did stop, and when she attempted to cross the track near the detached portion of the train."

This language was a suggestion of a possible explanation of a seeming contradiction,—a suggestion of a possible harmony in the facts consistent with the integrity of all the witnesses. It was a suggestion that Miss York might have stopped her horse, as testified by some witnesses, and yet have said to the other witnesses that her horse was frightened.

The defendant's counsel contends that this explanation—this possible harmony—was not suggested by anything in the evidence, and would not have occurred to the jury had it not been suggested by the presiding justice. He further contends that, as the plaintiff's counsel did not allude to any such explanation, nor make any such point, it was improper for the presiding justice of his own motion to make the point and suggest the explanation.

We think the explanation—the possible harmony—would occur to a skilled, reflecting mind in analyzing and comparing the different parts of the evidence. From what other

source than the evidence could it have come to the presiding justice? We also think the presiding justice, in communicating the suggestion or thought to the jury, was clearly within the limits of his official power and duty. A judge presiding in a court of justice occupies a far higher position and has vastly more important duties than those of an umpire. He is not merely to see that a trial is conducted according to certain rules, and leave each contestant free to win what advantage he can from the slips and oversights of his opponent. He is sworn to "administer right and justice." He should make the jury understand the pleadings, positions, and contentions of the litigants. He may state, analyze, compare, and explain evidence. He may aid the jury by suggesting presumptions and explanations, by pointing out possible reconciliations of seeming contradictions, and possible solutions of seeming difficulties. He should do all such things as in his judgment will enable the jury to acquire a clear understanding of the law and the evidence, and form a correct judgment. He is to see that no injustice is done. If a valid defense is disclosed by the evidence, and is admissible under the pleadings, and yet escapes the notice of the defendant's counsel, that defense should be stated to the jury by the presiding justice. If the plaintiff's counsel omits to comment upon or urge an answer to a defense, which answer is disclosed by the evidence and is available under the pleadings, the presiding justice may properly call attention to it. He should so conduct the trial that no truth is overlooked, and no right is forgotten.

To do all these things he must necessarily have a large discretion. Such discretion must exist somewhere, and the law lodges it with the presiding justice of the court. It is a part of his official power, for the proper exercise of which he is responsible to the people.

Motion and exception overruled.

Peters, Ch. J., and Virgin, Libbey, Foster and Whitehouse, JJ., concurred.

KENTUCKY COURT OF APPEALS.

KENTUCKY CENTRAL R. CO., *Appt.*,
v.

Austin K. SMITH.

(.....Ky.....)

1. Extraordinary care must be shown by a railroad company in the use of its

tracks on one of the principal streets of a city which is constantly used for street travel and in which there are three tracks, in order to exempt it from liability for injuring travelers on the street.

2. Negligence of a railroad company in making a flying switch across one of the principal streets without any

NOTE.—*Negligence of railroad company in respect to flying switches or detached cars moving by their own momentum.*

Making a flying switch across a street in a town along which people are constantly accustomed to travel is negligence. *Alabama v. R. Co.*, 7 Sumners, 68 Miss. 566; *Fulmer v. Illinois Cent. R. Co.*, 68 Miss. 355; *Drain v. St. Louis, I. M. & S. R. Co.*, 95 Mo. 574; *O'Connor v. Missouri Pac. R. Co.*, 94 Mo. 150; *Illinois Cent. R. Co. v. Baches*, 55 Ill. 379; *Chicago & A. R. Co. v. Garvey*, 58 Ill. 83; *Chicago, E. I. & P. R. Co.*, 18 L. R. A.

v. Dignan, 56 Ill. 487; *Illinois Cent. R. Co. v. Hammer*, 72 Ill. 347; *Chicago & E. I. R. Co. v. Hedger*, 106 Ind. 398; *Ferguson v. Wisconsin Cent. R. Co.*, 63 Wis. 145; *Louisville, N. A. & C. R. Co. v. Schmidt*, 128 Ind. 280; *Butler v. Milwaukee & St. P. R. Co.*, 28 Wis. 487; *Brown v. New York Cent. R. Co.*, 82 N. Y. 597.

In *French v. Taunton Branch Railroad*, 116 Mass. 537, the same doctrine is held where there is nothing to show that the crossing was other than an ordinary highway crossing.

So in *Hinckley v. Cape Cod R. Co.*, 120 Mass. 297,

watchman at the crossing or any lookout on the front of the cars, which are being pushed by an engine 80 feet away, although the bell is ringing, is so gross as to make the railroad company liable for injury to a boy thirteen years old, who is struck at the crossing just after he has got out of the way of a train going in the other direction on a parallel track, even if he was guilty of ordinary negligence and was engaged at the time in picking up pebbles from the street and examining them.

3. Other grounds for a new trial cannot be filed after a motion for a new trial has been overruled and after the expiration of the three days allowed for filing such grounds by Code, § 842.
4. Testimony that the uncle of a boy with whom he lived said he had often warned him to quit playing on railway tracks is inadmissible in an action by the boy for personal injuries at a railway crossing in which the question of his contributory negligence was involved.
5. The refusal of the court to allow a witness on his re-examination to answer a question whether or not he had recovered a judgment against the defendant where, on cross-examination, he had been asked if he had not a controversy with the defendant, sufficiently protects the defendant's rights as against an objection to the question.
6. The refusal to send the jury to view premises at a particular time during the trial and before the close of the testimony cannot be complained of where the place had been fully described and they were sent to make the view at the close of the testimony.
7. The refusal to open the case after

the trial had closed on the ground of the discovery of important testimony is not error where the witnesses had been previously summoned, except one who was an employé of the party moving to open the case.

(October 29, 1892.)

A PPEAL by defendant from a judgment of the Circuit Court for Kenton County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence.

Affirmed.

The facts are stated in the opinion.

Messrs. Hallam & Myers and G. C. Lockhart for appellant.

Messrs. O'Hara & Bryant for appellee.

Pryor, J., delivered the opinion of the court:

At the September term, 1890, of the Kenton circuit court, the appellee recovered a judgment based on a verdict of \$15,000 for damages on account of personal injuries sustained by him, and caused, as is alleged, by the negligence of the appellant, the Kentucky Central Railway Company. The appellee, on the 7th of August, 1889, at the instance of Mrs. Spotts, who lived at Eighth and Washington streets, in the city of Covington, had gone to purchase bread at the grocery of one Linn, located at the southwest corner of Ninth and Washington streets. Where Ninth street intersects Washington street there are three separate railway tracks laid on the last-named street.

where the crossing was near glass works in which 500 people were employed with quite a village on one side of the railroad.

And even where the road had little if any travel except in going to and from a county farm it was held by the Supreme Court of the United States that the severing of a train of cars in the nighttime leaving a part of them uncontrolled otherwise than by ordinary brakes to run across a public highway at grade without some warning by a flagman or by bell or whistle or in some other effective mode that they are approaching constitutes negligence as matter of law on the part of the railroad company. *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 35 L. ed. 213.

Whether kicking cars across a street is negligence is held in Minnesota to be a question for the jury. *Howard v. St. Paul, M. & M. R. Co.* 82 Minn. 214.

In *York v. Maine Cent. R. Co.* (Me.) *ante*, p. 60, the question of negligence in making a flying switch across a highway constituting a thoroughfare between two towns was submitted to the jury.

So in Pennsylvania the question of negligence in making a flying switch at the rate of twenty miles an hour across a country road is a question for the jury. *Lehigh & W. Coal Co. v. Lear* (Pa.) Apr. 25, 1887.

In some of the cases above cited as to flying switches in towns, the question appears to have been treated as one for the jury. But in every case found it has been determined either as a matter of fact or law that making such a switch across a highway was negligence.

The failure of a railroad company to prescribe suitable rules and regulations for its employes when they make a flying switch is negligence. *Rogan v. St. Louis, K. & N. W. R. Co.* 98 Mo. 843.

18 L. R. A.

A railroad company's rule against making a flying switch was held admissible in evidence against the company in an action for injury to a person who was struck by cars making such a switch. *Baltimore & O. R. Co. v. Kean*, 65 Md. 394.

Where detached cars are running rapidly down grade in making a flying switch it is the duty of the railroad company to have servants upon them in position to give warning as much as if they were attached to a train. *Shelby v. Cincinnati, N. O. & T. P. R. Co.* 85 Ky. 224.

Signals of alarm from a switch engine are not sufficient to excuse the failure to have a brakeman on the front of cars which are making a flying switch. *Illinois Cent. R. Co. v. Baehes*, 55 Ill. 379.

So detaching an engine and running it rapidly over a crossing with detached cars coming behind so that the engine cannot be stopped is the grossest negligence. *Pennsylvania R. Co. v. McGirr*, 61 Md. 108.

Even to trespassers a railroad company owes the duty of stationing lookouts on cars moving by gravitation where they have broken off from the forward portion of a train. *Patton v. East Tennessee, V. & G. R. Co.* 12 L. R. A. 184, 89 Tenn. 370.

Where cars were cut off for a flying switch about three quarters of a mile from the place where the accident occurred and came down rapidly to within 150 feet of the place, where a person was on the side track before the detached cars separated from the train, it was held that the railroad company was guilty of very gross negligence. *Philadelphia & R. R. Co. v. Troutman*, 11 W. N. C. 453.

Sending a car unattended around a curve at a place where by license of the company the public enjoy a privilege of passage and where persons were likely to be is negligence on the part of the railroad company although it was the owner of

One of the tracks belonged to the Chesapeake & Ohio road, and the two remaining tracks to the appellant, lying east of the Chesapeake & Ohio track. The appellant had a switch on its tracks, the south end of it being, as the proof shows, about one hundred feet from Ninth street. At the time of the injury the appellee (a boy) was about thirteen years of age, and was temporarily residing with his uncle, Dr. Kearns, and, after he had purchased the bread, in order to reach his uncle's house, or that of Mrs. Spotts, who had sent him on the errand, he had to cross Washington street. The Chesapeake & Ohio track was west of the tracks of the appellant, and after he had crossed the Chesapeake & Ohio track, while standing between that track and the tracks of the appellant, he was struck by the cars of the appellant, knocked down, and both legs mashed to a pulp from the feet beyond each knee. Surgeons were at once sent for, and both legs amputated above the knee. It is shown by the testimony, and in no wise contradicted, that the place where the injury occurred on these two streets is in the central part of the city with regard to population, and was used and passed over by its citizens as much as any of the other streets. Both the appellee and the appellant had the right to the use of the street, with the duty on the part of the appellee to exercise such ordinary care and caution as pertains to one of his age to avoid coming in contact with the cars, and on the part of the railway company to use the highest degree of care in order to prevent injuring those who were using the

street in passing either on foot or in vehicles. Such a high degree of care must necessarily attach to every railway company when operating its cars on the streets of a densely populated city, and when the travel otherwise than on the cars of the company is as constant as is usual on such streets. The character of the highway, and the travel upon it, often determine the degree of care to be exercised by both the company and the party injured. A greater degree of care must be exercised by the company when running its cars on a public street than is required to be exercised at the ordinary crossings in the country, and when there are three railroad tracks on a principal street, constantly used, as is shown in this case, extraordinary care must be shown on the part of the railroad company before it can be exempted from liability for injuring those who have the same right to use the streets that the company has. It is true the party injured may be guilty of such contributory neglect as to prevent a recovery, and his failure to exercise such care as an ordinarily prudent man would exercise, under the circumstances, may often be interposed as a defense. Whether any such defense existed in this case will be first considered. The train of the appellant was made up of the engine and six cars. The train or engine was running backwards, and was pushing, in advance of it, two gondola cars, and pulling four box cars. The train was going north, and the purpose was to make a running switch; that is, they were to place the four box cars on another track, without stopping the engine or train. While the train was in fact going

the ground. *Kay v. Pennsylvania R. Co.* 65 Pa. 209.

At a place where a railroad company permitted persons to cross a spur track to a warehouse, and had even opened the way for them by shoveling out the snow it is negligence to shunt or kick cars across the path without any signal or any person upon them. *Schindler v. Milwaukee, L. S. & W. R. Co.* 87 Mich. 400.

But an implied license for workmen in a foundry to cross a railroad track for the purpose of reaching a highway does not charge the railroad company with any duty to set the brake or otherwise fasten cars left on its track where they have been kicked past such crossing so as to make the company liable for the death of a workman who is struck by such cars which have started back again when jarred by a passing train. *Sutton v. New York C. & H. R. R. Co.* 66 N. Y. 243.

A railroad company is liable for the death of a boy struck while walking along the track seeking employment in feeding and watering stock on the cars where this is due to negligence in making a flying switch. *Shelby v. Cincinnati, N. O. & T. P. R. Co.* 86 Ky. 224.

A conductor on the rear end of a flat car making a flying switch, who sees that a person on the track in front of the car is not aware of its approach but has his attention distracted by the blowing of the whistle of a train on the main track, although this was intended to warn him of the detached car, was held guilty of negligence in failing to stop the car until it was too late instead of trying to attract the man's attention by calling to him. *Louisville & N. R. Co. v. Coleman*, 86 Ky. 558.

Contributory negligence.

Gross negligence of a railroad company in cutting off an engine and running it rapidly ahead of 18 L. R. A.

the cars following detached does not excuse the contributory negligence of a person struck on the crossing. *Pennsylvania R. Co. v. McGirr*, 61 Md. 108.

The amount of care which a traveler must take in order to prevent being struck by detached cars at a place where there are five railroad tracks and his view is partly obstructed is a question for the jury. *Lehigh & W. Coal Co. v. Lear (Pa.)* Apr. 25, 1887.

But it is contributory negligence as matter of law to go on a railroad track in the middle of a bright clear day before a car moving four miles per hour with nothing to obstruct the sight. *Woodard v. New York, L. E. & W. R. Co.* 106 N. Y. 309.

So one who goes in day-light with an umbrella over his head directly in front of a box car which would be plainly visible to him if he looked for it is guilty of negligence. *Yancey v. Wabash, St. L. & P. R. Co.* 98 Mo. 433.

Where a person was struck and killed by a car making a flying switch in full view of persons approaching the railroad and without any evidence of precaution on his part, a nonsuit was granted in an action to recover for his death. *Hinkley v. Cape Cod R. Co.* 120 Mass. 267.

Likewise a person fully aware of a railroad company's manner of doing business by permitting detached cars to go down grade on switches is guilty of contributory negligence if he steps on a switch in front of such cars without looking for them. *Murphy v. Chicago, R. L. & P. R. Co.* 45 Iowa, 661, 38 Iowa, 549.

On the same grounds a new trial was granted on appeal from a motion denying it where a verdict in favor of a track repairer, who after stepping off the track to permit the passage of a train stepped back upon it without noticing the approach of de-

north, the head of the engine, or the front part, was south. There were on the train, at the time of the accident, five employes. The engineer and fireman were in the cab of the engine. O'Donnell, the foreman, was on the front part of the engine,—that is, between the engine and the box cars that the engine was pulling,—and was there for the purpose of separating the box cars from the engine when the signal was given. One of the brakemen was on top of the box cars, and another brakeman setting the switch, or preparing to do so. There was no one on either of the gondola cars that were being pushed north to give warning to those on the street, or those crossing it, of the train's approach, and no watchman stationed at the crossing for that purpose. We shall assume that the bell was ringing to give notice to the passengers of the train's approach. The employes on the train so state, and there is no reason for discrediting them. When the time arrived for detaching the box cars the signal was given, and the engine, as the testimony conduces to show, increased its speed to get out of the way of the detached cars; and the boy, being alarmed by the cry of some one as to his danger, stepped back near the track of the appellant, was struck by the car in front that was being pushed north, and mangled as already stated.

He had crossed the Chesapeake & Ohio track on his way with his bread, and while standing at or near the place of the injury a train passed south on the track he had the moment before crossed; so there was a train going south that he had managed to escape, and one backing north at the same time, but on a different track, that inflicted the injury; and it seems to us it would be difficult for one more prudent and careful, by reason of his advanced years, to have heard the ringing of a bell with these trains under headway, or to have discovered that the engine fronting the south was really

going north, and pushing the gondolas before it. It is said that the little fellow was picking up pebbles from the street, and examining them, and perhaps he was; but that his life was in peril from the time he undertook to cross the track of these roads is manifest, and one of mature years would probably have met with the same fate; but, whether so or not, if there had been a watchman at the crossing, or even a brakeman on the far end of the gondola, that was at least 60 feet from the engine, this accident would have been avoided. It is true the employes, when they discovered the danger, used every effort within their power to avoid the injury, even to the sacrifice of their own lives; and it may be said that the company, by reason of its neglect in not having watchmen at these crossings, or in making running or flying switches in the streets of a densely populated city, is the cause of this injury, and not those who perhaps exercised all the caution they could exercise with the employes assigned to this train.

It is an improper use of the streets of a city to so use them by railroad tracks and trains as to prevent the use of the streets for ordinary business purposes, or to use the streets for the purpose of making wild switching, that must necessarily endanger the lives of those who are compelled to cross or use them. The elementary books establish the doctrine that it is negligence *per se* on the part of a railroad company to use a running switch in a populous town or city. "The construction and use of a running switch on a highway, in the midst of a populous town or village, is of itself an act of gross and criminal negligence on the part of the company." *Shearm. & Redf. Neg. 8d ed. § 466; Kentucky I. Bridge Co. v. Kreiger (Ky.) 19 S. W. Rep. 788.* In the case of *Illinois Cent. R. Co. v. Baches*, reported in 55 Ill. 379, it was held that when a running or flying switch was used in a populous part of a city of

attached cars following the train, which he could have seen if he had looked. The general term of the supreme court held that he was not entitled to recover because of contributory negligence. *Haley v. New York Cent. & H. R. R. Co. 7 Hun. 84.*

But when a track repairer suddenly alarmed by a train stepped backwards and was struck by cars making a flying switch without warning, it was held to be a question for the jury whether he was guilty of contributory negligence. *Chicago, R. I. & P. R. Co. v. Digman, 56 Ill. 487.*

The question of contributory negligence in going before cars kicked in the dark without light or warning after waiting for a train to pass is for the jury. *Drain v. St. Louis, I. M. & S. R. Co. 86 Mo. 574.*

So the contributory negligence of a person injured just after he had seen an engine and freight cars go by, by cars crossing a highway by their own momentum making a flying switch in the night with no light upon the front, is a question for the jury. *Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 35 L. ed. 213.*

Where there is evidence that a person struck by detached cars looked and listened, the question of his contributory negligence is for the jury. *Howard v. St. Paul, M. & M. R. Co. 32 Minn. 214.*

It is for the jury to say whether a person on a railroad track who left it to allow a train to pass and then returned in front of a detached section following by gravitation was guilty of contributory negligence where he did not hear the noise of the approaching cars because of a waterfall near by. *Patton v. East Tennessee, V. & G. R. Co. 12 L. R. A. 184, 89 Tenn. 370.*

The contributory negligence of a man who in plain sight of approaching cars which were making a flying switch stood holding his team, which had become frightened and had broken loose and while struggling with them got in front of the cars is a question for the jury. *Butler v. Milwaukee & St. P. R. Co. 23 Wis. 487.*

The same is true of a person who got in front of cars making a flying switch where smoke and steam prevented his seeing them. *Ferguson v. Wisconsin Cent. R. Co. 63 Wis. 145.*

So in case of one struck by cars detached where he went on the track after the engine had gone by if there is any evidence to show that he might have been thrown off his guard by the passage of the engine. *Chicago & E. I. R. Co. v. Hedges, 105 Ind. 398.*

A person is not bound to anticipate that a railroad company will make a flying switch across a public highway and the question of his negligence in going upon the track where he is struck by a car kicked over the crossing with no one on it is for the jury where there is evidence that a passing train and two switch engines near by were making noises which prevented him from hearing a warning of the approaching car. *O'Connor v. Missouri Pac. R. Co. 94 Mo. 150.*

ten or twelve thousand inhabitants, at a crossing or along an alley used by the public, and the cars thrown upon the side track having a momentum of five miles an hour, from which an injury occurred, the company was guilty of a high degree of negligence, and the fact that signals of alarm were given from the engine employed in the switching, intended for those crossing the track, afforded no excuse. In this case the engine, with the cars attached, caused the injury, and the decided weight of the testimony is that it resulted in the effort to avoid the detached cars, and to make the switching successful. The momentum of the engine, as shown by the plaintiff's testimony, after it was detached, was eight or ten miles an hour, and from that of the defendant five or six miles an hour; the witnesses for the latter stating that the speed slightly increased when the signal was given. Here, then, was the highest degree of neglect on the part of the company, and ordinary neglect on the part of the injured boy; the one scarcely in a condition to judge of his danger, and the other not even exercising ordinary care, when from the facts the highest degree of care was required. If railroad companies are permitted to use the streets of a town or city, others, who have the right to use them, can require that the utmost care shall be used to secure the safety of these persons. This degree of care is rendered necessary by reason of the danger to which persons are exposed who are compelled to use the streets in common with the railway companies. This rule does not dispense with the duty on the part of one crossing or using the street to use ordinary care and prudence for his own safety, and if he fail to do this, and is guilty of gross neglect as well as the party injuring him, and but for which the accident would not have happened, he cannot recover. *Ferguson v. Wisconsin Cent. R. Co.* 63 Wis. 145. We have been referred to

no authority by counsel in which a recovery has been denied upon such a state of case as this, or in cases where the facts conduce to show such grave neglect on the part of the company. The neglect consists—*First*, in the company making flying switches in the street; *second*, in not having a brakeman or some other employé on the front gondola; and, *lastly*, in not having a watchman at a crossing, to use the language of a witness, used as much by the people in passing "as any other part of the city," with a population of 30,000.

It is contended by counsel for the appellee that the instructions form no part of the record. After the verdict, a motion for a new trial was made within three days, as provided by section 842, Code. That motion was heard and overruled by the court. The appellant then moved to set aside the order overruling the motion to enable it to file other grounds, and that motion prevailed over the objections of counsel for the appellee. Section 343, Code, provides that the motion must be by written grounds filed at the time of making the motion; and section 342 provides that it must be done within three days after the verdict, unless unavoidably prevented, making as an exception the cause mentioned in subsection 7 of section 340. By an amendment, when there is a special verdict, the grounds must be filed within three days after the judgment on the special finding. The object of requiring the motion to be made within the three days is to enable the court to render a judgment without delay, and when the facts and questions of law are fresh in the minds of court and counsel, and it is the evident meaning and purpose of the Code to close the doors to any other motion for a new trial upon any other grounds than the exceptions made, unless unavoidably prevented. Such, too, is a safe construction of this provision of the Code; for, if motions are permitted

It is a question for the jury whether a person struck by cars coming behind her making a flying switch without warning just after a part of the train had passed on another track was guilty of contributory negligence. *Alabama & V. R. Co. v. Summers*, 68 Miss. 566.

Neglect of a traveler to look and listen for cars at a crossing will not necessarily defeat the recovery of damages for his death by cars sent back on a switch from a train which he had just seen pass along the main track where there was nothing to lead him to suspect that they were to be sent back and the day was so cold that he had a shawl over his head while the railroad employé instead of taking care of the detached cars and giving warning of their movements left them to go wild and remained on the engine to protect themselves from the weather. *Phillips v. Milwaukee & N. R. Co.* 9 L. R. A. 521, 77 Wis. 349.

The contributory negligence of a traveler who is struck by cars which are making a flying switch over a crossing without any warning of their approach where the view of the track is obstructed until very near it, is a question for the jury. *French v. Taunton Branch Railroad*, 116 Mass. 537.

The contributory negligence of a person who is struck while crossing a railroad by a second car making a flying switch without warning just after he had waited for a train to pass and then for one detached car following it is a question for the jury. *Brown v. New York Cent. R. Co.* 82 N. Y. 597, 88 Am. Dec. 358.

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In Illinois, where the doctrine of comparative negligence prevails it is a question for the jury whether the contributory negligence of a person injured by cars making a flying switch is sufficient to prevent his recovery. *Illinois Cent. R. Co. v. Baches*, 55 Ill. 379.

A mere child not old enough to be guilty of negligence may recover for injuries caused by the negligence of a railroad company making a flying switch, at least where its parents are not guilty of negligence. *Louisville, N. A. & C. R. Co. v. Schmidt*, 126 Ind. 290; *Kay v. Pennsylvania R. Co.* 65 Pa. 299; *Schindler v. Milwaukee, L. S. & W. R. Co.* 87 Mich. 400.

A child injured by cars making a flying switch while crossing the track where the public had no right to cross is not entitled to damages where there is no evidence of willful or reckless misconduct. *Wright v. Boston & A. R. Co.* 142 Mass. 296.

An ordinance requiring cars propelled by steam power within the city to have a bell constantly sounded and if backing to have a man at the end furthest from the engine, etc., was held in *Merz v. Missouri Pac. R. Co.* 88 Mo. 672, to be valid as to cars making a flying switch with no one upon them although they were on the railroad company's private grounds, these being unenclosed.

But such an ordinance does not apply to the mere setting of cars in a car yard. *Rafferty v. Missouri Pac. R. Co.* 91 Mo. 83.

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to be renewed from day to day during the term, the time of the court would be consumed in hearing motions for new trials, for amendments would likely be allowed whenever the minds of counsel suggested some additional reason for another hearing. This court, in *Houston v. Kidwell*, reported in 88 Ky. 801, adjudged that additional grounds might be filed after the three days, but was careful to say that such additional grounds must be filed before the motion for a new trial was disposed of, and that construction was given with some doubt, it is true the court may as a general rule set aside orders made during the same term at which they were entered, and under this well-recognized rule of practice may set aside the order refusing a new trial, and grant one; but to permit counsel, after the motion has been overruled, to die other grounds, is in violation of the spirit and meaning of the Code. Counsel realized, doubtless, that the instructions given by the court were more favorable to the appellant than the law authorized, as the employes were confined to the exercise of ordinary care, and required only to give warning of the train's approach by bell or whistle when needed, and, if shown to have been given, would have exempted the company from responsibility. The court also, in effect, said to the jury that if the appellee was guilty of negligence he could not recover, if but for the negligence the injury would not have been sustained, unless the appellant became aware of the danger, and the exercise of ordinary care would have avoided the injury. This boy was only required to exercise that degree of care which an ordinarily prudent child of his age would have exercised, and, if he exposed himself to danger in such a manner as that the injury could not be avoided by the defendant by the exercise of proper care to prevent it, no recovery should be had; but if the child was on the street or crossing where it had the right to be, and was injured by reason of the gross neglect of the defendant, although guilty himself of ordinary neglect looking to one of his age, a recovery must necessarily follow. So the instructions could not be complained of, if in the record.

There were some objections made to the ac-

tion of the court during the progress of the trial that will not be considered, as there was no abuse of discretion and no harm resulting from such action. The appellant offered to prove by a witness that, at the time the legs of the appellee were amputated, Dr. Kearns, the uncle of the plaintiff, said: "He had often warned plaintiff to quit playing on the railway tracks at the place where the accident happened." This offer was refused for two reasons: Dr. Kearns could himself have testified, and, besides, it was incompetent. The boy was then under the influence of morphine, and, if not, it was incompetent, as it could not have affected the result, and in no wise lessened the care to be exercised by the appellant, or increased that to be exercised by the appellee. A witness was asked, on cross-examination by defendant's counsel, if he did not then have a controversy with the defendant, or was hostile to it; and, when re-examined by the plaintiff's counsel, was asked if he had not recovered a judgment for \$12,500. The question was objected to, and the court refused to allow the witness to answer, and thereupon counsel for the defense moved to set aside the swearing of the jury, and the motion was overruled. The court, it seems to us, fully protected the rights of the defense in requiring the witness not to answer.

There was an objection and an exception taken to the action of the court in refusing to send the jury to view the premises at a particular time during the trial, and before the testimony closed. The court refused to do this, but at the close of the testimony sent the jury to view the premises. The place of the injury had been fully described by the witnesses. No misconduct is alleged to have taken place on the part of the jury. Facts constituting the neglect have been clearly established, and we perceive no reason for reversing the cause on that ground. Some affidavits were filed showing the importance of other testimony discovered after the trial had closed; and it appearing that these witnesses had been previously summoned, except one who was an employe of the company, the court refused to open the case. There was no error in this regard.

The judgment is affirmed.

MISSOURI SUPREME COURT IN BANC.

Dosha J. VENABLE, *Appt.*,

v.

WABASH WESTERN R. CO., *Reopt.*

(.....Mo.....)

1. An inchoate right of dower is destroyed by a voluntary conveyance executed by the husband alone without payment of any consideration, or a right of way to a railroad company to be used only for railroad purposes, as this constitutes a dedication of the land to a public use.

2. The common consent and opinion of the legal profession as shown by their practice for a long period of time is very good evidence of what the law is.

(November 14, 1902.)

A PPEAL by complainant from a judgment of the Circuit Court for Chariton County in favor of defendant in an action for the enforcement of a claim to dower. *Affirmed.*

Statement by Sherwood, *Ch. J.*:

The plaintiff by her petition herein claims

NOTE.—The very full discussion by the court of the authorities on the subject of inchoate dower in premises taken for public use, and especially the decision as to the effect of a voluntary con-

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veyance for such purpose, are of unusual interest. See note to the case next following as to power of husband or his creditors to defeat wife's dower right.

dower in a strip of ground 100 feet wide and 275 rods long, which the defendant company occupies as a right of way, and as incident to such claim she asks damages because of being deforced of her dower; this is, in substance, the first count of her petition. The second count of the petition seeks to recover damages by reason of the railroad of the defendant dividing the farm into irregular parcels, thereby impairing its value, and by reason of embankments thrown up in the building of the railroad, whereby about fifty acres of said land were rendered wholly untillable and worthless. The cause was tried on the following agreed statement of facts: "The plaintiff is the widow of Jacob M. Venable, to whom she was lawfully married in 1846, and with whom she lived as his wife until his death, in 1883. During the coverture of plaintiff, on the 19th day of October, 1865, her husband, then lawfully seized in fee of the lands described in the petition, executed, acknowledged, and delivered to the North Missouri Railroad Company a deed, now duly recorded, conveying to said company 'the right of way for the construction, operation, and use of the west branch of the North Missouri Railroad over and through any land owned by him in the county of Chariton, in said state, the same being situate in sections ten, fourteen, eleven, and fifteen, township fifty-three, range nineteen, the said right of way to have the extent of one hundred feet in width through said lands, or as much more as may be necessary for the actual construction and operation of said railroad, according to the nature of the ground,' upon the following condition: 'To have and to hold the same unto the said North Missouri Railroad Company, their successors and assigns, as long as the same shall be required and used for the purposes of a railroad, and no longer, the said right of way to be confined to that part of said land south of the farm on the same.' The plaintiff never joined her husband in the execution of said conveyance, and has not since released or relinquished her right of dower in said land. The North Missouri Railroad Company was at the time and prior to the execution of said deed a railroad corporation, duly organized and chartered under the laws of the state of Missouri, and as such then had lawful authority to construct a railroad from St. Louis to Kansas City, through Chariton county. The North Missouri Railroad Company had a right to acquire a right of way for its railroad either by voluntary conveyance or by condemnation. The conveyance above described was the only one executed by plaintiff's husband, and no condemnation proceedings were ever instituted for acquiring a right of way over the said lands. Immediately after the execution and delivery of said deed, the North Missouri Railroad took possession of the strip of land described in the petition, and constructed and operated thereon a line of railway. The defendant has succeeded to all the right, title, interest, and estate of the said North Missouri Railroad Company in said lands, as fully and completely as the same was originally conveyed by plaintiff's husband to said North Missouri Railroad Company. The defendant is a railroad corporation, organized under the laws of Missouri on the 30th day of September,

1887, and has since that date been in the exclusive possession of a strip of land described in the petition, and has maintained thereon the roadbed and embankments constructed by said North Missouri Railroad Company, and operated its trains thereon. The consideration of one dollar recited in the deed was never paid, nor were any damages ever paid to plaintiff's husband for the injury, if any, done the remainder of said lands by the construction and maintenance of its said line of railway. Plaintiff's husband was seized in fee and was in possession of all of said lands described in the petition at the time of his death, except the strip now held and used by defendant, as aforesaid. Said lands constitute one farm or plantation, whereon his dwelling-house was situated, and where he resided with his family at the time of his death. Plaintiff, his widow, by herself and her tenants, has ever since remained in possession of said dwelling-house and farm. No dower has ever been assigned said widow in any of the lands described in the petition. The embankment complained of in the second count of plaintiff's petition was constructed by the North Missouri Railroad Company in the early part of 1866, more than twenty years before the institution of this suit. Said embankment was, when so first constructed, and has ever since remained, a permanent structure, and no change has ever been made in said embankment since its first construction aforesaid. This action was instituted by the widow in 1888."

Messrs. A. W. Mullens, Thomas Elliott, and Crawley & Son for appellant.

Messrs. F. W. Lehmann and George S. Grover, for respondent:

A dedication of lands to public use is tantamount to an appropriation of lands to public use in right of eminent domain.

The owner of land, as intended by the statutes of Missouri, who may make voluntary relinquishment of the land to the uses of a railroad, and who is to be compensated for the land taken in case condemnation proceedings became necessary, is a person having a vested interest in the land.

Mo. Stat. § 4525; Mo. Const. § 21.

The right of eminent domain exists in the government or in the people in their sovereign capacity, and they may resume possession of private property whenever the public safety, interest or expediency requires it, as where land is needed for a road or other public improvement.

Beekman v. Saratoga & S. R. Co. 3 Paige, 45, 13 L. ed. 50, 23 Am. Dec. 679; *Com. v. Erie R. Co.* 62 Pa. 286, 1 Am. Rep. 399.

The necessary existence of this right creates a fair presumption that the state, in granting the land to individual citizens, does it with this reserve implied.

Harding v. Goodlett, 8 Yerg. 40, 24 Am. Dec. 546.

The state may exercise its power of eminent domain either directly or by delegation.

The extent of the power and the condition upon which it may be exercised are in either case the same.

No distinction can be made between a dedication or grant to a railroad company and one

made to any other public agent or agency, or to the public direct.

Texas & N. O. R. Co. v. Sutor, 56 Tex. 496.

It would not be necessary to make a married woman having an inchoate interest in the lands of her husband a party to the condemnation proceeding.

Elliott, Roads & Streets, p. 285; *State v. Easton & A. R. Co.* 36 N. J. L. 181; *Parks v. Boston*, 15 Pick. 198.

The enactment, whether that of the charter or that of the general statute providing that we might acquire right-of-way by voluntary relinquishment of the owner, had the effect to subordinate the wife's right of dower thereto. For it has been held in this state, as in many others, that the inchoate right of dower is subject to change by legislative enactment.

Kennerly v. Missouri Ins. Co. 11 Mo. 204.

Sherwood, Ch. J., delivered the opinion of the court:

1. The first and the controlling question the record presents is whether the plaintiff is entitled to demand dower in the defendant company's right of way. Touching the validity of such a demand in circumstances similar to those here related, an author of recognized authority says: "(1) In the time of Henry III., the Great Charter of King John was so amended as to withhold from the widow the privilege of quarantine in the castle of her husband. 'This,' says Lord Coke, 'is intended of a castle that is warlike, and maintained for the necessary defense of the realm, and not for a castle in name maintained for habitation of the owner.' Although the language of the Great Charter appears to be limited, in this particular, to the quarantine of the widow, it is nevertheless laid down, by the same author above quoted, that a castle necessary to the public defense is not subject to dower. 'Of a castle that is maintained for the necessary defense of the realm, a woman shall not be endowed, because it ought not to be divided, and the public shall be preferred before the private. But of a castle that is only maintained for the private use and habitation of the owner, a woman shall be endowed.' Here we see shadowed forth the principle upon which the courts, at a later day, have proceeded, in holding the inchoate right of dower extinguished in lands appropriated, according to the forms of law, to the uses of the public. (2) The English Reports furnish no instance in which the applicability of this principle to the case of lands taken for public uses is considered, but it appears to have been assumed in the time of Mr. Park that by such appropriation the right of dower was devested. 'It should also be noticed,' he says, 'as the prevailing impression of the profession, that under enabling Acts, such as those of the West India and London Dock Companies the Grand Junction Canal, and the improvements at Temple Bar, Snow Hill, and Smithfield, the wife's title of dower will be bound by the alienation of the husband, although the title is taken by way of conveyance only, and the purchase money is not invested in other lands or paid into the bank. This is understood to have been the opinion of several gentlemen of high professional reputation, in answer to the requi-

sition of an eminent conveyancer, who, on the behalf of the corporation of London, had called for fines from vendors whose wives had titles of dower, and the writer believes that the subsequent practice in the great majority of cases has been to dispense with fines.' In the United States, however, this question, in different forms, has undergone judicial inquiry on several occasions." 1 Scribner, Dower, 2d ed. pp. 577, 578. And, after mentioning several adjudications in this country, sustaining the position that the widow is not dowerable in such circumstances, he concludes his observations by saying: "The rule fairly deducible from these authorities would seem to exclude dower in all cases where lands are dedicated to the public for a legitimate purpose, and the public have acquired a right to the enjoyment thereof, or where they are lawfully appropriated in virtue of the right of eminent domain. The reasoning of the courts appears to apply as well where lands are granted and used for public parks, public libraries, or other public use of a like character, as where they are devoted to the purposes of a market place or a public highway; and it is difficult to discern any good ground for a distinction between the two classes of cases. In some of the states burial grounds are expressly exempted from dower by statute." 1 Scribner, Dower, 2d ed. pp. 577, 578, 582.

When discussing the same question, the learned author of the work on Real Property gives expression to conforming views, thus: "One mode in which dower may be defeated remains to be mentioned, and that is by the exercise of eminent domain during the life of the husband, or, what is equivalent to it, dedication of land to the public use. This grows out of the nature of a wife's interest in the lands, and whether it is such as ought to be regarded in giving compensation. . . ." Then, after discussing the authorities, he remarks: "The principle involved in the above and similar cases is a pretty important one, nor has it been hitherto well defined. . . . It is difficult to see why it should not apply in all cases where the law authorizes the husband's land to be taken *in invitum*, and compensation therefor made for the fee of the same, as, for instance, in those states where the millowner is authorized to flow lands which he does not own. At common law, a widow cannot have dower of a castle, since, among other reasons, she could not put it to profitable use; and the same reasoning would apply as to lands, though granted by the husband, which have been appropriated to public uses, such as cemeteries, public parks, and the like." 1 Washb. Real Prop. 5th ed. p. 279. Treating of the same point, *Judge Dillon* says: "As dower is not the result of contract, but is a positive legislative institution, it is constitutionally competent for the Legislature to authorize lands to be taken by a municipal corporation, for a market, street, or other public use, upon an appraisal and payment of their value to the husband, the holder of the fee, and such taking and payment will confer an absolute title divested of any inchoate right of dower. Nor is a widow dowerable in lands dedicated by her husband in his lifetime to the public, where the dedication is

complete, or has been accepted and acted upon by the municipal authorities." 2 Mun. Corp. 4th ed. § 594. In a recent work of pronounced merit, it is said: "A married woman cannot claim dower in lands dedicated by her husband to the public. It is settled that dower is created by law, and does not exist by virtue of contract, and that it is therefore within the power of the Legislature to change or destroy the rights of a married woman at any time before they have vested. This rule prevails where dower has been abolished and an estate in fee substituted. Dedication of land to public use is placed upon the same general principle as that on which rests the right of eminent domain, and it is held that the property interests of the married woman must yield to public necessity." Elliott, Roads & Streets, 108. Another author says: "An inchoate right of dower may be taken during the lifetime of the husband, on giving full compensation to the husband. The inchoate right of dower is not such an interest as is capable of assessment. During the life of the husband he represented the fee, and compensation to him appropriated the fee. It has been well held that, when an estate is taken before the decease of the husband, the value of the widow's inchoate right of dower is deemed too uncertain to admit of compensation; that the husband must be regarded as the owner of the entire estate; and that as such, he is entitled to full compensation for it." Mills, Em. Dom. 2d ed. § 71.

It may not be unprofitable to make some extracts from, and citations of, the adjudicated cases giving support to the positions already quoted from the text-books. Thus in *Moore v. New York*, 8 N. Y. 110, by virtue of a statute of New York, commissioners were appointed to assess damages to "the respective owners, lessees, parties and persons, respectively, entitled unto or interested in the lands," etc. The wife of one of the owners, not having been made a party in the condemnation proceedings, after the death of her husband preferred a claim for dower against the city. The court held: "In the case under consideration, the land was taken against the consent of the husband, by an act of sovereignty, for the public benefit. The only person owning and representing the fee was compensated by being paid its full value. The wife had no interest in the land, and the possibility which she did possess was incapable of being estimated with any degree of accuracy. Under these circumstances, the Legislature had the power, which I think they have rightfully exercised, to direct that the value of the entire fee should be paid to the husband of the appellant; and that the corporation by such payment, in pursuance of the statute, has acquired an indefeasible title to the premises." In that case the property was of great value, and was appropriated for the purpose of a market place. In *Gwynne v. Cincinnati*, 3 Ohio, 24, a widow sought to have dower assigned her in grounds occupied by a market house in the city of Cincinnati. The husband during his lifetime, in conjunction with other owners of property in the same square, agreed to open a way or street through it upon which a market house was to be erected. It stood upon that part of the square given by one Platt, a space for a street remain-

ing open on both sides of it. Platt, in his lifetime, conveyed the property he owned in the square, and his wife joined him in the conveyance. It did not appear that any conveyance was made of the ground covered by the market house by either Platt or wife. Gwynne intermarried with the widow of Platt, and brought the bill for dower. It was contended on behalf of Platt's widow that she was entitled to dower, because she had not released it by any act of her own. On the other hand, it was insisted that she was excluded from dower by the grant of the land in question to a public use. The court said: "The street, including the ground in question, was opened, and the market house established, by an agreement with the owners of the ground, and under an ordinance of the city council of Cincinnati. The whole space became subject to the same public regulations as the grounds originally laid out into streets, and for other public uses and purposes. The claim of dower must stand upon the same principles that it would stand on in any case to the ground thus appropriated. The counsel for the complainants insist that it is a case to be distinguished from that of public grounds condemned for public uses, but the court is unable to comprehend the distinction. When a town is laid out, the law requires the plat to be recorded, and by such record the streets become public highways, and the title to the grounds set apart for public uses is vested in the county for the purposes contemplated. The uses thus created are inconsistent with the exertion of any private right while the use remains; consequently, all private rights must be either suspended or abrogated. Such has been the general understanding, not only in this state, but so far as we are informed, in other states also. A claim for dower in the streets of a town, or in the public jail, court-house, or public offices, would be a novel one, and, if sustained, could not be enjoyed without defeating the original purpose and present use of the grant. It cannot be admitted for the same reason that it is not admitted to a castle in England. It could yield nothing to the support of a widow, by a direct participation in the possession, without such an interference with the public right to control the whole subject as to render its enjoyment inconvenient and unsafe, if not impossible." In *Duncan v. Terre Haute*, 85 Ind. 104, the husband had donated land to be used as a street, the wife not joining in the grant. After his death she preferred her claim for dower. The court said: "The courts of this country seem to have uniformly held, when the question has come before them, that when lands are appropriated by the exercise of eminent domain, or, what is said to be equivalent to it, the dedication of lands to public use, the dower of the wife is defeated."

In Minnesota a homestead cannot be conveyed except by the joint deed of the husband and wife, and yet it has been held in that state that where a part of a homestead has been taken by a railroad company under the law of eminent domain, and payment made to the husband alone, the law of homestead would not prevent him from disposing for his own use of the money thus awarded him. *Canty v. Latterner*, 31 Minn. 239. In Iowa the same

rule of law prevails with regard to the necessity of the husband joining his wife in a deed in order to convey their homestead or any interest therein; but, where the husband alone had agreed in writing to convey to a railroad company a right of way across the homestead, it was held that, notwithstanding the failure of the wife to sign the agreement, a court of equity would decree specific performance, the court remarking: "Can a husband grant a right of way to a railroad company over the homestead property, unless the wife concurs and signs the conveyance? As applied to the circumstances of this case, we answer this question, also, in the affirmative. The right of way is but an easement, and does not pass the title, and in this case it does not and is not claimed to affect the substantial enjoyment of the homestead as such. If the homestead was a single lot, and the right of way occupied it all, so as to destroy the homestead or defeat its occupancy as such, the case would be very different." *Chicago & S. W. R. Co. v. Swinney*, 88 Iowa, 182. With these authorities shedding such a broad light on the subject under discussion, it would seem difficult to stray from the true path of adjudication; and they have been cited and quoted from thus at large, not as doubting the views they enunciate, but because of doubts attempted to be cast upon their applicability to some of the salient features of this case, and that applicability is now for discussion. There can be no doubt, from the text-books and adjudications, that where a railroad is empowered, as in the present instance, to condemn land for public use, it occupies in all respects the same footing as any other corporation or quasi corporation, municipal or otherwise, or governmental agency, when exercising similar authority to obtain land for a market place, for a street, highway, jail, or court-house. The state, in the first place, might directly assert its power, in any given instance, to take land for a public use, or it might delegate that attribute of sovereignty to any chosen agency, individual, or corporation or municipality or county, the right to exercise which but for such delegation could only be exercised by the state alone. In *Olcott v. Fond du Lac County Suprs.*, 83 U. S. 16 Wall. loc. cit. 694, 695, 21 L. ed. 588, Judge Strong said: "That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence. Very early the question arose whether a state's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly it could not, unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies taking property for private use. Yet it is a doctrine universally accepted that a state Legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean if not that building a railroad, though it be built by a private corporation, is an act done for a public use? And the reason why the use has always been held a public one is that such a

road is a highway, whether made by the government itself or by the agency of corporate bodies, or even by individuals, when they obtain their power to construct it from legislative grant. . . . Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the state. Though the ownership is private, the use is public."

Judge Cooley says: "Accordingly, on the principle of public benefit, not only the state and its political divisions, but also individuals and corporate bodies, have been authorized to take private property for the construction of works of public utility, and, when duly empowered by the Legislature so to do, their private pecuniary interest does not preclude their being regarded as public agencies in respect to the public good which is sought to be accomplished." "The manner in which the right of eminent domain shall be exercised rests within the discretion of the Legislature. It may be, and in point of fact generally is, effected by a delegation of its power to an agent. That agent may be a corporate body, carrying on a work of public utility, though for the purposes of private gain. . . . The instances of the delegation of the power of eminent domain of most frequent occurrence are to be found in the case of railroad companies, coupled to the general powers conferred by their charters. There is usually an authority granted to appropriate lands so far as required for the construction of their tracks." 6 Am. & Eng. Encyclop. Law, 517, 518, title *Eminent Domain*. "The grant of a right to take land 'for the purposes of a railroad' authorizes the taking of only an easement, leaving the fee with the owner, to whom the right of possession reverts on the cessation of the public use; and this is the limited interest usually given by statutes authorizing the condemnation of land for railroads. The property is, however, to be deemed taken for a public use itself, rather than for the particular use and enjoyment by the party to whose possession it passes. It does not, therefore, revert to the owner upon a mere transfer of the railroad to another company, nor upon its appropriation to another similar public use." Pierce, Railroads, p. 168. "That the right [of eminent domain] should be placed in the hands and under the control of a private corporation detracts nothing from the public nature of the use; for, as was very correctly said by the Supreme Court of Pennsylvania in *Hays v. Risher*, 82 Pa. 169, that an individual expects to gain by the use of the way, and has private motives for risking the whole of the necessary investment, and acquires peculiar rights in the work, detracts nothing from the public aspect of it. The same can be said of every railway corporation, and of almost every public enterprise." *New Central Coal Co. v. George's Creek Coal & Iron Co.* 87 Md. loc. cit. 562. In *Oregon C. R. Co. v. Bailey*, 8 Or. loc. cit. 175, it was sought to appropriate lands already used for public purposes, and the court said: "It is wholly immaterial upon this

point whether such railway company obtains the property which forms the roadbed by purchase or by judgment of the court. The general corporation law, and the Act of incorporation under it, create the corporation and confer whatever franchises or grants are conferred. It is not the condemnation of property that gives character to the corporation. The judgment of the court is a means of placing the corporation in possession of what is necessary to a discharge of its franchises and its duties to the public. But when property is condemned, the corporation has no higher or better right to that property than it has to property acquired by purchase. It follows from what has been already said, that, whether the right of way is acquired by gift or purchase, or by the judgment of a court, the corporation is so far a public agent that what it holds in its corporate capacity is held for a public use."

When discussing the powers of railroad companies, as distinguished from mere private corporations, in the matter of the condemnation of lands, the Supreme Court of Michigan said: "They are the means employed to carry into execution a given power. That private property can be taken by the government from one and bestowed upon another for private use will not for a moment be contended, and these corporations can only be sustained upon the assumption that the powers delegated are to a public agent to work out a public use.

... It is obvious that the object which determines the character of a corporation is that designed by the Legislature, rather than that sought by the company. If that object be primarily the private interest of its members, although an incidental benefit may accrue to the government therefrom, then the corporation is private; but if that object be the public interest, to be secured by the exercise of powers delegated for that purpose, which would otherwise repose in the state, then, although private interest may be incidentally promoted, the corporation is in its nature public. It is essentially the trustee of the government for the promotion of the object desired, a mere agent to which authority is delegated to work out the public interest, through the means provided by a government for that purpose.

... It argues nothing that compensation is required to be made for property taken before it can be used, for this is made by the Constitution a condition to the exercise of this right by the government itself, and the delegation of the power necessarily carries the incident with it. Nor can it be said that the property when taken is not used by the public, but by the corporators for their own benefit and advantage. ... The grant to the corporation is in no essential particular different from the employment of commissioners or agents. The difference is in degree, rather than in principle; in compensation, rather than in power. ... It legitimately follows that the tenure of the corporation is in the nature of a trust for the public use, subject to the supervision of the government, while its franchises are but the consideration paid for the faithful execution of this trust." *Swan v. Williams*, 2 Mich. 427. So, also, in Texas, it has been held that "the right of the company to occupy with

its roadbed Sutor's land depended upon his consent then given or a judicial condemnation. A railroad is a public highway, (Const. Tex. art. 10, § 2;) and especially is this true, so far as the acquisition of the right of way is concerned, for upon no other theory could the right of eminent domain be conferred upon a railroad corporation. In this respect the doctrine of dedication, or rather of estoppel *in pais*, would apply to the right of way for a railroad, the same as to any other public highway." *Texas & N. O. R. Co. v. Sutor*, 56 Tex. 496.

These authorities, as well as those heretofore cited, show, in the most convincing manner, that the dedication of land to public use on behalf of a railroad company occupies, in legal contemplation, the same place as does condemnation for a similar purpose; both are but means to the same end; both have the same object in view,—for "dedication is an appropriation of land to some public use, made by the owner of the fee," (Ang. & D. Highways, 8d ed. § 132,) while condemnation is but the appropriation *in invitum* of the land in the absence of the owner's consent. The only difference between them is, the former is voluntary; the latter, compulsory. Both are mere conduits, through which flows the consent of eminent domain. In the present instance, the charter of the original company made either method effectual, and only on the failure of the first was the second method permissible. The prior was indeed a condition precedent to pursuing the latter method, as all of our own Reports on the subject show. It is conceded in this case that, where the purpose is to appropriate lands to a public use, *ex. gr.* for a street, highway, jail, court-house, or market place, the husband, as the owner of the fee, represents the wife, and that his deed or dedication is equally as effective in barring the wife's inchoate dower as would be condemnation proceedings; but a similar operative effect as to a deed to another public use, to wit, the right of way to a railroad company, is denied. We are satisfied, from an examination of the authorities and from the very nature and reason of the case that this distinction is unwarranted and unsound, and will not bear the test of judicial scrutiny. There is no warrant for the assertion, and there is no authority or reason for the assertion, that one public highway dedicated by deed to public use should escape the incubus of inchoate dower, while another highway, proclaimed by the Constitution of the state to be a public highway and equally dedicated by deed to public use, should be compelled to bear such a burden, unless resort were had to condemnation proceedings. What particular virtue inheres in such proceedings? Why should a judgment which condemns an easement—a right of way over a man's land—do more than that man's deed executed for the same purpose? These questions answer themselves.

Though, in case of a railroad, the land in one sense is appropriated or accepted for the private gain of the particular railroad company, yet the use is none the less a public one, as all the authorities show; and, but for the fact that the use is a public one, there would be no basis laid, in either law or fact, for the exercise of the right of eminent domain, in either of the methods mentioned. Wherever

the right of eminent domain exists there exists also as its companion and legal equivalent, the right to accept a voluntary dedication. The two rights are the inseparable and inevitable concomitants of each other. To rule otherwise would be to deny the cogent reasoning of the authorities cited; to rule otherwise would produce these anomalous results. That a railroad company, though ever so desirous of doing so, could not accept a voluntary relinquishment of the husband to lands for a right of way without incurring long years afterwards, upon the death of the husband, the peril and the penalty of a demand for dower consummate and unsatisfied in a right of way for which compensation in full had long since been paid. Under such a ruling, a railroad company would of necessity be forced to reject the proffered deed, the amicable settlement, and be driven to condemnation proceedings in order to cut off inchoate rights, possibilities, and expectancies,—something the value and duration of which the law as yet has furnished no method and provided no machinery for estimating. Such a ruling would be to encourage litigious strife,—something assuredly not favored by the law. Besides, if in the hypothetical case the parties "could agree" there would be no basis for proceedings to condemn, because the essential jurisdictional fact of non-agreement would be wholly lacking; and therefore there could be no such proceeding had, except by practicing a fraud on the court by making an averment in the pleadings at war with the real fact, that the parties litigant had failed to agree.

But it is persistently urged that the case of *Nye v. Taunton Branch R. Co.*, 118 Mass. 277, supports the contention of the plaintiff that her dower is not bound by the deed of her husband. But, after a careful reading of that case, it is not thought it yields that claim any support whatever. The facts of it are few, plain, and simple. Here they are: In 1826 Nye bought the land and secured payment of the purchase money by a mortgage, which his wife did not sign. In 1828 his equity of redemption was sold under execution to Washburn, who conveyed to Newcomb, who in 1872 conveyed the land to the railroad company, who purchased the same for a freight station outside of the location of their road. The deed was in warranty form, and contained no restriction as to the use of the land. In 1846 Newcomb satisfied the mortgage. Nye died in 1878, whereupon his widow sued for her dower; and thereupon it was ruled that the demandant had an inchoate right of dower in the premises at the time it was conveyed to the tenant by deed in common form. Then it is pointed out in the opinion that two methods are provided by the statute whereby a railroad company can take land for depot and station purposes: *First*, by purchase and conveyance from the owner; *second*, if the owner refuses to sell, by application, etc., and the assessment of damages: that by the first, if the deed is without restriction, the corporation obtains a fee in the soil, just as a natural person would do, and the corporation may convey the land, when no longer necessary for its purposes, to whosoever it will; but that by the second method the

corporation simply acquires an easement in the land, and, the use being abandoned, the easement is extinguished, and the land reverts to the owner of the soil. And upon these premises it was properly ruled that the land in question was subject to the demand for dower. But how different that case is in its facts from the one at bar? *First*, there the land was simply sold under execution, and so the husband never represented his wife in receiving compensation for his land, and so her inchoate dower was not extinguished therein for that reason, and the land passed to the first and subsequent purchasers, with the burden of inchoate dower fettered to it; *second*, the land in that case was conveyed by the last purchaser to the railroad company in fee, unhampered by a single restriction and unburdened by a single use, and the railroad company took it just as a "natural person" might have done. Here, on the contrary, the husband represented the wife, received or waived compensation for the land, and only granted an easement, which is precisely just what that company would have gained at the end of condemnation proceedings. For these reasons *Nye's Case* is not authority in the case before us, and, if it were, we would not follow it, in opposition to such an array of well-considered cases as already cited.

2. Finally, this is the first suit in this state, that we are aware of, that, in circumstances like the present, a suit for dower has been brought against a railroad company. The common consent and opinion of the legal profession in this state has been that it was not necessary to make a wife a party in order to bar her inchoate right of dower, either as to a railroad right of way or other public highway. This, of itself, is a very pregnant circumstance and very good evidence of what the law is. *State v. Meyers*, 99 Mo. loc. cit. 114; Sedgwick, Stat. & Const. Law, 2d ed. 218 *et seq.* and cases cited. In a case of the house of lords, under Stat. 27 Hen. VIII., Lord Hardwicke said: "The opinion of conveyancers in all times, and their constant course, is of great weight. They are to advise; and, if their opinion is not to prevail, must every case come to law? No: the received opinion ought to govern." And Lord Mansfield said: "Consider also the usages and transactions of mankind upon the statute. The object of all law with regard to real property is quiet and repose." *Earl of Buckinghamshire v. Drury*, 2 Eden, 61. In *Scanlan v. Childs*, 83 Wis. 668, the court says: "The general understanding of law and constant practice under it, for a period of over twenty years, by all officers charged with the execution of it, unquestioned by any public or private action, is strong, if not conclusive, evidence of the true meaning." In *Packard v. Richardson*, 17 Mass. 143, 9 Am. Dec. 123, the court says: "A contemporaneous is generally the best construction of a statute. It gives the sense of a community; of the terms made use of by a Legislature. If there is ambiguity in the language, the understanding and application of it, when the statute first comes into operation, sanctioned by long acquiescence on the part of the Legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice." For reasons

already given, it is unnecessary to pass upon the grounds alleged for recovery in the second count in the petition.

The judgment of the lower court should be affirmed.

All concur except **Black, J.**, who dissents.

GEORGIA SUPREME COURT.

George N. FLOWERS, Individually and as
Exr. of John Y. Flowers, Deceased, *Ptff.*
vs.
Err.,

v.

Catherine FLOWERS.

(.....Ga.....)

***1. There being in this state no statute inhibiting the sale of land by the husband to defeat his wife's right of dower, save as to lands to which the title came through her, an actual sale and conveyance, though made for the purpose of defeating dower, will be upheld in favor of the purchaser against the widow's claim after her husband's death. But a mere colorable sale and conveyance, not intended by the parties to be real and operative except as a means of dividing the lands among the children of the husband after his death, he in the mean time to be the real while the grantee in his conveyance is to be the nominal and formal, owner, will leave the husband seised, so far as the dower right is concerned; and his widow,**
*Headnotes by SIMMONS, J.

after his death, may claim dower, and have it assigned, notwithstanding such colorable and pretended conveyance made by the husband.

2. In the present case the right to dower turns upon the question of a real, as distinguished from a mere colorable, sale and conveyance, and not upon the payment or nonpayment of the purchase money in the lifetime of the husband. If the sale was real, and the purchase money was really due and owing by the purchaser as a bona fide debt against him, the dower would be as effectually barred as if all the purchase money had been paid.

3. As the husband had a legal right to intend the defeat of dower and to effectuate the intention, provided he did it by an actual and real conveyance, his will, subsequently executed, in which he made no provisions whatever for his wife, would throw no light on the present controversy which is simply whether the conveyance was real or only colorable and pretended.

4. As tending to show a motive for endeavoring to defeat dower without parting with dominion and real ownership, evidence of family disturbances between the husband and

NOTE.—Power of husband, or his creditors, to defeat wife's right of dower.

Dower is an incident of the marriage relation, established by positive institutions of the country, and not by contract. *Moore v. New York*, 8 N. Y. 110, 59 Am. Dec. 473.

It is a legal maxim that "dower is a favorite of the law." And the wife is not to be barred of her dower, without her consent, by the will of her husband, even though ample provision is made for her support. *Thayer v. Thayer*, 14 Vt. 107, 39 Am. Dec. 211.

Under the common-law rule, which is still in force in many states, it is not in the power of the husband alone, by any act in the nature of an alienation or charge, to defeat the wife's right of dower after it has once attached. *Grady v. McCorkle*, 57 Mo. 172, 17 Am. Dec. 676.

This rule is recognized in numerous cases and is not denied in any state where it has not been changed by statute. But in a considerable number of states the statutes have cut down the wife's dower right to land of which the husband died seised or made same nearly equivalent provision.

For the value of land which one has received as a gift to defeat the right of dower of the donor's wife, he must account. *Jenny v. Jenny*, 24 Vt. 324.

A conveyance by a husband in Minnesota after the Act of 1875 abolishing dower and limiting the wife's interest in the nature of dower to lands of which the husband died seised, and prior to the Act of 1878 changing back again to the lands of which he was seised during coverture, passed his title to the grantee discharged of all claims of his wife. *Morrison v. Rice*, 35 Minn. 436.

Where land was acquired, and a marriage took place since the North Carolina Act of 1784 which restricted dower to lands of which the husband died seised, and prior to the adoption of the Constitution of 1868, the husband can make a good title without the joinder of the wife, but if the land was acquired or the marriage took place after that date

the wife must join in the deed. *Castlebury v. Maynard*, 95 N. C. 281.

A man cannot defeat his wife's right of dower in land purchased with his own money during coverture by taking a conveyance thereof to himself for life, with remainder to one of his children. *Crecelius v. Horst*, 11 Mo. App. 304.

In *Thayer v. Thayer*, *supra*, it was held under the Vermont statute limiting dower to lands of which the husband died seised that a man's conveyance to his children, made a short time before his death, in consideration of love and affection, with the intent of defeating his wife's right of dower, was a fraud upon the law and upon the marital rights of the wife.

Where a husband, shortly after marriage, purchased a farm, but had the deed made out to a third party, such deed was in fraud of the wife's dower rights. *Rabbitt v. Gaither*, 67 Md. 95.

Where a husband, under an oral contract for the purchase of land, takes possession and subsequently pays the whole of the purchase price, he is equitable owner of the land; and if he directs the vendor to convey the same to his son by a former wife, his widow may recover her dower interest in the land, in an action against his son. *Everitt v. Everitt*, 71 Iowa, 221.

As to lands held in common by the husband.

Weaver v. Gregg, 6 Ohio St. 547, 67 Am. Dec. 355, was the case of a petition for dower under the statute. The husband of the plaintiff, during the coverture, was seised as tenant in common of an undivided fourth part of certain lands. In proceedings for partition the lands were adjudged not to be susceptible of partition and were sold by the sheriff by order of the court and the proceeds divided during the lifetime of the husband. It was held that the inchoate contingent dower interest of the wife was defeated by the sale. *Brinkerhoff, J.*, delivering the opinion of the court, said: "The

wife, and between her and one of his children by a former marriage, is relevant.

(May 16, 1892.)

ERROR to the Superior Court for De Kalb County to review a judgment denying plaintiff's motion for new trial after judgment in favor of defendant in a proceeding brought to contest the decision of commissioners setting off dower to defendant in lands previously owned by John Y. Flowers, deceased. *Reversed.*

The facts are stated in the opinion.

Messrs. Candler & Thomson for plaintiff in error.

Messrs. John A. Wimpey and W. J. Spiers for defendant in error.

Simmons, J., delivered the opinion of the court:

Commissioners appointed to assign dower to Mrs. Catherine Flowers, widow of John Y. Flowers, assigned to her 165 acres of farming land and a town house and lot. George N. Flowers objected, as executor of John Y. Flowers and individually, upon the ground that John Y. was not seised and possessed at the time of his death of the lands in which the dower was admeasured. It appeared upon the trial that George N. claimed the land in question under a deed made to him by John

Y. on August 14, 1875, in consideration of \$5,500. The will was dated February 16, 1884. The jury found the issue in favor of Mrs. Flowers, and George N. made a motion for a new trial, which was overruled, and he excepted.

1. There was evidence tending to show that the deed was made by John Y. Flowers for the purpose of defeating his wife's right to dower; and the court in its charge made the right depend upon whether this intention was established, without regard to whether there was an actual sale and conveyance or not. The jury were instructed that, if such was the husband's purpose, she would be entitled to dower, notwithstanding the conveyance. We think this was error. In this state there is no statute inhibiting the sale of land by a husband to defeat his wife's right of dower, save as to lands the title to which came through her. It is true that at common law no acts of the husband during coverture, without the concurrence of the wife, could defeat dower. Her inchoate right attached to all lands of which the husband was seised at any time during the coverture. But by our Statute of 1826 (Cobb's Dig. p. 171) it was provided that "all conveyances of lands and tenements made by the husband alone during the coverture shall be legal and valid, and effectually convey the entire premises therein described, except such lands as the husband may have become pos-

right of dower in the wife subsists in virtue of the seisin of the husband; and this right is always subject to any incumbrance, infirmity, or incident which the law attaches to that seisin, either at the time of the marriage or at the time the husband became seised. A liability to be devested by a sale in partition is an incident which the law affixes to the seisin of all joint estates; and the inchoate right of the wife is subject to this incident, and when the law steps in and divests the husband of his seisin, and turns realty into personalty, she is, by the act and policy of the law remitted, in lieu of her inchoate right of dower in the realty, to her inchoate right to a distributive right of the personalty into which it has been transmitted."

Under Iowa Code, § 2440, providing that one third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage which have not been sold on execution or any judicial sale, and to which the wife has made no relinquishment of her right, shall be set apart as her property in fee-simple, if she survive him, it has been held that her interest is contingent, and subject to divestment, even by a judicial sale to which she is not a party. *Williams v. Westcott*, 77 Iowa, 332.

And a referee's sale in partition is of that character. *Ibid.*

In *Bailey v. Com.*, 41 Pa. 473, the acceptor of lands in proceedings in partition gave one recognition for the whole value of the land, the widow's share not being provided for. The land was subsequently sold under a judgment against the acceptor. After the death of the widow the heirs brought a *scire facias* to recover the principal of the widow's third, and the question was whether they could recover it, it being unquestioned that as a mere obligation for the payment of the shares due the heirs it lien was devested by the sheriff's sale. It was held that there could be a recovery.

The inchoate right of dower of the wife of a tenant in common is defeated by a sale in partition of the common property, although she is not a party 18 L. R. A.

to the proceedings. *Holley v. Glover* (S. C.) 16 L. R. A. 776.

A prior sale by a tenant in common of his undivided interest does not prevent the bar of his wife's inchoate right of dower by a subsequent sale in partition. *Ibid.*

And see further, on this subject, the note to *Holley v. Glover*, *supra*.

As to lands sold under mortgage.

Inchoate right of dower in the wife of the mortgagor is devested by sale on foreclosure. *Bryar's App.* 111 Pa. 81.

When the real estate of a husband is sold at judicial sale there is nothing for the wife to inherit. Under the statute the wife, on the death of her husband, obtains no interest in any real estate ever owned by the husband, if the same had previously been sold to pay his debts on any execution or other final process. *Andrews v. Alcorn*, 18 Kan. 361.

The sale of a debtor's land, which is not a home-stead, upon a special execution or order of sale issued in pursuance of a judgment against him upon a note, and to foreclose a mortgage securing it, cuts off the rights of the debtor's wife therein, and prevents any claim by her after his death to a distributive share of the land, though she was not a party to the note or mortgage or to the foreclosure proceeding. *Mosteller v. Gorrell*, 41 Kan. 322; *Sturdevant v. Norris*, 30 Iowa, 65.

In *Bank of Commerce v. Owens*, 81 Md. 320, 1 Am. Rep. 60, the husband was seised of the legal title in the land upon which theretofore the wife's inchoate right of dower had attached at common law. She had joined her husband in the execution of mortgages, and the property was afterwards sold under a deed of trust executed by the husband alone for the purpose of paying all mortgages and incumbrances according to their legal priority; and the court held that she was dowable of the surplus after payment of the mortgages in which she had joined. From what was said in the

seised of by his intermarriage, . . . any law, usage, custom, or rule of court to the contrary notwithstanding: provided, that nothing hereinafter contained shall prevent the widow from her right to dower in all lands of which her husband may have died seised and possessed." The Code, § 1763, declares that "dower is the right of a wife to an estate for life in one third of the lands, according to valuation, including the dwelling-house, . . . of which the husband was seised and possessed at the time of his death, or to which the husband obtained title in right of his wife." It is clear from these provisions that, prior to the husband's death, and as to property of which he was not seised and possessed at the time of his death, and which did not come through the wife, no dower right could exist. Hence, if there was actual sale and conveyance of the property, no right or title being reserved in the husband, and none existing in him, at the time of his death, there was no right of the wife, present or future, upon which the conveyance could operate as a fraud; and therefore she could not be heard to complain of his motive in thus disposing of his property. Having the right, without her consent, to make an absolute conveyance, the necessary effect of which would be to cut off the possibility of dower, it cannot be objected that his purpose was to accomplish that result. In this case the conveyance was, upon its face absolute, and there is no claim

that the property came through the wife. If there was in fact an absolute sale, and this conveyance was intended to operate as a present and effectual transfer of the grantor's rights in the property, the transaction must be upheld in favor of the purchaser against the claim of the widow. If, however, it was merely a colorable sale and conveyance, not intended by the parties to be real and operative, except as a means of dividing the lands among the children of the husband at his death, he in the meantime to be the real, while the grantee in this conveyance was to be the nominal and formal owner, this would leave the husband seised, so far as the dower right is concerned; and his widow, after his death, could claim dower, and have it assigned, notwithstanding such colorable and pretended conveyance.

Though there is no direct adjudication of this court upon the question, our decisions, so far as they go, are in harmony with what is here said. The same view is upheld in other states, having statutes similar to our own. See 5 Am. & Eng. Encyclop. Law, title, *Dower*, pp. 886, 912; Stewart, *Husb. & Wife*, § 268; 1 Scribner, *Dower*, chap. 29, § 18, ed. 1883, p. 616. In Connecticut the statute confers upon the widow dower in "one-third part of the real estate of which her husband died possessed," the word "possessed" as here used, being held to be synonymous with "seised." In the case of *Stewart v. Stewart*, 5 Conn. 317, the

opinion in this case it may be inferred that the same result would follow in the case of a simple mortgage of an equitable interest. To the same effect is the decision in *Mantz v. Buchanan*, 1 Md. Ch. 205, and *Lynn v. Lynn*, 27 Md. 547. But in *Purdy v. Purdy*, 3 Md. Ch. 547, a mortgage was regarded as a transfer or parting with the equitable estate.

And it is held that an absolute sale of an equitable interest in land, by the husband alone, will bar all claims to dower. *Bowie v. Berry*, 1 Md. Ch. 452; *Rabbitt v. Gaither*, 67 Md. 95.

A wife is not entitled to a share of the surplus resulting from the sale of lands under a mortgage made by the husband's grantor. *Newhall v. Lynn Five Cents Sav. Bank*, 101 Mass. 423, 3 Am. Rep. 387; *Matthews v. Duryee*, 4 Keyes, 540; *Frost v. Peacock*, 4 Edw. Ch. 973, 6 L. ed. 1016.

In Indiana by foreclosure sale of husband's land under a mortgage in which the wife did not join her right is not lost. *Verry v. Robinson*, 25 Ind. 14, 37 Am. Dec. 344.

Under a Florida statute limiting dower to lands of which the husband died seised "or had before conveyed, whereof the wife had not relinquished her right of dower," a mortgage by him alone and a sale on foreclosure thereof will not bar her dower. *McMahon v. Russell*, 17 Fla. 693.

A widow's right of dower, consummated when assigned, is not barred by foreclosure suit to which she was made a party, when she did not join in the mortgage and the petition did not seek to bar her dower right. *Moomey v. Maas*, 22 Iowa, 380, 92 Am. Dec. 395; *Standish v. Dow*, 21 Iowa, 393; *Oleson v. Bullard*, 40 Iowa, 14.

See further, as to widow's right on foreclosure, *note* to *Mandel v. McClave* (Ohio St.) 5 L. R. A. 519.

Bankruptcy.

When a debtor makes an assignment for the benefit of creditors, a sale of the real estate by the assignees is a judicial sale, within the Indiana Act of 1875; and the wife's inchoate interest in the real

estate becomes absolute and vested, under that Act. *Elliott v. Cale*, 113 Ind. 388; *Ketchum v. Schickelans*, 73 Ind. 137; *Warford v. Noble*, 9 Biss. 320.

In Pennsylvania it is held that neither an absolute conveyance by the husband nor an assignment by him for the benefit of creditors, whether executed voluntarily or under a requirement of the insolvent law of the state, impairs the wife's right of dower. *Kennedy v. Medrow*, 1 U. S. 1 Dall. 415, 417, 1 L. ed. 232; *Graff v. Smith*, 1 U. S. 1 Dall. 461, 464, 1 L. ed. 232, 233; *Kirk v. Dean*, 2 Binn. 341; *Killinger v. Reidenbauer*, 6 Serg. & R. 581; *Riddlebarger v. Mentzer*, 7 Watts, 141; *Keller v. Michael*, 2 Yeates, 300; *Eberle v. Fisher*, 18 Pa. 596; *Worcester v. Clark*, 2 Grant, Cas. 84.

A purchaser from an assignee in bankruptcy takes subject to the wife's right of dower. *Re Angier*, 4 Nat. Bankr. Rep. 619; *Lazear v. Porter*, 37 Pa. 513, 30 Am. Rep. 380; *Kelso's App.* 102 Pa. 7.

In Connecticut, by statute (Rev. 1875, p. 375, § 4), it is provided that "if, on the report of commissioners, the estate shall appear to be insolvent, the court shall set out to the widow her dower." *Lawrence's App.* 49 Conn. 411.

And there is nothing in the Bankrupt Act of the United States, nor in the proceedings under it, to bar the wife's right of dower in lands of which her husband was seised during coverture. *Porter v. Lazear*, 109 U. S. 84, 27 L. ed. 355.

Sale on execution to satisfy mechanics' lien.

A sale of a house and lot belonging to the husband, on execution, to satisfy a mechanics' lien will not defeat the wife's dower right. *Bishop v. Boyle*, 9 Ind. 168, 63 Am. Dec. 615; *Gove v. Cuthier*, 23 Ill. 640, 76 Am. Dec. 711; *Mark v. Murphy*, 70 Ind. 534; *Schaeffer v. Weed*, 8 Ill. 511; *Van Vronker v. Eastman*, 7 Met. 157, 161; *Jaeger v. Bossieux*, 15 Gratt. 83, 105, 76 Am. Dec. 189; *Piper v. Ward*, 8 Blackf. 252.

Says Cookins, J., in *Bishop v. Boyle*, *supra*: "Hers is the older lien. The mechanic bestows his

husband executed a deed conveying all his real estate to his children, and placed it in the hands of a third person to be delivered at his death. On the happening of the event the deed was delivered in accordance with his directions, and it was held that the instrument was strictly a deed, taking effect from the time of its delivery to the depository, and that the widow was thereby barred of her dower. In respect to the objection urged in behalf of the widow, that it was fraudulent as against her, Hosmer, *Ch. J.*, said: "Was the deed fraudulent as relative to Mrs. Stewart? This depends entirely on the right which she had to the estate conveyed anterior to the death of the husband. If she had no right which the law recognizes, then the delivery of the deed could be no fraud on her right, that is, no fraud on a nonentity.

By the English law the right to dower originates on the marriage, but by our law it takes its origin at the husband's death. Our ancestors did not think it expedient to restrain that free transfer of real estate which the interest of the community requires; and for this reason the law has given to the wife no lien or right, legal or equitable, to the husband's estate during his life. Her condition, in this respect, is like that of her husband's children, or other heirs; and the only right of either is to such estate as he has not disposed of." The cases cited by counsel as contrary to this view are clearly distinguishable from the case in hand. The first of these cases is from Vermont, where a similar statutory provision existed, (*Thayer v. Thayer*, 14 Vt. 107, 89 Am. Dec. 211, but in that case the decision was placed upon the ground that the conveyance,

labor with a knowledge of her prior right in the real estate, and he knows the house he is building, as brick is added to brick, and nail after nail is driven, becomes real estate. He can protect himself by security or not venture. She is passive and can do nothing."

Sale under execution against husband.

A sale of lands under execution against the husband issued under a judgment rendered against him after the marriage will not cut off the wife's right of dower. *Wright v. Tichenor*, 104 Ind. 185; *Dunham v. Osborn*, 1 Paige, 684, 2 L. ed. 780; *McClanahan v. Porter*, 10 Mo. 748; *Ayer v. Spring*, 9 Mass. 8; *Harrison v. Eldridge*, 7 N. J. L. 468; *Fleeson v. Nicholson*, Walk. (Miss.) 247; *Sharp v. Pettit*, 1 Yeates, 389; *Ingram v. Morris*, 4 Harr. (Del.) 111; *Dayton v. Corser* (Minn.) post, 80.

The law is settled in accordance with the above cases in those states where the common-law rule prevails; and if the husband by his own conveyance cannot defeat the wife's dower this cannot be done by a sale on execution under a judgment against him.

In *Harrison v. Eldridge*, *supra*, the court says the law is conclusively settled to this effect and that in fact no claim to the contrary was made in that case. But the actual point decided was that the rule applied to an execution sale under a judgment on a bond although the bond was secured by a mortgage which the wife had signed.

So an execution sale against a husband of his equity of redemption from a mortgage in which the wife joined did not defeat her dower rights where a third person paid off the mortgage. *Barker v. Parker*, 17 Mass. 564.

In *Ingram v. Morris*, *supra*, dower was allowed by verdict of a jury against a judgment entered on the day of the marriage.

But in states where the statutes have changed the common-law rule so that the husband can by his conveyance defeat the wife's inchoate right of dower judicial opinion has not been so harmonious.

Thus, under a Mississippi statute under which a bona fide conveyance by the husband will defeat the wife's dower, it was held that a sale on execution under a judgment against him would not defeat it. *Gould v. Luckett*, 47 Miss. 96.

But in Pennsylvania since the Act of 1833, under which a sale by the husband would cut off the wife's dower right, it was held that a sale on execution against a tenant in tail would defeat his wife's dower right, and the court said it was admitted to be so in respect to a fee-simple estate. *Elliott v. Pearsall*, 4 Pa. L. J. 157.

And in Georgia a bond for title given by the husband was held to defeat the wife's dower right. 18 L. R. A.

But in this state the Act of 1836 allowed the husband to convey the property, and the Statute of 1842 had further expressly provided that a judicial sale should bar dower. *Aaron v. Bayne*, 28 Ga. 107.

In North Carolina while the Act of 1784 was in force, which limited the wife's dower right to lands of which the husband died seised, it was held that such right was defeated by a sale under execution against the husband in his lifetime although the deed was not made until after his death. *Den v. Frew*, 14 N. C. 3, 22 Am. Dec. 708.

On the other hand, it was finally decided, after much uncertainty, that in case of a sale after his death although under execution levied during his lifetime, dower was not barred. *Frost v. Etheridge*, 12 N. C. 80.

This decision overruled *Hodges v. McCabe*, 10 N. C. 78. Both these cases were decided by a majority of the court against dissent, and the same question had been presented in *Winstead v. Winstead*, 2 N. C. 248, in which a special case was made up by judges who were divided in opinion, but the case went off without any decision although the judge who was originally opposed to the claim of dower in that case was inclined to the other opinion before the case was disposed of.

As to judgments rendered before marriage the rule is clear and uniform that a dower right is subject thereto. *Trustees of Poor of Queen Anne's County v. Pratt*, 10 Md. 6; *Lane v. Gover*, 3 Harr. & Mohl, 394; *Robbins v. Robbins*, 8 Blackf. 174; *Eiseman v. Finch*, 79 Ind. 511; *Sanford v. McLean*, 3 Paige, 117, 8 L. ed. 80, 23 Am. Dec. 778.

The foreclosure of a lien for the purchase price of land cuts off the right of dower. *Island v. Hewett*, 11 Smedes & M. 184.

And an attachment of land before marriage followed by sale under execution issued on the judgment rendered after marriage defeats dower. *Brown v. Williams*, 31 Me. 403.

Under the Tennessee statutes, which gave a wife dower only in lands of which the husband died seised, the court very emphatically denied a claim of the husband's creditors to be preferred to the widow's dower right and gave her claim priority. *Combs v. Young*, 4 Yerg. 218, 26 Am. Dec. 225.

So in Illinois a sale by an administrator for the husband's debts will not defeat dower. *Slak v. Smith*, 6 Ill. 503.

Under the present Indiana statute the wife's interest in one third of the land which the statute gives in lieu of dower vests at once on a sale of the other two thirds under execution. *Mansur v. Hinkson*, 94 Ind. 595; *Taylor v. Stockwell*, 66 Ind. 505.

Adverse possession of the husband's lands.

Adverse occupation of land during the life of the

which was without any valuable consideration, was intended not only to defeat the wife of her dower, but to secure to the grantor the possession, use and control of the property during his life. Both in that case and the case in 24 Vt. 824, (*Jenny v. Jenny*), the possession was in the husband at the time of his death. The case of *Brewer v. Connell*, 11 Humph. 500, was placed upon a statute which declared that any sale with intent to defeat the widow of dower should be void. Other cases cited by counsel were decided in states where the common-law rule had not been changed, and the concurrence of the wife was necessary to defeat dower.

2. The court below held that, even if part of the purchase money of this property had been paid in good faith by the grantee, he ac-

quired no title if the note for the remainder was not paid before the grantor's death. The charge on this point was as follows: "If George N. Flowers, during the lifetime of his father, John Y. Flowers, had in good faith paid this purchase money, \$5,500,—\$1,000 at the beginning, and \$4,500 afterwards,—then the title would have been transferred to him, so that it would not have been in John Y. Flowers at his death, unless it might have been disregarded on account of some fraud against the widow by the parties involved in that title. That I do not charge you at this time, but I may do so before I get through. Then, if that had been the case, he would stand as the possessor, as I say, without more, and the title would be in him at the death of John Y. Flowers. But if you should believe

husband cannot affect the rights of the widow. She cannot be prejudiced by his laches. *Williams v. Williams*, 6 L. R. A. 697, 80 Ky. 361; *Winters v. DeTurk*, 7 L. R. A. 668, 188 Pa. 369; *Boling v. Clark* (Iowa) Oct. 16, 1891.

In *Durham v. Angier*, 20 Me. 242, there had been an adverse holding for over twenty years before the husband's death, and the widow was allowed to recover.

In *Hart v. McCollum*, 28 Ga. 478, the husband had been disseised for twenty-three years at the time of his death. The court, in its opinion, said: "The mere failure of the husband to sue for lands of which he was once legally seized during coverture, until the Statute of Limitations attaches against him, does not exclude the wife's right to dower in said lands,—a right which she may assert when she becomes discoverer."

To the same effect is *Moore v. Frost*, 3 N. H. 126. It is not barred by seven years adverse possession with color of title and payment of taxes under the Illinois Act of 1889. *Brian v. Melton*, 125 Ill. 647; *Miller v. Pence*, 132 Ill. 149.

In case of the husband's absence for seven years without being heard from, under circumstances raising a presumption of death, her right accrues at the end of that period and the statute then begins to run against her. *Whiting v. Nicholl*, 45 Ill. 220.

As to lands sold for taxes.

The Missouri Statute of 1889, § 4525, provides that "no act, deed, or conveyance executed or performed by the husband without the assent of the wife . . . and no judgment or decree confessed by, or recovered against him, and no laches, default, covin, or crime of the husband, shall prejudice the right and interest of the wife." Under this statute an inchoate right of dower is not cut off by a sale of the husband's land for taxes, the tax proceeding not being strictly *in rem*. *Blevins v. Smith*, 13 L. R. A. 441, 104 Mo. 693.

An inchoate right of dower is not defeated by a tax sale when the liens for taxes attached to the dower rights had become fixed by the concurring facts of marriage and the husband's seisin. *Shell v. Duncan*, 5 L. R. A. 921, 81 S. C. 547. See, further, the note to *Blevins v. Smith* (Mo.) 13 L. R. A. 441.

As to lands dedicated or condemned to the public use.

Says Lord Coke: "Of a castle that is maintained for the necessary defense of the realm a woman shall not be endowed, because it ought not to be divided, and the public shall be preferred before the private." "Here," says Scribner, "we see shadowed forth the principle upon which the courts at a later day have proceeded in holding the inchoate right of dower extinguished in lands appropriated, ac-

ording to the forms of law, to the uses of the public." 1 Scribner, Dower, 578.

In *Gwynne v. Cincinnati*, 8 Ohio, 24, the husband of the plaintiff, and other property owners, agreed to open up a street with a space therein for a market, and accordingly the city opened the street and created a market house, and thereafter the widow petitioned for dower. It was held she was not entitled to dower in the land occupied by the market house; that the case then in hand could not be distinguished from those where property had been condemned for public use.

A widow is not dowerable in lands which have been appropriated to public use by the exercise of the right of eminent domain during the life of the husband, or in land which he dedicated to uses purely public, as for markets, streets, parks, and the like. *French v. Lord*, 60 Me. 537.

A wife's inchoate right of dower is defeated by condemnation of lands to public use; and no compensation need be made her. *Moore v. New York*, 8 N. Y. 110, 50 Am. Dec. 473; *Duncan v. Terre Haute*, 85 Ind. 108; *Wheeler v. Kirtland*, 27 N. J. Eq. 534; *Re Central Park Extension*, 16 Abb. Pr. 56.

In *Bonner v. Peterson*, 44 Ill. 253, it is held that her dower right in the land is cut off but transferred to the proceeds.

In *Re Central Park Extension*, *supra*, the court, referring to *Moore v. New York*, *supra*, said: "It might have been added to that case that the right was transferred from the land to the money received from the land."

In *Nye v. Taunton Branch R. Co.*, 118 Mass. 277, after the husband had purchased and improved property, it was sold under execution, and after passing through several hands it was conveyed to a railroad company by a common warranty deed with no restrictions as to the use of the property which was in fact used by the railroad company for depot and station purposes. The demand for dower was resisted on the ground that it was barred, because the property had been taken for public use. The defense was overruled and the court made a distinction between property acquired by the power of eminent domain and by purchase.

But in the recent case of *Venable v. Wabash W. R. Co.* (Mo.), *ante*, 68, a voluntary conveyance expressly limited for railroad purposes was held as effectual as a condemnation by eminent domain to defeat the dower right of the grantor's wife although she did not join the conveyance.

As to provision of will in lieu of dower, see *Calahan v. Robinson*, 3 L. R. A. 497, and note, 30 S. C. 249.

As to antenuptial conveyance, see *Dudley v. Dudley*, 3 L. R. A. 814, and note, 76 Wis. 567.

A. P. W.

from the evidence that that note was not paid during the lifetime of John Y. Flowers, then, so far as that goes, it would not convey to him such title as might be consummated by the payment of the purchase money." From what we have said in the preceding division of this opinion, it will be seen that the right to dower in this case turns upon the question of a real, as distinguishable from a merely colorable, sale and conveyance; and, this being so, it does not matter whether the whole of the purchase money was paid in the lifetime of the husband or not. If the sale was real, and the purchase money was in fact due and owing by the purchaser as a bona fide debt against him, dower would be as effectually barred as if all the purchase money had been paid. In *Day v. Solomon*, 40 Ga. 83, where the land was not paid for, and it was held that dower was not barred, there was not merely a failure to pay, but there was no conveyance of the title, the purchaser holding under a bond to convey. It was held, therefore, that the husband, at the time of his death, had a perfect legal title.

3. It was further alleged as error that the court allowed the applicant for dower to read in evidence the will of John Y. Flowers, over objection that the same was irrelevant. This will provided for the payment of the testator's debts; that his executors should sell at public outcry, after advertisement, all his property, real and personal, and collect all his notes and accounts; and that proceeds arising from the sale of the property and money collected on the notes and accounts, after the payment of

the debts, should be divided equally, share and share alike, between the six children of testator, of whom George N. Flowers was one. George N. was appointed executor. It was contended that the will was relevant testimony to show that the widow was ignored, and that John Y. Flowers, at the time of its execution, was endeavoring to defeat his wife of all interest in his estate, and using George N. Flowers to carry out his plans. In reply to this it is enough to say that if the husband, as we have shown, had a legal right to intend the defeat of dower, and to effectuate the intention by an actual and real conveyance, a will subsequently executed, in which he made no provision for the wife, would throw no light on the present controversy, which is simply whether the conveyance was real or only colorable and pretended.

4. Error is also assigned upon the admission of testimony relating to family disturbances between the husband and the wife and between her and one of his children by a former marriage. As tending to show a motive for endeavoring to defeat dower without parting with dominion and real ownership, we think this testimony was relevant. As the case is to go back for a new trial, it is unnecessary to enter into a discussion of the evidence. What has been said disposes of the material questions presented by the record. For the reasons stated, we think the court erred in not granting a new trial.

Judgment reversed.

MINNESOTA SUPREME COURT.

Lyman C. DAYTON *et al.*

v.

Elwood S. CORSER *et al.*

(.....Minn.....)

*1. **The inchoate contingent interest of a husband or wife in real estate** owned by the other, fixed by the terms of Gen. Laws 1890, chap. 48, subchap. 3, § 64, and commonly called the "dower right," is not divested by a transfer of title from the owner of the property to a purchaser at an execution sale founded upon a judgment against such owner.

2. **Certain assignments of error** considered and disposed of.

(November 29, 1892.)

CROSS-APPEALS from a judgment of the District Court for Ramsey County entered in an action brought to set aside a judgment obtained against May I. Dayton, deceased, and to vacate the sale of certain real estate which was sold under the execution issued thereon, which judgment refused to set aside the sale but charged the property with the husband's right of curtesy. *Affirmed.*

*Headnotes by COLLINS, J.

The facts are stated in the opinion.

Messrs. Lyman C. Dayton, E. F. Lane and George S. Engle for plaintiffs.

Messrs. Hahn & Hawley for defendants.

Collins, J., delivered the opinion of the court:

These were cross-appeals from the same judgment. The facts were that, under and by virtue of an execution duly issued upon a judgment obtained by these defendants against one May I. Dayton, certain real property was levied upon and sold in January, 1891. These defendants became the purchasers at such execution sale, and there was no redemption. At the time of the rendition of the judgment the debtor was the wife of this plaintiff, and so remained until her death in June, 1891. In the case at bar, which was brought to have set aside and vacated both the judgment and the sale for reasons which need not be stated, and also to have determined the rights of the parties in the real property so sold, the trial court refused to interfere with either the judgment or the sale, but did adjudge that the property passed to the defendants at the sale, subject to the inchoate and contingent right of the debtor's husband, the plaintiff, under the provisions of the Probate Code, and that upon her death

NOTE.—The subject of dower is presented in several important phases by this case and the two immediately preceding.

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See as to effect of execution as well as of other acts of the husband or his creditors, the note to the case next preceding.

he became seised in fee of an undivided one third of the same. It is this feature of the judgment which has been assailed by defendants' assignments of error, while the contention of plaintiff in his appeal is that the court erred in various rulings made upon the trial, and in its determination that the defendants became the owners of an undivided two thirds of the property on the expiration of the period of redemption, or acquired any interest whatever. Naturally the defendants' appeal should be first disposed of, and the inquiry is whether the inchoate and contingent interest of a husband or wife in the real property of the other, as fixed by Gen. Laws 1889, chap. 46, subchap. 3, § 64, is swept away and destroyed by a sale on execution, issued upon a judgment rendered during coverture against the husband or wife alone. The statute, which was but a re-enactment of Gen. Stat. 1878, chap. 46, § 3, provides: "Sec. 64. Such surviving husband or wife shall also be entitled to and shall hold in fee simple, or by such inferior tenure as the deceased was at any time during coverture seised or possessed thereof, one equal undivided one third ($\frac{1}{3}$) of all other lands of which the deceased was at any time during coverture seised or possessed, free from any testamentary or other disposition thereof to which such survivor shall not have assented in writing, but subject, in its just proportion with the other real estate, to the payment of such debts of the deceased as are not paid from the personal estate." The remainder of the section need not be quoted, as it has no bearing on the case. When speaking of this language in *Re Rausch*, 35 Minn. 291, it was said that the provisions of the statute for the widow in the real estate of her deceased husband were rather in the nature of an enlargement than an abolishment of dower, and that this inchoate right "is of the same general nature as inchoate right of dower at common law." Although having reference to the rights of a surviving wife, these views are equally as pertinent and applicable to a case like this, where the statutory rights of a surviving husband are being considered; hence his rights are analogous to, and of the same general nature as, inchoate right of dower at common law. It hardly seems necessary to cite authorities to the proposition that at common law a wife could not be deprived of her dower rights in the real estate of her husband through a sale upon execution under a judgment obtained against him subsequently to the marriage, but they may be found collected in 5 Am. & Eng. Encyclop. Law, 920. And from an examination of the statute it would be impossible to conclude that a radical change in this matter had been wrought by it. There is nothing to indicate an intent to reduce or diminish the inchoate rights of a survivor; but, upon the other hand, the rule of the common law as to dower rights has been emphasized by this legislation; for, in addition to providing that such survivor shall hold in fee simple, or by such inferior tenure as the deceased had or held, an equal undivided one third of all lands of which the deceased was at any time during coverture seised or possessed, it was expressly declared that such holdings should be free from any testamentary or other disposition to which the survivor had not assented in writing, sub-

ject, however, in its just proportion with other real estate, to the payment of such debts of the deceased, as cannot be paid out of the personal estate. The plain meaning of this statute is that neither husband nor wife can be divested of the statutory right or interest in the real property of the other without having consented in writing. Every disposition of such real estate is covered by the language, and it is evident that, even if the words "or other disposition" were required to render the prohibition sufficiently certain, all doubt has been removed by their use. This language is broad and explicit enough to cover and include any transfer of title or disposition of the estate by execution sale. Husband and wife are given absolute protection as to the acts of either in respect to this statutory right or interest, and the statute must not be so construed as to place it in the power of a simple judgment creditor to defeat its purpose. If this were permitted, the husband or wife could, through connivance with a spurious creditor, easily circumvent the statute, and by means of an execution sale wipe out a right or interest which has been granted with great care and certainty. Again, such a construction would authorize the sale of an interest in real property which the debtor was unable to turn out in satisfaction of the debt or to dispose of in any manner. No statute should be interpreted so as to permit that to be done by indirection which cannot be accomplished by direct means. Nor do the statutory provisions in regard to judgments and execution sales have any bearing upon those found in the Probate Code in reference to the title to real property by descent. By section 277, chap. 66, Gen. Stat. 1878, a duly docketed judgment is declared to be a lien on the real property of the debtor for a certain period of time; and by section 323 the sheriff's certificate on execution sale, if properly proved or acknowledged and recorded, operates, upon the expiration of the period of redemption, as a conveyance of the judgment debtor's right, title, and interest in the estate, and nothing more. There is nothing in either of these sections indicating that the sale is not made subject to the inchoate contingent interest of the husband or wife. Under statutes similar to our own it has been held repeatedly that the inchoate right to dower attaches at the moment the husband's interest in the realty becomes fixed, during coverture, so that his creditors cannot by any proceeding against him impair or destroy the right. *Tate v. Jay*, 81 Ark. 576; *Nance v. Hooper*, 11 Ala. 552; *McMahon v. Russell*, 17 Fla. 698; *Wright v. Tichenor*, 104 Ind. 185; *Sisk v. Smith*, 6 Ill. 503; *Sutherland v. Sutherland*, 69 Ill. 481; *Grady v. McCorkle*, 57 Mo. 172; *Gould v. Luckett*, 47 Miss. 96. A later decision—*Stewart v. Ross*, 50 Miss. 776—that a sale under legal process of a wife's land defeats the husband's right of curtesy is based upon the statute in regard to this right. As section 64, *supra*, provides that the statutory interest in question shall be "subject, to its just proportion with the other real estate, to the payment of such debts of the deceased as are not paid from the personal estate," it has been urged as a strong reason for adopting the views of defendants' counsel that the creditor who neglects to

prosecute his claim, and upon the decease of the debtor files the same in the probate court, has a lien upon the entire estate, and may have it sold to satisfy his claim, free from the statutory right or interest, thus having an advantage over the diligent creditor who procures a judgment and makes sale upon execution during the lifetime of the debtor; but this line of argument has no real merit. If title to real property has been divested during lifetime by sale on execution, it is evident that a general creditor has no enforceable claim upon that part of the same appropriated by statute to the surviving husband or wife, for it was held in *Goodwin v. Kumm*, 48 Minn. 403, that only the interest of the wife in the lands owned by her husband at his decease—and consequently a part of his estate—could be rendered subject to his debts. The statute may be inconsistent in some respects, and present practical difficulties, but the lien or claim of the general creditor upon the statutory right or interest of the survivor is not without limit or qualification; and whatever this lien or claim may be, and to what extent it may be satisfied out of the statutory right or interest, is to be first determined in the probate court, in case the personal estate be insufficient to satisfy the debts of the deceased. This disposes of defendants' appeal, and we proceed to a brief consideration of such assignments of error made by plaintiff's counsel as need be mentioned.

The issue of law which would have been raised if counsel had been allowed to interpose a demurrer to the amended answer was pre-

cisely the issue determined upon the trial in plaintiff's favor, and which we have just held to have been correctly decided. There are several reasons why the court was justified in its ruling, but it is enough for us to say that the plaintiff was not prejudiced by it.

The ruling on plaintiff's application for a continuance, based solely on the ground that the issue was not made until after the first day of the term, was correct. The pleadings were filed and served in strict accordance with a stipulation in which it was agreed that the case should be tried at the March term of the court, but not earlier than the 20th day of the month.

The contention that testimony should have been received as to an oral agreement between plaintiff and his wife that she should receive and hold the title to the property herein involved in trust for him has no merit. Conceding, even, that such testimony would have been admissible under any circumstances, it appeared from the testimony of the plaintiff himself, in immediate connection with the rulings by which this oral testimony was excluded, that the trust agreement had been reduced to writing, and counsel reserved the right to offer the instrument in evidence later on. It was not produced, nor was attempt made to put it in evidence, until after the case was closed. A motion to reopen for the purpose of putting the document in evidence was then denied upon the ground that the case was closed, and no exception was taken to the ruling.

As to both parties the judgment is *affirmed*.

TEXAS SUPREME COURT.

W. A. DAVIS & Wife, *Plffs. in Err.*,
v.

R. H. LANING.

(.....Tex.....)

Sentencing a person to imprisonment for life does not cast the descent to

his estate under statutes fixing the time at which descent shall be cast at a person's death.

(May 24, 1882.)

ERROR to the District Court for Llano County to review a judgment in favor of defendant in an action brought to recover possession of certain real estate. *Affirmed*.

NOTE.—Civil death in United States.

Civil death is the state of a person who, though possessing natural life, has lost all his civil rights and as to them is considered as dead. Bouvier, Law Dict. title *Death*.

Lord Coke, in Co. Litt. 180 a, says: "Besides men attainted in a premunire, every person that is attainted of high treason, petit treason, or felony, is disabled to bring any action, for he is *extra legem positus*, and is accounted in law *civilitur mortuus*." Of this passage Chancellor Kent said that, as was seen by comparison with other passages, it was not to be taken in the full latitude of expression, and he declared that civil death was confined to the cases of persons professed, or who have abjured the realm or been banished by statute or process of law. *Platner v. Sherwood*, 6 Johns. Ch. 113, 2 L. ed. 73.

Civil death involved a total extinction of the civil rights and relations of the party, so that he could neither take nor hold property, but his estate passed to his heirs, as though he were really dead, or was forfeited to the crown. Of this kind were the cases of monks professed, and abjuration of the realm. Profession was a creation of the ecclesiastical law, and the relinquishment of the 18 L. R. A.

estate was voluntary; this species of civil death terminated when popery was abolished in England.

Abjuration of the realm was abolished by Statute of 21 Jac. I. chap. 28. See opinion of Veazey, J., in *Baltimore v. Chester*, 58 Vt. 315, 38 Am. Rep. 677.

Civil death involved also an incapacity to hold property, or to sue in the king's courts, attended with forfeiture of the estate and corruption of blood; and the king took the property to the exclusion of the heirs. *Jackson v. Catlin*, 3 Johns. 282, 3 Am. Dec. 415.

Crimes in Vermont do not work a forfeiture of the estate, or corruption of blood, and therefore in the case of one convicted for crime there is lacking that taint which constituted at the common law one of the essential elements of civil death. *Baltimore v. Chester*, *supra*.

The Statute of 54 Geo. III., chap. 45, abolished forfeiture of lands on corruption of blood in every case except treason, petit treason, and murder.

And by the Statute of 33 & 34 Vict. chap. 23, the whole doctrine of attainder, corruption of blood and forfeiture, except forfeiture consequent on outlawry, was swept away.

The facts are stated in the commissioner's opinion.

Mr. W. S. Maxwell for plaintiffs in error.

Marr, J., filed the following opinion:

This action was brought by the plaintiffs in error against the defendant in error to try title to and to recover a certain tract of land in Llano county, Tex. They claim the land as heirs-at-law of their son, one C. C. Davis, who was duly convicted in the district court of the above-named county, and sentenced to the state penitentiary for the term of his natural life. They contend that this conviction rendered C. C. Davis *civilter mortuus*, and cast descent upon his heirs. He is, however, still alive in fact, and undergoing the life sentence in the penitentiary. The land belonged to him at the time of his conviction, and he was and is an unmarried man, and has no children. The defendant claims title to the land under a purchase at an execution sale upon a judgment of a justice court which was rendered against C. C. Davis in a suit instituted against him after his conviction and incarceration in the penitentiary. It is alleged, however, in the petition that this judgment and the execution sale are null and void for the want of service of process upon the defendant in said suit. Upon the foregoing state of the case, the court below sustained a general demurrer to the petition of the plaintiffs, and dismissed their suit. The plaintiffs seek to recover the land in their own right, and not for or on behalf of C. C. Davis. They have sued out a writ of error, and have assigned as error the action of the court in sustaining the demurrer.

The question presented for our determination is one of first impression in this state, if it can be deemed a question at all, in view of the Bill of Rights and our statutory provisions which relate to descent and distribution, administrators and wills, and the probate thereof,

etc. Attainders, outlawry, deprivation of property except by due process of law, and the corruption of blood or forfeiture of estate, as a result of conviction of crime, are expressly prohibited by the organic law. Const. art. 1, §§ 10, 19-21. Section 21 declares that "no conviction shall work a corruption of blood or forfeiture of estate, and the estates of those who destroy their own lives shall descend or vest as in case of natural death." This provision is invoked by the plaintiffs in error, but it aids their case no further than a declaration that a convict may either inherit himself or transmit inheritance. It does not attempt to determine at what time the descent of his estate shall be cast, but excludes this idea by the express regulation concerning the estates of suicides. In any event, it most certainly does not declare that the estates of convicted felons shall, upon conviction, "descend or vest as in case of natural death." In short, we find nothing in the Constitution to support the position of the plaintiffs, but much that might warrant an opposite conclusion. It is not necessary, however, for us to determine whether, under the provisions of the Constitution before cited, it would be within the power of the Legislature to establish a rule of descent as contended for by the plaintiffs, in cases like the present, for the plain reason that, so far as we are aware, the Legislature has not yet enacted any such law. The statutes before mentioned are too numerous to be quoted, but an examination of their provisions will, as we think, inevitably lead to the conviction that, whenever these statutory enactments upon the subjects aforesaid speak of death, they mean the natural death of the person whose estate or testament is involved. Analogous statutes are so construed in similar cases by the Court of Appeals of New York and the Supreme Court of Ohio. As our statutes regulate the time when the descent is cast, viz., when the ancestor is in fact dead, we

In *Frazer v. Fulcher*, 17 Ohio, 280, it was held that one sentenced to imprisonment for life in the penitentiary was not civilly dead, and that the appointment of an administrator was improper. *Hitchcock, J.*, said: "If, then, we rely upon the authority of *Chancellor Kent*, there is no principle of the common law by which a man in the situation of *Frazer* would be held to be civilly dead. . . . It has been suggested, however, that for the Legislature to enact that the estate of a person in such situation should be disposed of as if he were dead would be a violation of that clause of the Constitution which declares that 'no conviction shall work corruption of blood or forfeiture of estate.' Whether it would be so or not, depends upon the meaning which we attach to the word 'forfeiture' as used in this connection. To me it seems clear that the intention of the convention in the introduction of this clause was to guard against evils existing in the country from which many of our laws are derived."

A person attainted under the Act of Attainder of 1779 was to be considered as civilly dead. *Jackson v. Catlin*, 2 Johns. 248, 3 Am. Dec. 415.

In *Troup v. Wood*, 4 Johns. Ch. 223, 1 L. ed. 823, it was held where the point arose incidentally that every person convicted of felony and sentenced to imprisonment in the state prison for life is *civilter mortuus*.

But in *Platner v. Sherwood*, 6 Johns. Ch. 113, 2 L. ed. 73, this point was the material one in issue. 18 L. R. A.

and the chancellor, condemning his former position, held that a person convicted of felony and sentenced, prior to March 29, 1790, to imprisonment for life, was not civilly dead, and his estate, therefore, not devastated.

The "maxim of *civilter mortuus*, on a conviction for felony, does not apply" in Delaware, and an action for the support and maintenance of minor children may be maintained against one who has been convicted of the crime of murder. *Cannon v. Windsor*, 1 Houst. (Del.) 143.

A person found to be an habitual drunkard is not civilly dead so as to transfer his rights and responsibilities to his trustees as administrators. *Steel v. Young*, 4 Watts, 459.

One convicted for embezzlement is not *civilter mortuus* and may be served with notice of appeal in an action in which he was sued as administrator. *Brown v. Mann*, 68 Cal. 517.

A person imprisoned in the penitentiary for life is not civilly dead and may sue in his own name, and it is improper to permit another to sue as his *prochein ami*. *Willingham v. King*, 23 Fla. 478.

One convicted of felony is not civilly dead, and can sue for injuries received while in the penitentiary. *Dade Coal Co. v. Haslett*, 83 Ga. 549.

The provision of New York Rev. Stat. (2 N. Y. Rev. Stat. p. 701, § 20), that a "person sentenced to imprisonment in a state prison for life shall thereafter be deemed civilly dead," is declaratory of the common law and does not devert the criminal of

are not, therefore, relegated to the common law for a rule of decision, although, under that law, even an attainted convict was not divested of the title to his lands until after office found, but could dispose of them by will, subject to a forfeiture at the instance of the crown, etc. *Avery v. Everett*, 110 N. Y. 817, 1 L. R. A. 264, 6 Am. St. Rep. 868. In the case just cited it was held that, although a statute of that state declared that "life convicts should thereafter be deemed civilly dead," still, in case of a devise of land to such a convict with directions that if he should die without issue the property shall vest in another, the land "does not so vest upon his civil death." The decision was not rested upon the intention of the testator, but upon the broader ground that the conviction had not divested the convict of his title to the land. We have no such statute as the one above quoted, and for stronger reasons, therefore, would the principle just announced apply to the case in hand. The Supreme Court of Ohio held that "a man sentenced to imprisonment for life in the penitentiary, in punishment for crime, is not civilly dead, and letters of administration cannot be granted upon his estate." *Frazer v. Fulcher*, 17 Ohio, 260. The learned judge who delivered the opinion observed that "we know that in England there are cases in which a man, although in full life, is said to be civilly dead, but I have not learned until this case was brought before us that there was but one kind of death known to our laws." This, perhaps, about expresses the state of our own laws upon the subject. It has been decided that convicted felons may be sued and may dispose of their property by will or deed, etc.,

and it would seem that, under the terms of our own statutes, there exists no valid objection to a convict devising his lands, if otherwise possessed of the statutory qualifications essential to testamentary capacity. *Avery v. Everett*, *supra*; *Rankin v. Rankin*, 6 T. B. Mon. 531, 17 Am. Dec. 161; Rev. Stat. art. 4857. See also art. 8222. If he can be sued, and his property seized by his creditors after conviction, as has been held; if he can dispose of it by will to vest as he shall direct after his death,—then, clearly, he is neither dead in fact nor in law, and *a priori* there can be no descent of his estate to "his heirs-at-law," under such circumstances. We do not deem it important to pursue the inquiry to any greater extent. We think that we have said sufficient to indicate our views of the point at issue. The subject, however, in many of its phases, is exhaustively discussed in the case of *Avery v. Everett*, *supra*, and in a learned note to that decision, as reported in volume 6 of the American State Reports, (page 379.) See also 2 Lawson, Rights, Rem. & Pr. § 899. We have no statute like that in England, providing for the appointment of a trustee or guardian of the estate of a life convict. That is a matter for the determination of the legislative department. We conclude that the conviction and sentence of C. O. Davis did not effect a devolution of the title to his land upon the plaintiffs in this case as his heirs-at-law, and that the maxim, *nemo est heres viventis*, applies.

The judgment should be affirmed.

Adopted by supreme court, May 24, 1892.

his property. *Avery v. Everett*, 1 L. R. A. 264, 110 N. Y. 817, 6 Am. St. Rep. 868.

The English cases hold that attainder or civil death does not prevent a person from being sued in a civil action. *Banyster v. Trussel*, Cro. Elis. 516; *Ramsay v. McDonald*, 1 Wils. 217; *Coppin v. Gunner* 3 Ld. Raym. 1572.

An early New York case which is little more than a memorandum holds that sentence to state prison for life which constitutes civil death abates a civil action against the convict. *Graham v. Adams*, 2 Johns. Cas. 408.

The same doctrine is asserted again in *Freeman v. Frank*, 10 Abb. Fr. 870, although in this case it is held that an answer setting up the fact of such imprisonment and civil death is demurrable since the very fact of answering shows that he is able to defend.

So in *O'Brien v. Hagan*, 1 Duer, 664, it is held that under § N. Y. Rev. Stat. 701, § 19, which suspends all civil rights of a convict during imprisonment in state prison, a suit against him is abated.

But these cases are overthrown by other cases in the same state, in which, although the question was in fact as to imprisonment for years, the doctrine is plainly declared in harmony with the English cases to the effect that a person sentenced to state prison whether for life or for years is subject either to the commencement or the continuation 18 L. R. A.

of a civil action against him. *Morris v. Walsh*, 14 Abb. Pr. 387; *Phelps v. Phelps*, 7 Paige, 150, 4 L. ed. 102; *Davis v. Duffie*, 3 Keyes, 606, affirming 3 Bosw. 619; *Bonnell v. Rome*, W. & O. R. Co. 12 Hun, 218.

And in New Jersey it was decided that a conviction of treason with the consequent confiscation of property did not prevent maintaining a civil action against the person convicted. *Dunham v. Drake*, 1 N. J. L. 815.

In Mo. Rev. Stat. 1879, § 1697, it is provided that "a sentence of imprisonment in the penitentiary for a term less than life suspends all civil rights of the person so sentenced during the term thereof. . . . And the person sentenced to such imprisonment for life shall thereafter be deemed civilly dead." *State v. Reeves*, 97 Mo. 668.

To the same effect are the provisions of the Penal Code of California' (*Desty*, Pen. Code Cal. § 673, 674); and also of Oregon. *Hill*, Laws of Oregon, § 2022.

A bankrupt is for many purposes *civilliter mortuus*. *International Bank v. Sherman*, 101 U. S. 406, 25 L. ed. 866.

When a corporation becomes insolvent it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. *Graham v. La Crosse & M. R. Co.* 102 U. S. 148, 25 L. ed. 106. A. P. W.

MICHIGAN SUPREME COURT.

James A. STEELE

v.

GERMAN INSURANCE CO., of Freeport,
Illinois, *Appt.*

(.....Mich.....)

1. Failure to make proofs of loss within sixty days after the fire, as required by Michigan standard policy, which provides that the loss shall not become payable until sixty days after such proofs and that no suit or action shall be maintainable "until after full compliance by the insured with all the foregoing requirements nor unless commenced within twelve months next after the fire," will not make the policy void where the specified requirements in fourteen cases expressly provide for a forfeiture in case of failure to comply therewith but no such provision is made in respect to the proof of loss.

2. A false statement in an application for insurance that there is no other insurance on the property will not make the policy void where the other insurance was placed upon it by the same insurance agents and the statement of the insured to the agents who wrote the application was that there was no other insurance except what they had placed on the property.

3. The acts of clerks of insurance agents who solicit insurance, make out applications and policies, and generally attend to the business of such agents, are as binding as though done by the agents themselves.

4. Whether lumbermen's tools, second-hand furniture, and camp equipment included within a policy of insurance on a stock of dry-goods, groceries, hardware, queensware, hats, caps, boots, shoes and such other articles not more hazardous as are usually kept for sale in country stores, is a question for the jury where the evidence is conflicting as to the character of the property.

(October 4, 1892.)

ERROR to the Circuit Court for Ionia County to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due under a policy of fire insurance. *Affirmed.*

The facts are stated in the opinions.

Mr. George S. Steele for appellant.

Messrs. Davis & Nichols for appellee.

Grant, J., delivered the following opinion:

This is an action to recover upon a policy of insurance for loss by fire. Four objections are

NOTE.—*Forfeiture of insurance by failure to furnish proofs of loss within a stipulated time.*

The very slight difference in the language which distinguishes the above case from the Gould Case, which is discussed in the opinion and in which a contrary decision was made by the same court, illustrates the difficulty of the question where a failure to furnish proofs of loss within the exact time stipulated will constitute a forfeiture of the insurance.

The question has not been squarely presented and decided in a very large number of cases, but in several it has been held that no forfeiture occurs by failure to furnish proofs of loss within the exact period stipulated therefor unless there is an express provision in the policy making such default a cause of forfeiture. *Coventry Mut. Live Stock Ins. Assn. v. Evans*, 102 Pa. 281; *Vanzindertaelen v. Phoenix Ins. Co. (Wis.)* April 12, 1892; *Hall v. Concordia F. Ins. Co.* 90 Mich. 408; *Tubbs v. Dwelling House Ins. Co.* 84 Mich. 646; *Kenton Ins. Co. v. Downs*, 12 Ky. L. Rep. 115.

The case of *Kenton Ins. Co. v. Downs*, *supra*, was very similar to the main case as there were a large number of stipulations expressly making the policy void and following these, without such an express stipulation, a requirement that the proofs of loss must be furnished within thirty days, and then a provision that there should be no suit until after all the conditions, provisions, and requirements of the policy have been complied with. The failure to make proofs within the thirty days was held not a cause of forfeiture.

Likewise in the case of *Hall v. Concordia F. Ins. Co.*, 90 Mich. 408, the policy made numerous express provisions as to causes of forfeiture, and declared that it should not be due until sixty days after all requirements of the policy had been complied with, and it was held that a failure to make proofs within thirty days as stipulated was not a ground of forfeiture.

Several New York cases have touched upon the question, but in each of them the decision may be said to rest more on the unreasonableness of the

delay in furnishing the proofs than on the doctrine of forfeiture for failure to comply strictly with the requirement as a condition precedent. In *Quinlan v. Providence Wash. Ins. Co.*, 138 N. Y. 856, the court in speaking collectively of provisions as to an indorsement in case of foreclosure proceedings, immediate notice of loss and a sworn statement within sixty days, says these are conditions precedent, and adds that the authorities are conclusive that the non-performance of these conditions or any one of them constitutes a complete defense. But in that case there was more than six months' delay after the sixty days' limitation in furnishing the proofs of loss, and the other conditions mentioned were also violated; so the court might not feel itself bound by this decision to hold that a mere technical failure such as a single day's delay after the time specified to furnish proofs of loss would forfeit the policy.

The case of *Blossom v. Locomotive F. Ins. Co.*, 64 N. Y. 162, which is one of the authorities relied on in the case preceding, states that a *substantial compliance* with a provision as to the time for furnishing proofs of loss is necessary unless waived. In this case proofs required by the policy to be furnished within thirty days were not furnished until about four months after the loss and were held insufficient.

So in *Underwood v. Farmers Joint Stock Ins. Co.*, 57 N. Y. 500, it is said that effect should be fairly given to such a provision as to every other part of the contract; and proofs furnished one month after a loss were held insufficient under a provision requiring them within ten days. The New York cases seem fairly reconcilable with the other cases above cited in agreement to the general doctrine that a forfeiture must be expressly stipulated by the policy in order to make a policy void for failure to furnish the proofs within a specified number of days.

For notes on the waiver of proofs of loss, see *German Ins. Co. v. Gray* (Kan.) 8 L. R. A. 76; *Kenton Ins. Co. v. Wigginton* (Ky.) 7 L. R. A. 81; *Smith v. Niagara F. Ins. Co. (Vt.)* 1 L. R. A. 216.

B. A. R.

raised against the judgment, viz.: (1) Plaintiff, in his application, represented that there was no other insurance upon the property; (2) there was other insurance without the consent of the defendant; (3) proofs of loss were not made and rendered within sixty days after the fire; (4) recovery was allowed for goods not covered by the policy.

1. The evidence on the part of the plaintiff showed that defendant's local agents who placed this insurance had also placed the other insurance complained of; that they knew it at the time; that plaintiff, at the time of the making of the application, so informed them; that the defendant's agents, through their clerk, wrote out the application. It is the settled rule in these cases that the agents for insurance companies, in making out these applications do not represent the insured, but the insurer, and that the consequences of the failure to incorporate the necessary statement in the application must fall upon the insurer, and not upon the insured, who has made an honest statement of the facts. *Russell v. Detroit Mut. F. Ins. Co.* 80 Mich. 407; *Gristock v. Royal Ins. Co.* 84 Mich. 161; *Gristock v. Royal Ins. Co.* 87 Mich. 428; *O'Brien v. Ohio Ins. Co.* 52 Mich. 181.

No question of waiver upon the first two points is involved. The clerk of the local agents wrote out the application, and to him plaintiff said that there was no other insurance except what they themselves had placed upon the property. This testimony was objected to as incompetent, upon the ground that the acts of and statements made to and by said clerk were not binding upon the defendant. The precise claim is that the local agents cannot redelegate their authority to clerks, unless such authority to delegate is conveyed in express terms. In general, this is true, but courts will recognize the ordinary course of business. It must be well known that these local agents do their business to a very large extent through clerks, who solicit insurance, make out applications and policies, and generally attend to the business of their employers. In such cases their acts are as binding as though done by the agents themselves. *Story, Ag. § 14; Continental Ins. Co. v. Ruckman*, 127 Ill. 864; *Iodine v. Exchange F. Ins. Co.* 51 N. Y. 117, 10 Am. Rep. 566; *Bennett v. Council Bluffs Ins. Co.* 70 Iowa, 600.

2. This was a Michigan standard policy, and contained the following provision: "If fire occur, the insured shall give immediate notice of any loss thereof in writing to this company; . . . make a complete inventory of the property, stating the quantity and cost of each article, and the amount claimed thereon; and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and all others in the property; the cash value of each item thereof, and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation,

location, possession or exposure of said property since the issuing of this policy; by whom and for what purpose any building herein described, and the several parts thereof, were occupied at the time of the fire. . . . This company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any requirement, act or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice . . . and satisfactory proof of the loss herein required have been received by this company. . . . No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire. . . . This policy is made and accepted subject to the foregoing stipulations and conditions . . . and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon, or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." The fire occurred March 12, and proofs of loss were not furnished until October, three days before suit was commenced. It is insisted that proofs of loss within the time required by the policy were waived. The facts upon which the alleged waiver was based are as follows: Immediately after the fire, plaintiff notified the local agents by telegram, and received a dispatch in reply. Two days after the fire the local agents sent one of their employes to the plaintiff. They went to the place of the fire, and the employe asked plaintiff how it occurred, to which plaintiff replied he would like to know himself. Plaintiff then testified: "We looked it over, and he asked me if I had a statement of what was burned. I told him I had. 'Well,' he said, 'you may take a copy of it, and send it to our office, and I will notify the companies, and they will send an adjuster to adjust the loss; and it might be such a thing that Mr. Weatherwax will adjust it.' He didn't say that he would, but that it might be such a thing that Mr. Weatherwax would adjust the loss. After this conversation I made out a statement, and sent it to Stanton, to Weatherwax & Co., the local agents." March 22, the local agents acknowledged the receipt of this statement by letter, and wrote, "We have notified the companies, and expect prompt attention." April 11, the local agents again wrote plaintiff, saying: "The insurance companies have authorized Mr. C. C. Kemp, of Greenville, to settle your loss. I just heard of it today. Now, if you will write him at Greenville, you can, I presume, arrange with him a time to come to Stanton, and meet at our office, and settle up your loss." Mr. Kemp was

not the agent or adjuster for the defendant, and had no authority to act for it. He represented the Hibernia Insurance Company, which had the other and prior policy upon the same property. About three weeks after sending the invoice to Weatherwax & Co., plaintiff met Mr. Kemp, and had a talk with him about the loss. He says that Kemp did not say anything to him particularly as to what company he was working for; that Kemp told him to send to Weatherwax & Co. for the invoice; that he would be back again in a couple of days; that meantime he would communicate with the other company; that after he returned from Detroit, where he was going to adjust a loss, he would meet plaintiff, and settle the matter with him. Not hearing from Kemp for a week or ten days, he wrote him again, stating that he had got the invoice, and would like to meet him; that, receiving no reply, he wrote him again, but received no reply to this letter. He did nothing further until the last of August, when in the office of the local agents, one of their employes asked him if he had settled with the company, and, upon being informed that he had not, the employe said that they had notified the company, and thought it very queer that they had not settled the loss. On cross-examination plaintiff testified that before he saw Kemp he supposed that he represented both companies, but that before Kemp left he understood that he appeared for one company,—the Hibernia. When asked what caused him to delay sending proofs to the defendant, he replied, "Well, I kept waiting,—waiting to see their adjuster." It is not claimed that plaintiff did not know the requirements of his policy as to furnishing proofs of loss. It was a part of his contract which he was bound to perform, if not waived. It conclusively appears from his own testimony that he had no conversation or communication with any officer of the company authorized to adjust his loss or waive the proofs. It is also evident that he knew this. This case is therefore clearly distinguishable from *Gristock v. Royal Ins. Co.*, 84 Mich. 161, where the adjuster had agreed with the insured upon the value of most of the property, and had agreed upon arbitration as to the rest; and from *Young v. Ohio Farmers Ins. Co.* (Mich.) 52 N. W. Rep. 454, where the insured offered what he termed "proofs of loss" to the adjuster, who assured him that he did not care for them, and that they were not necessary. The language of this court in *Cleaver v. Traders Ins. Co.*, 65 Mich. 532, 533, is applicable here. Under this record, there is, in my judgment, no room for serious contention that this requirement of the policy was waived.

3. Did the failure to furnish proofs of loss avoid the policy? I think the question must be answered in the affirmative, according to the rule recognized by this court in *Gould v. Dwelling-House Ins. Co.*, 90 Mich. 302. The clause in that policy was, "No action shall be sustained in any court unless the insured shall have fully complied with all the foregoing requirements," among which was one requiring proofs to be furnished within a specified time. The clause in this policy differs only in that it uses the word "until" instead of the word

"unless." It is suggested that by the use of the word "until" the contract should be construed to mean that the insured cannot bring a suit within the sixty days without furnishing the proofs, but that he may bring his suit at any time after that within the year upon furnishing proofs. I am unable to concur in this view. Under such construction, this important condition, to be performed by the insured, would be useless to the insurer. Of what use or benefit to the defendant in this case were the proofs of loss furnished to it only three days before suit was brought? The condition is a reasonable one, and the reasons for it are too obvious to require mention. This policy was issued in accordance with the requirements of the statutes of this state. How. Stat. 4344-4353. The contract, besides being the deliberate meeting of the minds of the parties, is expressly directed and authorized by this law. Certainly the insured should be required to comply with it as well as the insurer. No one can misunderstand his obligation under such a contract. Every man of sense would at once recognize his duty under it. To hold as suggested would be to say that the insured may furnish his proofs at any time within twelve months,—that being the time limited for the bringing of suit,—provided only that he furnish them before he brings suit. This would be making a contract for the parties, instead of interpreting one that they themselves have made under the express provision of the law; and especially is this true in the light of the provision that any extension of time must be in writing. *Blossom v. Lycoming F. Ins. Co.* 64 N. Y. 162.

4. In view of the possibility of a new trial, one other point will be determined. The property covered was described as a stock of dry goods, groceries, hardware, queensware, hats, caps, boots, shoes, and such other articles, not more hazardous, as are usually kept for sale in country stores. It is insisted that a portion of the goods destroyed consisted of lumberman's tools, second-hand furniture, and camp equipment, which cannot come under the head of merchandise, and that they were stored in the building merely for safe-keeping. There was a conflict of evidence as to the character of this property, and the question was properly left to the jury, the court instructing them that, if they found any of the articles did not come within the class of goods mentioned, the plaintiff could not recover for them. Judgment should be reversed, and a new trial ordered.

McGrath, J., delivered the following opinion:

This action is upon a Michigan standard policy, which contains the following provisions: "The sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of loss have been received by this company in accordance with the terms of this policy. . . . If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company, . . . and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement ordinarily denominated 'proofs of loss.' . . . The

loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company."

The policy contains a number of other distinct paragraphs limiting the liability of the company. One provides that the entire policy shall be void if the insured has concealed or misrepresented any material fact, or if he has misrepresented his interest, or in case of any fraud or false swearing by the insured touching any matter relating to the insurance or the subject thereof, whether before or after the loss; another declares that the entire policy shall be void upon the happening of any one of fourteen contingencies; another provides that "this company shall not be liable for loss" in a number of enumerated cases; another that in a certain contingency the insurance shall cease; another that the company shall not be liable for losses to certain classes of property, enumerating them, unless, etc. Then follows the provision that "no suit or action on this policy shall be maintainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire." This latter provision clearly refers to such requirements in the policy as relate to the notice of loss, proofs, and adjustment of the loss; and its evident intent is to provide that no suit can be maintained unless commenced within one year, and in no event until after compliance with such requirements. The use of the words "until after"

distinguishes this case from the *Gould Case*, 90 Mich. 303, and brings it within the rule laid down in the *Tubbs Case*, 84 Mich. 646. The effect of misstatement, of changed condition and contingency, of omission and commission, of fraud and false swearing, is explicitly declared in each other paragraph in which the act, omission, or contingency is referred to; even the effect of false swearing in the proofs of loss is specifically declared, but the paragraph relating to proofs of loss suggests no penalty. This omission in an instrument replete with clear and explicit declarations of forfeiture is worthy of note. The presence of the declaration of forfeiture in every other instance, and its absence in this, is clearly not an oversight. Time is not made the essence of the provision relating to proofs, and in the paragraph relied upon by defendant the words "until after" import order or sequence, rather than an intent to make performance within the time specified the essence of the requirement. The selection of this phraseology seems to me inconsistent with such a purpose. The language has reference to the thing to be done before suit brought, rather than the time within which it is to be done. It is therefore unnecessary to consider the question of waiver.

Upon the other points I concur with *Mr. Justice Grant*, and the judgment should be affirmed, and it is so ordered.

Long, J., did not sit. *Morse, Ch. J.*, and *Montgomery, J.*, concurred with *McGrath, J.*

NEBRASKA SUPREME COURT.

W. C. NORTON, *Plff in Err.*,

v.

Byron E. TAYLOR *et al.*

(.....Neb.....)

* 1. It is a well-settled rule that the

* Headnotes by NORVAL, J.

doctrine of caveat emptor applies to all judicial sales, subject to the qualifications that the purchaser is entitled to relief on the ground of after-discovered mistake in material facts or fraud, where he is free from negligence. He is bound to examine the title, and not rely upon statements made by the officer conducting the sale as to its condition. If he buys

NOTE.—Effect of misrepresentation to purchasers by sheriff on a judicial sale.

A careful examination of the question shows very few authorities directly touching the effect of a sheriff's misrepresentations to a purchaser on an execution or judicial sale. In the above case the question is not directly decided since it is held that the purchaser had constructive notice of the facts as to the title by the pleadings and record and also that the misrepresentations made were misstatements of law merely and not of fact.

The case most nearly in point is that of *Van-sooyoc v. Klimler*, 77 Ill. 151, in which it is held that a sheriff's misrepresentations as to the freedom of the property from incumbrances were not grounds for setting aside a sale to the plaintiff in execution as the sheriff was his agent rather than that of the defendant.

In *Reed v. Diven*, 7 Ind. 189, it was held that untrue representations stating an excessive amount of incumbrances was a fraud upon the execution defendant and this with other grounds was held sufficient to set aside a sale and thus protect the defendant. The case was thus brought within the common rule that a fraud on the execution defendant whereby the property was sacrificed would be 18 L. R. A.

ground of relief from the sale. This is evidently quite a different question from that of the effect of misrepresentations whereby the purchaser is misled.

In *Auwerter v. Mathiot*, 9 Serg. & R. 397, it was said by way of argument that if the sheriff gave cause to suppose a purchaser was to have a complete legal title when he would not in fact obtain it that probably he would be discharged from the purchase upon an application therefor, but this question was not in fact in the case.

In *Lewark v. Carter*, 3 L. R. A. 440, 117 Ind. 206, it was decided that a deputy sheriff's misrepresentations as to the title of property sold by him on execution were outside the scope of his authority and would not make the sheriff liable, at least if they were made in good faith. Also that the owner of the property would not be made liable unless he was connected with the misrepresentations.

So in *Weidler v. Farmers Bank of Lancaster*, 11 Serg. & R. 134, an under sheriff's assurances as to the title of property on a sale conducted by him were held not sufficient to charge a creditor in the execution so as to make him liable for money had and received unless he authorized such assurances as the under sheriff was an agent of the law and not of the parties.

B. A. R.

without such examination, he does so at his peril, and must suffer the loss occasioned by his neglect.

2. A purchaser at a mortgage foreclosure sale will not be relieved from completing his purchase on account of defective title, or on the ground of there being prior incumbrances on the property, when the true condition of the title is fully set out in the pleadings and the record of the proceedings under which the sale was made, as he is chargeable with notice of such material facts as the record discloses.

(Marwell, Ch. J., dissents.)

(October 26, 1892.)

ERROR to the District Court for Butler County to review an order overruling a motion by plaintiff to vacate and set aside a sale of land to him under a foreclosure decree against defendant Taylor on the ground of misrepresentation. *Affirmed.*

The facts are stated in the opinion.

Mr. S. S. McAllister for plaintiff in error.

Messrs. Steele Brothers for defendants in error.

Norval, J., delivered the opinion of the court:

The Nebraska Loan & Trust Company brought suit in the district court of Butler county against Byron E. Taylor and Lela A. Taylor, his wife, to foreclose a mortgage upon the S. 4 of section 12, in township 15 N., of range 1 E., executed by the Taylors, which mortgage was junior and subject to a prior mortgage of \$3,000 on said real estate, owned and held by one Washington Quinlin. The court found that there was due the loan and trust company on its mortgage the sum of \$1,056.60; that said Quinlin had the first lien on said premises for \$3,000, with interest thereon at 6 per cent from July 1, 1888; and a decree of foreclosure was rendered, which directed the sale to be made subject to the lien of Quinlin. Subsequently an order of sale was issued, and the land, after being duly appraised and advertised, was sold by the sheriff to one W. C. Norton, the plaintiff in error herein, for the sum of \$2,585. The sale was reported by the sheriff to the court, and the same was approved and confirmed. Shortly thereafter, at the same term of court, the purchaser filed a motion to vacate and set aside the sale on the ground that he was induced to purchase the property by reason of certain representations made by the sheriff and the clerk of the district court as to the character of the title the purchaser would acquire. The motion was overruled, and Norton was ordered to pay into court the amount of his bid. To reverse said order Norton prosecutes a petition in error to this court.

It appears from the affidavits filed in support of the motion to set the sale aside that Mr. Norton came to the place where the sheriff was offering the property for sale, and inquired what he was selling, to which the officer replied that it was the B. E. Taylor land, and requested Norton to make a bid thereon; that Norton thereupon asked what amount must be bid to get the land, to which the sheriff re-

plied that under the appraisement it could not be sold for less than \$2,533.60, as that was two thirds of the appraised value, and that by paying said sum he would acquire a good and perfect title to the land, free from all liens; that the sheriff and Norton then went to the office of the clerk of the district court to ascertain what amount was against the land, and the clerk, after examining the papers, told Norton he would have to bid \$2,533.60 to get the land, but he had better make the bid \$2,535 even, and thereby get a little above two thirds of the appraised value; that the payment of said sum would clear the land of all prior liens and incumbrances; that, relying upon said statements, Norton made a bid of \$2,535, and the land was struck off to him at said sum. On the next day, the sheriff, on meeting Norton, said to him that the amount of his bid was not two thirds of the appraisement; that the land had been appraised at \$4,800, and could not be sold for less than \$3,200, and that, unless Norton would raise his bid to said sum, he could not have the land, whereupon Norton replied he would not bid the sum of \$3,200, and the sheriff then stated that such sale must be declared off. It also appears that the statements of the sheriff and clerk were innocently made, and without any intention to mislead or deceive the purchaser. It is also shown by uncontradicted testimony that the land was well worth \$6,400.

The object and purpose of the plaintiff in error is to set aside a sheriff's sale on the ground that he did not thereby acquire the title which he at the time supposed he was purchasing. No claim is made that either the plaintiff in foreclosure or Taylor or his wife was guilty of any fraud, or that any representations were made by either of them to Norton as to the character of the title to the land, or that they had any knowledge at the time of the purchase of the statements and representations made by the clerk and sheriff. The only proposition presented is whether the fact of the sheriff and clerk having represented to Norton that, if he would buy the land, he would get a clear and perfect title thereto, free from liens, although such representations were untrue, was sufficient to require the court to set aside the sale. In our view, under the facts disclosed by this record, and the law applicable thereto, plaintiff in error is not entitled to any relief. Ordinarily a purchaser at sheriff's sale takes all risks. He buys at his peril, and, if the title is bad, he must bear the loss. The rule of *caveat emptor* applies in all its force to all judicial sales. The court undertakes to sell the title of the defendant, such as it is, and it is the duty of the purchaser to ascertain for himself the character of the title he is about to acquire. *Miller v. Finn*, 1 Neb. 254; *Smith v. Painter*, 5 Serg. & R. 225, 9 Am. Dec. 344; *Vattier v. Lytle*, 6 Ohio, 478; *Lewark v. Carter*, 117 Ind. 206, 8 L. R. A. 440; *Corwin v. Benham*, 2 Ohio St. 36; *Mason v. Wait*, 5 Ill. 127; *Bishop v. O'Conner*, 69 Ill. 431; *Sackett v. Twining*, 18 Pa. 199, 57 Am. Dec. 590; *Lynch v. Baxter*, 4 Tex. 431, 51 Am. Dec. 735. An exception to the rule above stated, recognized by the weight of authorities, is where the purchaser has been induced to bid by fraud, or under a mistake of fact. A purchaser will be released from the sale on the ground of a

mistake of fact, where the mistake is not the result of his own negligence, if application therefor is made at the proper time; but he will not be released from his purchase on his mere ignorance or mistake of law. *Haden v. Ware*, 15 Ala. 149; *Burns v. Hamilton*, 33 Ala. 210, 70 Am. Dec. 570; *Hayes v. Stiger*, 29 N. J. Eq. 196; *Upham v. Hamill*, 11 R. I. 565, 23 Am. Rep. 525. The facts do not bring the case at bar within the exception to the rule, so as to entitle him to have the sale set aside. Neither the clerk nor sheriff misrepresented any material fact concerning the condition of the title. They did not inform the purchaser that there were no incumbrances upon the property, nor does Norton claim that he was not aware of there being a prior mortgage of \$3,000 on the premises at the time he made his bid. The clerk and sheriff supposed that the sale would extinguish all incumbrances, and that the purchaser would acquire a perfect title to the property. In so informing Norton they mistated the law, or the legal effect of the foreclosure proceedings and sale, and for which the law affords no relief. We think plaintiff in error is concluded by his own neglect. He had no right to rely upon the statements of the clerk and sheriff, but should have had the title and the proceedings under which the sale was made examined for himself, before he made his bid. Had he done so, he would have been fully apprised of the condition of the title. The records of the county and of the court are open to inspection to every one, and these records disclose the objection now urged to the title of the lands. Had an examination been made of either the petition to foreclose the mortgage, the decree, the appraisement, certificates of liens, or notice of sale, he would have ascertained that Washington Quinlin had a first lien upon the premises for \$3,000 and interest, and that the sale was to be made subject thereto. If Norton was deceived, it was the result of his own negligence in not taking the precaution to examine the records. He is chargeable with knowledge of their contents. Equity will not relieve a purchaser of his own negligence. *Roberts v. Hughes*, 81 Ill. 180, 25 Am. Rep. 270; *Vanacoyoc v. Kimler*, 77 Ill. 151; *Riggs v. Pursell*, 60 N. Y. 193; *Preston v. Breckenridge*, 86 Ky. 619; *White v. Seaver*, 25 Barb. 235; *Eccles v. Timmons*, 95 N. C. 540; *Webber v. Clark*, 136 Ill. 256; *Dennerlein v. Dennerlein*, 111 N. Y. 518.

In *Eccles v. Timmons*, *supra*, it is held that a purchaser at a judicial sale will not be released from his bid on the ground that the title is imperfect when the true state of the title is set out in the pleadings under which the sale was made. *Dennerlein v. Dennerlein*, *supra*, was a partners' sale. The property was described in the proceedings and in the notice of sale by metes and bounds, and as "containing thirty-one acres, be the same more or less." Prior to the sale, hand-bills were issued in the name of the referee who made the sale, in which the boundary lines of the premises were omitted and the property described as the farm of "the late John Dennerlein, containing thirty-one acres." The purchaser, in bidding upon the property, relied upon the statement in the handbills as to the quantity of land. Subsequently he discovered that the premises

only contained 24½ acres, and applied to the court for an order releasing him from completing the purchase on the ground that he had been misled as to the number of acres, which motion was denied. He appealed to the general term, where the order was affirmed (46 Hun, 561), and on appeal to the court of appeals of New York it was held that he was not entitled to relief. *Vanacoyoc v. Kimler*, *supra*, was an appeal from an order of the circuit court sustaining a motion made therein by the purchaser to set aside a sale of a tract of land made upon execution, on the ground that he was led to believe, by misrepresentations made by the officer conducting the sale, that the land was not incumbered, when in fact it was mortgaged in excess of its value. The supreme court held that the maxim of *caveat emptor* applied, and that the misrepresentation of the sheriff afforded no ground for setting aside the sale. In the case at bar the price paid was so greatly inadequate to the real value of the land as to put the purchaser on inquiry. He should have known that a half-section of land, which the evidence shows was well worth \$6,400, would sell for more than \$2,535,—the amount of his bid,—if there was no prior incumbrance. The land was actually worth several hundred dollars more than the amount bid by Norton and the Quinlin lien combined, so that, instead of losing anything by the transaction, the investment is still a profitable one. He does not complain that he has lost anything by the transaction, but rather that he failed to double on the investment.

Concerning what took place between the sheriff and Norton the day following the sale, to which reference has been made, we will say that it is unexplainable how the former made the statement he did, if correctly quoted in Mr. Norton's affidavit, in regard to what the land was appraised at. It is not true that it had been appraised at \$4,800, and could not be sold for less than \$3,200. The sum bid by Norton was more than two thirds the appraised value of the land as shown by the appraisement. However, what the sheriff may have said in that regard, as well as the statement that "the sale must be declared off," is of no importance for the reason that the status of Norton as purchaser was fixed when his bid was accepted. The officer had no power or authority to afterwards release him from his purchase.

It is contended that this case falls within, and is controlled by, that of *Paulett v. Peabody*, 3 Neb. 196, and *Fraser v. Ingham*, 4 Neb. 531. We do not think so. These cases were decided upon facts materially different from these. In the first case there was a decree of foreclosure of a junior mortgage in a suit wherein the senior mortgagee was not a party. The property was sold under a decree by the sheriff, the purchaser being induced to buy the property through the false representations of the attorneys of both the plaintiff and the senior mortgagee that the prior mortgage would be paid off out of the proceeds of the sale, and that he would take the property discharged of such lien. It was held that said false representations of the parties were sufficient grounds for vacating the sale. In the case we are considering it is not pretended that any misrepres-

representations or fraud can be imputed to any of the parties to the suit or to Quinlin, the senior mortgagee, whereby Norton was induced to buy the land. Of course, when a fraud is practiced upon the purchaser at a judicial sale by the party in interest, which induced the purchaser to make his bid, the sale will be set aside therefor. But the rule has no application here. In the case reported in 4 Neb. 581, the sheriff levied an execution upon, appraised and sold a tract of land covered with timber. The sale was duly confirmed and a deed executed to the purchaser. Afterwards it was discovered that the record of the proceedings under the writ described another tract, near by, which was of no value whatever. It was held, on a petition of the purchaser to set aside the sale, that he was entitled to relief. Clearly the case is not analogous to the one before us, for in this case there was no error in describing the lands, as in the case cited. The doctrine announced in these decisions should not be extended to cases not clearly of their class. We are of the opinion that the district court did not err in overruling the motion of the plaintiff in error to set the sale aside, and its decision is affirmed.

Post, J., concurs.

Maxwell, Ch. J., dissenting:

I am unable to give my assent to the opinion of the majority of the court, and will as briefly as possible state my reasons for failing to concur with the majority. This is an application to compel the purchaser of land under a decree of foreclosure of a mortgage to complete the purchase by paying the amount of his bid. He answers, in effect, that he was induced to bid by the misrepresentations of the officer conducting the sale, and that a large mortgage, viz., \$3,000, exists as an incumbrance against the land, which he was induced to believe would be satisfied out of the proceeds of sale. The cause was submitted to the court on affidavits as follows:

"W. C. Norton, being first duly sworn according to law, deposes and says that on the 14th day of September, 1889, while the sale was being made of the lands sold under the order of sale in this case, this affiant had a conversation with the sheriff of said county, who was then and there conducting the said sale, wherein said sheriff stated to this affiant that said land, under the appraisement, could not be sold for less than \$2,538.60, and that, under the appraisement, said last-named amount would be sufficient to buy the same. That said sheriff then and there examined the report of the appraisers, the certificates of the county clerk, clerk of the district court, and county treasurer, and, after making said examination, and after figuring up the amount of the decree and the amount of liens on said land, stated to this affiant that the said sum of \$2,538.60 would be sufficient to purchase said land, and that by paying the said sum of \$2,538.60 this affiant would acquire a good and perfect title to said land, free and clear of all previous liens or incumbrances. This affiant then and there trusted and believed the said statement and representation of said sheriff, and then and there believed that by bidding the sum of

\$2,535 for said land, and paying the said sum of \$2,535 therefor, he would receive and have a good title to said land free and clear of all other liens and incumbrances thereon. Said affiant then and there stated to said sheriff that he would give the sum of \$2,535 for said land if he thereby would acquire a clear deed and title to said land, free of all prior liens and incumbrances. That said sheriff then and there stated that this affiant would acquire such a deed and title. Affiant says that the clerk of this court, Ed. G. Hall, was also present when said sheriff stated to this affiant that a bid of \$2,535 would entitle the purchaser to a deed for said land, and that the payment of said \$2,535 would clear said land of all prior liens and incumbrances, and that said Ed. G. Hall then and there assisted said sheriff to look over and examine said appraisement and certificates, and assisted to figure up the amount of said decree and said liens; and the said Ed. G. Hall also then and there, before the time he, this affiant, bid the said sum of \$2,535, said that it was more than two thirds of the appraised value of said land, and that by bidding the said sum of \$2,535 he would be entitled to a deed therefor, and that a deed under said bid would entitle the purchaser to a deed free and clear of all prior liens and incumbrances. That this affiant then and there believed and trusted in the said statements and representations of said sheriff and said clerk, and acted upon their said statements and representations in making said bid. Affiant says that said sheriff and said clerk stated to said affiant that no bid less than \$2,538.60 could be received for said land, stating that said last-named amount was two thirds of the value of said land; and that, after the payment of said amount, there would be no prior liens on said land. That on the next day after bidding said sum of \$2,535 for said land, to wit, on the 15th day of September, 1889, he met said sheriff, whereupon said sheriff stated to this affiant that the said amount bid by this affiant, to wit, \$2,535, was not two thirds of the appraised value of said land; that said land had been appraised at the sum of \$4,800, and could not be sold for less than \$3,200, and that unless he, this affiant, would raise his said bid to said sum of \$3,200, he, said sheriff, could not sell said land to this affiant, whereupon said affiant stated to said sheriff that he, this affiant, would not bid the said sum of \$3,200. That said sheriff then stated to this affiant that said sale must be declared off, and no sale, as he, said sheriff, could not sell said land for less than \$3,200. That this affiant then and there believed that his said bid of \$2,535 was wholly rejected by said sheriff, and he would not be held to act upon said bid or pay for said land, and paid no more attention to said pretended purchase, and did not suppose or anticipate that any effort would be made to confirm said sale, offer or bid, and was not present in court when said sale was confirmed, and had no notice that an application would be made to this court to confirm said sale, and was not in the court room, and not in Butler county, when the sale was confirmed. That, if he had known or supposed that an application was going to be made to this court to ratify or

confirm his said bid, he would have appeared by counsel and have opposed said confirmation, on the ground and for the reason that in fact he was misled and deceived by the said statements and representations of said sheriff and said clerk, in this, to wit: *First.* That the decree under which said land was sold was not a first lien on said land; that in fact there was a prior lien on said land, amounting to the sum of \$8,000, and that said land was sold subject to said prior lien of \$8,000, which said prior lien of \$8,000 consists of a mortgage given thereon by Byron E. Taylor and wife to the Nebraska Loan & Trust Co., which said mortgage is in full force and effect, and not yet due. *Second.* That said land, or the interest therein, of said Byron E. Taylor and wife, was not appraised at the sum of \$8,000, as stated by said sheriff and said clerk at and before the time of said bid, but that said interest of Byron E. Taylor and wife in said premises was appraised at the sum of \$1,478.64, and that in fact said land could have been bought at said sale for two thirds of said last-named amount, as fully appears by the records and files in this proceeding. That, if this affiant had known the true condition of liens and incumbrances on said land, and had been correctly informed of the true condition of affairs regarding liens and incumbrances on said land by said sheriff and said clerk, he would not have purchased or bid on said land, and, had he known or supposed that an application was about to be or going to be made to this court to confirm said sale, and had he not been misled by the said sheriff telling this affiant that he, said sheriff, could not accept said bid, he, this affiant, would have at once, and before the confirmation of this sale, taken steps to examine and determine the regularity of said sale and the reasonable or unreasonable extent of his said bid. That he had no knowledge or information that an application had been made to confirm said sale until after the same was confirmed by this court, whereupon he at once took steps to institute this motion, and says that a great wrong, hardship and injustice will be done this affiant if he is compelled to pay the amount of his said bid or offer, and that said bid or offer was made under a misapprehension of the true facts surrounding said bid or offer, as stated and recited in this affidavit. W. C. Norton."

"I, Ed. G. Hall, being first duly sworn, depose and say I am the clerk of the district court of Butler county, Nebraska, duly qualified and acting as such, and was on the 14th day of September, 1889; and on the said 14th day of September the sheriff of Butler county was making sale of one Byron E. Taylor's farm by virtue of an order of sale in the above-entitled cause. That during the time of said sale the said sheriff came to my office, and I asked of him, 'Have you a bidder for the land?' He answered: 'No, I have not; but I think Norton is going to buy it.' He then went out, and shortly after W. C. Norton came to my office, and asked me how much there was against the Byron E. Taylor farm. Before having time to answer, the sheriff returned, and, together with said Norton, seated themselves at a desk in my office. While at the desk I heard said Norton say to the sheriff, 'If you'll make me a

clear title to the land, I will buy it.' The sheriff then said, 'I will make you a sheriff's deed.' I then said, 'A sheriff's deed is as good a deed as can be made;' that his, said Norton's, title would be perfectly good upon receipt of a deed of that kind. I then picked up from the desk the order of sale and certificates attached, and said to the said Norton, 'I will tell you in a minute what you'll have to pay to get the land;' but, upon looking over the papers, did not find the said appraisement, and, being in a hurry, asked the sheriff what the appraisement was. He replied that it was \$——. I then said to said Norton: 'You'll have to pay two thirds of this amount, which will be \$2,533.60;' and I further said to the said Norton: 'You had better make the bid \$2,535 even. You'll be sure then to cover everything.' I also told said Norton that all other liens would be canceled as against this land when the sale was confirmed, not knowing at that time that said sale was being made subject to the lien of Washington Quinlin for \$3,000, but did know that said lien and mortgage did exist, but believed and told said Norton that said lien would be no good if the sale was confirmed under his bid. And further this affiant sayeth not. Ed. G. Hall."

It will be observed that Norton applied to the clerk who should have had the appraisement if the sheriff had done his duty. The appraisement would have shown what liens existed against the land. The sheriff did not seem to have it in his possession. In view of the course he pursued afterwards, it is probable that he had a design in suppressing the appraisement.

"I, Sumner Darnell, being first duly sworn, depose and say that I am the sheriff of said county, duly qualified, and acting as such. That on the 14th day of September, 1889, while I was offering the land described in the order of sale in the above named cause for sale under an order of sale issued in the above-entitled cause on the 12th day of July, 1889, one W. C. Norton came to me, and said, 'What is this you are selling?' I says, 'A farm.' He says, 'What farm?' and I says, 'E. B. Taylor's.' He says, 'What have you been offered?' I told him, 'I have no bid yet,' and asked him to make a bid. He, Norton, said, 'What is there against it?' Then I told him to go up stairs to the clerk of the district court, Ed. G. Hall, who is there in his office, and see for himself. Then he, Norton, says, 'If you will make me a clear title, I'll give you \$——.' Then he went upstairs to the office of the clerk of said district court. In a few minutes I followed. I asked him what he had found out. Ed. G. Hall, the said clerk, said, 'It will take \$2,533 to make two thirds of the appraised value.' Then Ed. G. Hall says: 'You had better make it \$2,535, and make sure that the amount is sufficient for the two thirds of the appraised value.' And I, believing that the two thirds of said appraisement was \$2,533.60, and believing in good faith that that was the least amount that would buy said land at said sale, said, 'Yes, you had better make it \$2,535;' and he, Norton, said, 'Well, I'll raise it that much if you'll make me a good deed.' I said, 'I'll make you as good a deed as a sheriff can make,' or words to that effect. Then I went down—

stairs, and, receiving no other bid, declared it sold to W. C. Norton. The next day, the 15th of September, or within a day or so after, I met said W. C. Norton, and told him there was a mistake, and that his bid was not two thirds of the appraised value of said land, and the sale would not be confirmed, as I believed. And then he said, 'I will not raise my bid,' and 'I will not take the land.' That said W. C. Norton made no other bid than the offer I have above described. Sumner Darnell."

As an offset to these affidavits, a number of persons were permitted to swear that the land in question was of greater value than the amount fixed by the appraisers and it was worth from \$15 to \$20 per acre. It is very clear to my mind that if the testimony of the witnesses swearing to the increased value is true, it is an additional reason why the sale should be set aside because the landowner is being defrauded. As an evidence that the testimony is not true, however, the landowner, as well as the trust company, is here insisting on the performance of the contract, evidently believing that the property would not bring as much if again offered for sale; but, even if the affidavits are true as to the value, they cannot be considered in this case. Suppose the plaintiff in error to be a man of very limited means, who desired the land for a farm, and was able to procure a loan thereon, if free and unincumbered, for \$3,000, but utterly unable to obtain a loan for any greater sum. In a case of that kind it would be possible to rob him of every cent he possessed by compelling him to accept property subject to a heavy incumbrance when he had no means of satisfying the same. It will not do to say that the plaintiff in error possesses sufficient means, and is able to satisfy the incumbrance, because the same rule must apply to rich and poor alike, and both will suffer by the proposed rule. It will be observed that the majority opinion is predicated almost wholly upon sheriffs' sales under executions in actions at law or in partition cases. The case of *Eccles v. Timmons*, 95 N. C. 540, cited in that opinion, was a partition case, and the title of the various parties was set out in the petition. In that case the petition evidently contained a condensed statement of the title of the several parties, and the objection was not made for many months after the purchaser had taken possession, and not until a payment was due. It is said: "It will be observed that the title of the defendant tenants is set out in the petition, and a copy of the deed under which they derive it annexed thereto. With the information thus furnished or of easy access, the purchaser bids for the lots, pays part of the purchase money, and secures the residue by a note with the allowed credit. This credit expired on December 1, 1885, and seven months thereafter, when served with a notice of a demand for judgment, for the first time the defense is set up of an imperfect title to the lot. It is not a case when, upon the face of the pleadings, a perfect title purports to be sold that is afterwards discovered to be defective, when the court will relieve, and not compel, the purchaser to pay for what he does not get. But the true state of the title appears in the averments in the petition itself, so that every bidder may know by examination what

estate he will acquire in the land; and his bid must therefore be regarded as his own estimate of the value of what he may buy, and the court may direct thereafter to be conveyed." "A sale by the master in a case of this kind" (for partition), says Ruffin, *Ch. J.*, in *Smith v. Brittain*, 88 N. C. 847, 851, "is but a mode of sale by the parties themselves. It is not merely a sale by the law, *in invitum*, of such interest as the party has or may have in which the rule is *caveat emptor*, but professes to be a sale of a particular estate, stated in the pleadings to be vested in the parties, and to be disposed of for the purpose of partition only. Thereupon, if there be no such title, the purchaser has the same equity against being compelled to go on with his purchase as if the contract had been made without the intervention of the court, for in truth the title has never been judicially passed on between persons contesting it." It seems to me the case is directly against the majority opinion in this case. A sheriff is the officer provided by law in each county to execute the ordinary process of the court. His duties are clearly pointed out by statute. While, to a considerable extent, he is under the control of the court, yet he does not derive his power from it. Where, however, a court renders a decree of foreclosure, it directs the sale to be made by some particular person; not necessarily the sheriff. This person may be the sheriff, but, if so, it is because he is designated by the court to make the sale, and not because the duty devolves upon him as sheriff. A sale under a decree of foreclosure under the former chancery practice was made by a master in chancery or some one designated by the court; and the same rule prevails under the Code, except that the office of master has been abolished, and the court is authorized to appoint a commissioner to conduct the sale. In either case the sale is made by the court, and the person conducting the sale is the agent of the court.

In *Veeder v. Fonda*, 3 Paige, 97, 3 L. ed. 73, it is said: "As property to a vast extent is sold under the decrees and orders of this court, much of which property belongs to infants and others who are not able to protect their own rights, it has always been an important object with the court to encourage a fair competition at master's sale. For this purpose it is necessary that purchasers at such sales should understand that no deception whatever will be permitted to be practiced upon them. That in a contract between them and the court they will not be compelled to carry that contract into effect under circumstances where it would not be perfectly just and conscientious in an individual to insist upon the performance of the contract against the purchaser, if the sale had been made by such individual or his agent. It is therefore a principle of the court that the master who sells the property shall not, in the description of the same, add any particular which may unduly enhance the value of the property, or mislead the purchaser." To the same effect are *Post v. Leet*, 8 Paige, 837, 4 L. ed. 451; *Seaman v. Hicks*, 8 Paige, 656, 4 L. ed. 580. In the last case cited it is said: "The terms of sale show that the land was sold as and for a good title, except as to the incumbrance mentioned. The court therefore ought not to

compel the purchaser to complete his purchase, unless he would have obtained, under the master's deed, such an interest, both in the land and in the buildings thereon, as he was authorized to suppose he was buying when the property was struck down to him upon his bid." The court in that case, however, reached the conclusion that the title was as represented, and required the purchaser to perform. See also *Kauffman v. Walker*, 9 Md. 229; *Merwin v. Smith*, 2 N. J. Eq. 182; *Den v. Zellers*, 7 N. J. L. 185; *Hodgson v. Farrell*, 15 N. J. Eq. 88. Many other cases to the same effect might be cited.

Where a sale is conducted by a commissioner under a decree of foreclosure, the commissioner represents the court. He is the hand of the court, so to speak, by which the decree is carried into effect. Any misrepresentation made by him, even if innocently made, but by reason of which the purchaser has been induced to bid, and will not acquire the interest which he is lead to believe he would acquire, are sufficient to justify setting the sale aside. This, so far as I am aware, is a uniform rule in the courts of equity: that, if the person who conducted the sale made misstatements, either honestly, ignorantly, or intentionally, whereby the purchaser was deceived and would be defrauded, the sale will not be sustained against his objection. It is no answer to say in effect that the property is cheap enough anyway, and therefore the purchaser receives the worth of his money. That is begging the question. In effect, it is admitting all that is claimed, but seeking to excuse the denial of relief. The purchaser may justly say: "I was deceived by the false representations of your agent. He misstated the facts. The appraisement was not at hand so that even the clerk could not obtain it. There was no bid but mine, and that was procured by falsehood and misrepresentation." The misrepresentation is admitted, and the court answers the purchaser in effect: "You had no right to rely upon the representations of the commissioner appointed by the court to conduct the sale; and, although you were the sole bidder, and there was the incumbrance of \$3,000 on the land, of which you had no notice, and was in excess of the amount of your bid, yet the land is cheap enough and the court will not relieve you."

In regard to the objection that the purchaser could have examined the title for himself, the answer is that there was no time to make an investigation of the title. The sheriff had offered, and was then offering, the property for sale. There were no bidders. Norton came up and inquired in regard to the sale, and the title that would be acquired. The officer professed to know and informed the party that he would obtain a clear title. The bidder certainly could rely upon this statement. Had the officer said: "I have no knowledge in regard to the matter. You must examine the records for yourself,"—then the purchaser would have bid at his peril, and the doctrine of *caveat emptor* would have applied. Considerable stress is laid upon the doctrine of *caveat emptor*, and it is said the purchaser must beware. The doctrine does not apply where a party has been induced to bid by a misstatement of facts made by the officer who conducted the

sale; and I think not a single case can be found where a sale was made under a device of a court of equity by an officer appointed by the court where such misrepresentations have not been held good cause for setting the sale aside. The decision in this case practically overruled *Paulett v. Peabody*, 3 Neb. 196, and *Fraser v. Ingham*, 4 Neb. 531, and I believe does great injustice to the purchaser, and places the court in the attitude of approving deception in its officers in conducting sales under its direction.

2. It is admitted, by not being denied, that "on the 15th day of September, 1889, he (Norton) met the sheriff, whereupon said sheriff stated to the affiant that the said amount bid by this affiant, to wit, \$2,585, was not two thirds of the appraised value. . . . That the land had been appraised at \$4,800, and could not be sold for less than \$3,200, and, unless Norton would raise his bid to \$3,200, the sale would be declared off," etc.: that is, that Norton's bid was not sufficient to authorize the sheriff to entertain it, and therefore, unless Norton would raise the bid to \$3,200, he would make a report of no sale. Norton informed him that he would not raise his bid, and the sheriff in effect declared it off. It is probable that this was part of the scheme to defraud Norton by putting him off his guard, and preventing an investigation of the title before the sale was confirmed, because the sheriff, without further notice to Norton, made a report of the sale, and it was thereupon confirmed without notice to Norton, and in his absence. So far as the sheriff is concerned, his conduct is wholly indefensible, and can only be accounted for upon the theory of a scheme to defraud Norton, in which probably he was not alone. I do not care to comment on this feature of the case, as it presents the officer in a very unenviable light. As I understand the law, a court of equity, in making a sale of real estate under a decree of foreclosure, takes the place of the vendor, and the person making the sale is the agent of the court, and it is the duty of the court to see that the sale was fairly conducted in all respects, and that it will not sanction misrepresentations by its agent as to the title of the property or incumbrance to induce persons to bid. In other words, misrepresentations which, if made by the landowner himself to a purchaser, would be good ground to set a sale aside, are equally so when made by the person appointed by the court to conduct a sale under a decree; and experience has shown that the establishment of this rule has induced competition in bidding at such sales. *McGowan v. Wilkins*, 1 Paige, 120, 2 L. ed. 584; *Morris v. Mowatt*, 2 Paige, 586, 2 L. ed. 1041, 22 Am. Dec. 661; *Veeder v. Fonda*, 8 Paige, 64, 3 L. ed. 71; *Seaman v. Hicks*, 8 Paige, 656, 4 L. ed. 580; *Kauffman v. Walker*, 9 Md. 229; *Tooley v. Gridley*, 3 Smedes & M. 493, 41 Am. Dec. 628.

I do not understand that the rule of *caveat emptor* applies where another element intervenes, viz., false representations. It seems to me that great injustice is done to the plaintiff in error, and a rule is established that is liable to be fraught with gross injustice, not only to purchasers at judicial sales, but to the owners of the equity of redemption as well. In my view the sale should be set aside.

ALABAMA SUPREME COURT.

W. W. JONES, *Appt.*,

v.

Josephine E. JONES.

(.....Ala.....)

1. A special Act of the Legislature granting a divorce is in violation of Ala. Const., art. 4, § 21, which prohibits the suspension of any general law for the benefit of any individual, since the subject of divorce is covered by general laws.
2. Voluntary abandonment of a wife by her husband is shown where he requires her to leave his house and fails to provide for her support and does not consent to her return.
3. A wife's offensive behavior, coarse and indelicate language and her anonymous letters foully slandering one of her husband's daughters by a former marriage, do not furnish him a legal justification for his abandonment of her which will prevent her from obtaining a divorce for abandonment.
4. A wife's ill temper and mean disposition which makes her principally responsible for an unhappy state of feeling in the household, although not a legal justification to her husband for abandoning her, may in a measure palliate his offense and abridge her claim to an allowance from his estate for her separate maintenance on obtaining a divorce from him for abandonment.

(April 27, 1892.)

A PPEAL by defendant from a decree of the Chancery Court for Fayette County granting plaintiff a divorce and alimony against defendant. *Modified and affirmed.*

A separation between plaintiff and defendant took place in 1886. At a session of the General Assembly of the State, in 1888-89 there was passed "An Act for the Relief of William W. Jones." This Act was in the following language: "Section 1. Be it enacted by the General Assembly of Alabama, that William W. Jones, of Fayette county,

NOTE.—Validity of legislative divorce.

Without considering the effect upon the power of the state legislatures to grant divorces of the provisions of the Federal Constitution, this note will deal with the question, How far under the state governments as established is the granting of divorces within the power of the Legislature? Many of the state constitutions contain provisions directly prohibiting the Legislature from passing divorce bills. In such states the validity of a legislative divorce can be determined by an examination of the Constitution, and it is needless to set the provisions out here.

In England the practice has always been for Parliament to pass divorce bills and that practice continues to the present time, except, possibly, where the case is covered by the Divorce Act of 1857. See Westropp's Divorce Bill, L. R. 11 App. Cas. 294; Hewat's Divorce Bill, L. R. 12 App. Cas. 812; Gifford's Divorce Bill, L. R. 12 App. Cas. 861; A's Divorce Bill, L. R. 12 App. Cas. 364; Joynt's Divorce Bill, L. R. 13 App. Cas. 741.

Such being the established rule when the state legislatures began their independent existence they as matter of course assumed the right to exercise the same power, and their action met with such universal acquiescence that the aid of the courts was seldom invoked to test the validity of divorce bills. The result is that while many legislative divorces appear upon the statute books during the early history of the country most of the cases in which mention is found of the subject treat it almost as a matter of history. See Young v. Naylor, 1 Hill, Eq. 383; Jones v. Jones, 2 Overt, 2, 5 Am. Dec. 645; Noet v. Ewing, 9 Ind. 37.

It has been held that in the absence of constitutional provisions the Legislature may grant divorces. Head v. Head, 2 Kelley (Ga.) 191.

In the absence of direct prohibition the power over divorces remains in the Legislature. Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654.

In Richardson v. Wilson, 8 Yerg. 77, the court said both parties recognize the binding force of the statute granting the divorce upon them and the court will so construe it.

Granting divorces a rightful subject of legislation.

It was said in a Maryland case that granting divorces can be viewed in no other light than as regular.

ular exertions of legislative power. Crane v. McGinnis, 1 Gill & J. 474, 19 Am. Dec. 237.

The question has arisen under the territorial organic Acts conferring power on the territorial legislatures, and the Supreme Court of the United States has said that the granting of divorces is a rightful subject of legislation within the meaning of the Act of Congress conferring power upon territorial legislatures to legislate upon such subjects. Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654.

Although in a prior case in a territorial court, where a territorial Legislature had passed a general law regulating the subject of divorce and then proceeded to pass a special Act granting a divorce, the court in passing upon the validity of the special Act said the Act cannot be sustained without holding that the granting of a divorce is a rightful subject of legislation, without violating that great principle of equality upon which all justice and all equity repose and without denying to the petitioner the benefit of the law of the statute and refusing her a day in court and a right to a fair trial, and held the law to be invalid. Higbee v. Higbee, 4 Utah, 19.

How far conflicting with judicial power.

In some instances where the state Constitution has not expressly prohibited the granting of legislative divorces such prohibition has been sought to be sustained by implication from other provisions. The provision which seems to have been chiefly relied on is the one dividing the government into departments and prohibiting one department from encroaching on the powers of the others. There is considerable conflict of opinion on the question whether or not the granting of a legislative divorce is an encroachment upon the power of the courts. It has been held, on the one side, that under a territorial organic Act separating the legislative from the judicial departments the Legislature had no power to grant divorces. Ponder v. Graham, 4 Fla. 23; Chouteau v. Magen, 28 Mo. 192.

Power to grant divorces is judicial. Bingham v. Miller, 17 Ohio, 445, 49 Am. Dec. 472.

The division of the government into departments deprives the Legislature of the power to grant divorces. State v. Fry, 4 Mo. 147.

Marriage cannot be dissolved by the Legislature. Bryson v. Campbell, 12 Mo. 496.

be, and he is hereby, released from the bonds of matrimony now existing between him and his wife, Josephine E. Jones, which divorce shall have the same effect as divorce granted by a court of chancery; and the said Jones is hereby permitted to contract matrimony again: provided, that the provisions of this Act shall not affect in any manner the rights of the said Mrs. Josephine E. Jones in the courts of this state in the recovery of alimony in any proceedings in any court of this state for a divorce from the said William W. Jones. Approved February 18, 1889."

Upon the final hearing the chancellor granted the prayer of the bill dissolving the bonds of matrimony between the complainant and the defendant, and decreed that the complainant was entitled to receive temporary alimony "pendente lite" at the rate of \$15 per month, amounting to \$220, and was also entitled to recover \$300 as attorneys' fees; and fixed her permanent alimony at \$25 per month.

It is an interference with judicial power. *Bryson v. Bryson*, 17 Mo. 590.

In *Jones v. Jones*, 12 Pa. 351, 51 Am. Dec. 612, the court says: "The Legislature seems to have acted on the ground that the power to grant divorces was a legislative power and therefore not requiring a judicial examination. We think, however, that the doctrine may well be questioned."

It seems to be assumed that it would be a violation of the division of the government into departments for the Legislature to grant a divorce, in *Berthelemy v. Johnson*, 3 B. Mon. 90, 38 Am. Dec. 180.

It was intimated in *Maguire v. Maguire*, 7 Dana, 184, that so far as a divorce was for the benefit of one of the parties for breach of contract by the other it was judicial and beyond the authority of the Legislature. But in *Cabell v. Cabell*, 1 Met. (Ky.) 319, where the divorce was for the benefit of both parties and was acquiesced in by both, the court held that it might be granted by the Legislature.

The separation of the departments of government will prevent an appeal to the Legislature after the commencement of a divorce suit in the courts. *Gaines v. Gaines*, 9 B. Mon. 205, 48 Am. Dec. 425.

Another class of cases has upheld legislative divorces where the courts had no jurisdiction.

The power of the Legislature to grant a divorce in a case where the court had jurisdiction was questioned in *Townsend v. Griffin*, 4 Harr. (Del.) 442.

The Legislature has power to grant divorces in cases where the court has no jurisdiction; but where the court has jurisdiction the Legislature cannot exercise the power under a Constitution dividing the government into departments and prohibiting one department from encroaching on the power of the others. Opinion of Justices, 18 Me. 479.

A legislative divorce is valid in a case of which the court under existing laws has no jurisdiction. *Adams v. Palmer*, 51 Me. 490.

The territorial legislatures had power to grant divorces in cases over which power had not been granted to the courts by general law. *Levins v. Sletor*, 2 G. Greene, 604.

But on the other side, and in conflict with the above decisions, the United States Supreme Court has decided that the division of government into departments and the consequent implied inhibitions upon the legislative department to exercise judicial functions was never intended nor understood to exclude legislative control over the mar-

Messrs. McGuire & Collier, for appellant:

The special Act in question is not violative of the Constitution, but will be upheld by the courts.

The legislative action in question is not only not prohibited by the section of the organic law cited, but it is there expressly provided for. Its terms are, no special law shall be enacted for the benefit of individuals in cases which are or can be provided for by a general law, or where the relief sought can be given by any court of this state. In pronouncing on the constitutionality of an Act which has received the sanction of a co-ordinate department of the government—the legislative department—the courts will indulge the presumption that such Act is constitutional, until clearly convinced to the contrary.

Zeigler v. South & North Ala. R. Co. 58 Ala. 594; *South & North Ala. R. Co. v. Morris*, 65 Ala. 198; *Edwards v. Williamson*, 70 Ala. 145; 8 Brick. 127, 23.

riage relation. *Maynard v. Hall*, 125 U. S. 190, 31 L. ed. 654.

So it has been decided that granting divorces is not an invasion of the power of the judiciary. *Starr v. Pease*, 8 Conn. 547; *Maynard v. Valentine*, 3 Wash. Terr. 3.

The mere fact that the Legislature has conferred power on courts over divorce proceedings will not prevent it from passing special Acts granting divorces. *Wright v. Wright*, 2 Md. 429, 56 Am. Dec. 726.

Construction of particular constitutions.

A constitutional provision that all cases of divorce shall be heard and tried by the superior court until the Legislature shall by law make other provisions, makes the granting of a divorce a judicial proceeding which removes it from the jurisdiction of the Legislature. *Clark v. Clark*, 10 N. H. 385, 34 Am. Dec. 165.

Under the Massachusetts Constitution, which provides that all cases of divorce shall be heard by the governor and council until the Legislature shall by law make other provisions, when the Legislature conferred the power on the courts it lost all power to grant divorces. *Sparhawk v. Sparhawk*, 116 Mass. 317; *Shannon v. Shannon*, 2 Gray, 225.

In Ohio the powers of the Legislature are held to be delegated and therefore the Legislature has no power to grant divorces unless it is expressly conferred by the Constitution. *Bingham v. Miller*, 17 Ohio, 445, 49 Am. Dec. 472.

Where the Constitution expressly prohibits the Legislature from exercising the power to grant divorces whenever the courts are vested with the power the Legislature has by implication the power to grant them in all cases not within the power of the court. *Jones v. Jones*, 12 Pa. 351, 51 Am. Dec. 612; *Cronise v. Cronise*, 54 Pa. 264; *Roberts v. Roberts*, 54 Pa. 265.

A special statute authorizing a divorce in a case in which it could not have been granted under general law is unconstitutional as granting a special indulgence by way of exemption from a general law. *Simonds v. Simonds*, 103 Mass. 575, 4 Am. Rep. 576.

Authorizing the court to grant a divorce in a particular case for a cause not provided for by the general law is a violation of a constitutional prohibition against legislative divorces. *Teft v. Teft*, 3 Mich. 68.

H. P. F.

The question will be approached with great caution, patiently and deliberately examined in every aspect, indulging the presumption of its validity; and the court will not pronounce sentence of invalidity until it is clear that the Constitution and the statute cannot co-exist.

Jones v. Black, 49 Ala. 540; *Mobile v. Dargan*, 45 Ala. 810; *Mobile v. Stonewall Ins. Co.* 53 Ala. 570; 8 Brick. 127, 20.

A state Legislature may grant divorce, unless expressly or impliedly prohibited by its Constitution.

5 Am. & Eng. Encyclop. of Law, pp. 746, 747; *Strader v. Graham*, 51 U. S. 10 How. 82, 13 L. ed. 32; *Green v. State*, 58 Ala. 190, 29 Am. Rep. 739; *State v. Gibson*, 86 Ind. 389, 10 Am. Rep. 42; *Sewall v. Sewall*, 132 Mass. 156, 28 Am. Rep. 299; *Hopkins v. Hopkins*, 8 Mass. 158; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Lamar v. State*, 8 Heisk. 287; *Fraser v. State*, 3 Tex. App. 263, 30 Am. Rep. 131; *Cook v. Cook*, 56 Wis. 195, 43 Am. Rep. 706.

The enactment of the statute was purely and simply a question of legislative discretion and expediency.

Holman v. Bank of Norfolk, 12 Ala. 403; *Clarke v. Jack*, 60 Ala. 278; *Bruce v. Bradshaw*, 69 Ala. 380; *Tindal v. Drake*, 60 Ala. 170; *Cooley, Const. Lim.* 85-108; *Watson v. Oates*, 58 Ala. 649; *McKemie v. Gorman*, 65 Ala. 442.

The General Assembly has the same right to construe the Constitution of the state that the courts have, and where the question is one in which a liberal construction may be made, the legislative construction will not be condemned, unless it very clearly appears that it is wrong.

Ex parte Selma & G. R. Co. 45 Ala. 696, 6 Am. Rep. 722.

When the legislative decree was passed, dissolving the bonds of matrimony between complainant and defendant, all her rights, if any at all, passed from her. The relation of husband and wife did not exist between the parties at the time the bill was filed, and hence she had, and has, no rights as wife.

5 Am. & Eng. Encyclop. of Law, p. 746, note, p. 840; *Boykin v. Rain*, 28 Ala. 842, 65 Am. Dec. 349; *Barber v. Root*, 10 Mass. 263; *Kirrigan v. Kirrigan*, 15 N. J. Eq. 149.

There can be no original proceeding for alimony after divorce.

Wilde v. Wilde, 86 Iowa, 819; *Gray v. Gray*, 32 N. J. Eq. 25, note; *Petersine v. Thomas*, 28 Ohio, 596; *Bowman v. Worthington*, 24 Ark. 522; *Galland v. Galland*, 88 Cal. 265; *Murray v. Murray*, 84 Ala. 386.

The decree of divorce estops the plaintiff from maintaining this action. After the divorce the parties have no claim upon each other growing out of the former relations of husband and wife, except such as given them by the decree.

Clark v. Foadick, 6 L. R. A. 183, 118 N. Y. 7; *Kamp v. Kamp*, 59 N. Y. 212; *Crimmins v. Crimmins*, 29 Hun, 200.

As by this law an end has been put to the relation of marriage, as effectually as would have resulted from the death of either of the parties, the consequence is that all duties and

obligations dependent upon the continuance of that relation immediately cease.

See *Harrison v. Harrison*, 20 Ala. 649, 56 Am. Dec. 227.

An unconstitutional proviso in a statute does not affect the validity of the provisions which may be maintained separate and apart from it, but the courts will strike out the former and give effect to the latter.

Mobile & O. R. Co. v. State, 29 Ala. 573; 2 Brick. 438, 47; *Ramagnano v. Crook*, 85 Ala. 228; *Bogan v. State*, 84 Ala. 449.

Alimony is an allowance paid by the husband out of his income.

Lovett v. Lovett, 11 Ala. 763, 767. See also *Murray v. Murray*, 84 Ala. 365.

Messrs. Tompkins & Troy also for appellant.

Messrs. Arnold & Evans for appellee.

Walker, J., delivered the opinion of the court:

This is a suit by the wife against her husband for a divorce from the bonds of matrimony, and for alimony. It is contended for the appellant that all claim to such relief was barred by the Act of the General Assembly of Alabama, releasing him from the bonds of matrimony theretofore existing between him and the appellee. Acts Ala. 1888-89, p. 361. If that Act was valid, no divorce could be decreed in this case, as the bonds of matrimony had already been dissolved when the bill was filed. The proviso in the Act only covered a contingency which the enactment itself rendered impossible; for, if the Act operated to divorce the parties, the wife could not thereafter maintain any proceedings for a divorce from her former husband, and the proviso does not purport to save her rights to alimony except in proceedings by her for a divorce. If the Act had "the same effect as a divorce granted by a court of chancery," an end was thereby put to the relation of marriage, and, as a consequence, so far as the husband was concerned, the divorce having been granted in his favor, all duties and obligations necessarily dependent upon the continuance of that relation immediately ceased. *Harrison v. Harrison*, 20 Ala. 649, 54 Am. Dec. 227; *Boykin v. Rain*, 28 Ala. 843, 65 Am. Dec. 349. Before the power of granting divorces from the bonds of matrimony was confided to the courts in England, parliament assumed and exercised the right of passing special Acts dissolving the bonds of marriage. Many of the state legislatures in this country have passed special Acts of divorce, the validity of which has been sustained, when not rendered invalid by the operation of constitutional prohibitions. The courts have generally recognized the right of the state legislatures, when not restrained by the constitutional limitations, to exercise the same power over the subject as was possessed by the English parliament. And the enactment of general laws conferring upon the courts also authority to grant divorces in certain enumerated cases has not usually been regarded as having the effect of abridging the plenary power of the Legislature to dissolve the bonds of marriage by special Acts, either in the same or in other classes of cases. 1 Bishop, Mar. & Div. 6th

ed. §§ 660-695; Cooley, Const. Lim. 6th ed. 128-132; 5 Am. & Eng. Encyclop. Law, 747; *Maynard v. Hill*, 125 U. S. 190, 81 L. ed. 654; *Starr v. Pease*, 8 Conn. 541; *Wright v. Wright*, 2 Md. 429, 56 Am. Dec. 723. The power to grant divorces by special Acts is somewhat anomalous as a legislative function. It has been conceded rather because it had been too long assumed and acted on to be denied than because, on principle, it could be regarded as properly within the legitimate sphere of legislative action. Kent says: "The question of divorce involves investigations which are properly of a judicial nature, and the jurisdiction over divorces ought to be confined exclusively to the judicial tribunals, under limitations to be prescribed by law." 2 Kent, Com. 106. Cooley says: "But it is safe to say that the general sentiment in the legal profession is against the rightfulness of special legislative divorces; and it is believed that, if the question could originally have been considered by the courts, unembarrassed by any considerations of long acquiescence, and of the serious consequences which must result from affirming their unlawfulness, after so many had been granted, and new relations formed, it is highly probable that these enactments would have been held to be usurpations of judicial authority, and we should have been spared the necessity for the special constitutional provisions which have since been introduced." Cooley, Const. Lim. 6th ed. 132.

In each of the former Constitutions of this state there was a provision prohibiting the granting of divorces except in cases provided for by law by suit in chancery. The Constitution of 1819 further provided that "no decree for such divorce shall have effect until the same shall be sanctioned by two thirds of both Houses of the General Assembly." Const. 1819, art. 6, § 13. The corresponding section of the Constitution of 1861 was in these words: "Divorces from the bonds of matrimony shall not be granted but in cases provided for by law, by suit in chancery. But decrees for divorce shall be final, unless appealed from within three months from the date of the enrollment thereof." Const. 1861, art. 6, § 13. The substance of this provision was carried forward into the Constitutions of 1865 and 1868, respectively. Const. 1865, art. 4, § 80; Const. 1868, art. 4, § 80. The existence of these express constitutional restraints may be regarded as implying a recognition of the power of the Legislature to grant divorces in special cases, unless the exercise of such power is prohibited by the Constitution. The present Constitution of the state contains no express provision on the subject of divorce. It, however, prescribes general restraints upon the power of the Legislature which were not found in the former Constitutions. The question to be considered is whether the omission of a special provision against granting divorces except in judicial proceedings left the Legislature free to exercise an original plenary power over the subject, and to grant divorces by enactments for special cases. It is clear that such special legislation for individual cases is not in harmony with the policy of preserving an equality of all persons before the law, without favors to some and discrimination against others under similar cir-

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cumstances. The subjects of marriage and divorce are regulated by the general laws of the state, statutory and common. Those general laws fix the rights, duties, and obligations of the parties to the marriage relation. They also provide for the dissolution of that relation in certain contingencies, and prescribe the causes which authorize such dissolution, the kind and measure of relief to be granted, and the mode of proceedings to secure it. If a husband or a wife, who is not entitled under the general law to be relieved of the duties and obligations of the marriage relation, may be freed therefrom by a special Act of the Legislature for his or her relief, the result is to dispense with the general law for the benefit of an individual. Even if the circumstances are such that the same relief could be secured by proceedings under the general law, the granting of the relief by a special Act of the Legislature is equally an exemption from the operation of a general law, as the necessity of having recourse to the remedies which others in similar circumstances must pursue is dispensed with. Such legislation singles out an individual for special indulgence, and excepts him from obedience to the general rules which others must conform to. Several provisions of the present Constitution of the state indicate a purpose to confine the Legislature, as far as practicable, to the enactment of general laws, applicable alike to all persons under similar circumstances. It is made the duty of the General Assembly to "pass general laws, under which local and private interests shall be provided for and protected." Ala. Const. art. 4, § 25. It is also provided that "no special or local law shall be enacted for the benefit of individuals or corporations in cases which are or can be provided for by a general law, or where the relief sought can be given by any court of this state; nor shall the operation of any general law be suspended by the General Assembly for the benefit of any individual, corporation, or association." Id. art. 4, § 23. The Legislature owes equal obedience to each of the clauses of this section of the Constitution, but such obedience cannot be as effectually enforced by the courts in the one case as in the other. There is a marked difference between the two clauses. This court has held that under the first clause a discretion is necessarily left to the Legislature to determine whether the particular object or want "can be provided for by a general law;" and that the exercise of such discretion cannot be revised by the courts. *Clarke v. Jack*, 60 Ala. 271. No such construction can be put upon the language of the second clause of the section. That is a positive, unconditional limitation of the power of the General Assembly. It cannot suspend the operation of any general law for the benefit of any individual, corporation, or association. Within the range of this prohibition there is no room for the exercise of any discretion by the Legislature or by the courts. It is not necessary for the purposes of this case to define the scope of this provision. Clearly, it has the effect of leaving the Legislature without the power to pass a special Act relieving an individual of any liability or obligation which a general law imposes upon him in favor of an-

other, or exempting him from the operation of the remedies afforded by the general law for the enforcement of such liability or obligation, or giving him a right or remedy against another to which he is not entitled under the general law. We need not decide whether this provision would render invalid an Act merely conferring upon an individual, corporation, or association a privilege involving no interference with the rights of others under the general law, or removing disabilities, or granting such relief as could not operate as an infringement of any rights or remedies to which others are entitled under the general law. *McKemie v. Gorman*, 68 Ala. 442. It is sufficient for the purposes of this case to hold that the provision is effectual to render invalid a special Act of the Legislature for the relief of an individual, which would necessarily operate to absolve him from the duties and obligations which the general law imposes upon him as a husband, to suspend in his favor the general law which others, similarly situated, must conform to in order to obtain relief from the bonds of matrimony. The special Act relied on by the appellant was unconstitutional, and presents no obstacle to the relief sought by the appellee, if she is entitled to relief under the general law. *Darling v. Rodgers*, 7 Kan. 592; *Simonds v. Simonds*, 108 Mass. 572, 4 Am. Rep. 576.

More than two years before the bill was filed the appellant required the appellee to leave his house. They have not lived together since. The husband has not provided for the wife's support, and has not consented to her return to his house. These facts are not disputed. They show a "voluntary abandonment" of the wife by the husband, within the meaning of subdivision 3 of section 2322 of the Code. A husband may as effectually abandon his wife by putting her away from him and denying her the privilege of dwelling with him, as by going off himself from their former residence, leaving her there, and not permitting her to live with him. *Morris v. Morris*, 20 Ala. 168; *Hanberry v. Hanberry*, 29 Ala. 719; *Kinsey v. Kinsey*, 87 Ala. 393; 2 Am. & Eng. Encyclop. Law, 803.

It is not contended that the husband is entitled to a divorce from the wife on any of the grounds prescribed by the statute. Nothing short of the existence of a ground of divorce in favor of the husband against the wife can defeat the right of the wife to a divorce from her husband because of his abandonment of her without her consent for the period and in the manner fixed by the statute. The proof against the wife in this case, if believed, shows no more than that she was guilty of grossly offensive behavior in her husband's presence on one occasion; that at times she used coarse and indelicate language; that once, when her husband's young daughter by a former marriage was standing near the fire place, she stirred up the fire, so that the flame caught the clothing of the child, and she gave no assistance in the rescue; and that she wrote and circulated a number of anonymous letters, cruelly and foully elandering another of her husband's daughters. If she was guilty of such exhibitions of ill temper and a mean disposition, it may be readily understood how the marriage

relation became irksome to the husband. However hard it may have been for him to endure such conduct, yet it did not, under the statute, afford him ground for relief from an uncongenial association, or furnish him with a legal justification for his abandonment of his wife. *Bryan v. Bryan*, 34 Ala. 516; *Hanberry v. Hanberry*, *supra*; 5 Am. & Eng. Encyclop. Law, 805.

When a divorce is granted in favor of the wife, if she has no separate estate, or if it is insufficient for her maintenance, she is entitled to an allowance out of the estate of her husband; and in such case "the allowance must be as liberal as the estate of the husband will permit, regard being had to the condition of his family, and to all the circumstances of the case." Code, §§ 2332, 2333. The conduct of the wife before her husband's abandonment of her is a circumstance to be considered in determining the amount of the provision to be decreed in her favor. Her mere failure to contribute to the peace and happiness of the home cannot be allowed to justify the husband in casting her off. But she cannot be regarded as entirely blameless, if, while she was living with her husband, without provocation from him, she was inconsiderate or disrespectful in her bearing towards him, or was unkind in her treatment of his children by a former marriage, or if she habitually pursued a course of conduct calculated to vex and harass a reasonably indulgent husband. The inducement of gaining an advantage by a liberal provision for her separate maintenance is to be withheld from a perverse wife, who, though guilty of nothing amounting to a ground of divorce against her, yet, without previous fault on the part of her husband, so bears herself in her relations with him and his household as to provoke him into wishing to be rid of her society. Over-indulgence is not to be shown to a wife who has been abandoned by her husband, when her own failure to act the part of a dutiful wife has helped to put her in the position of "having the law on her side" in a proceeding against the husband for divorce. Such misconduct on the part of the wife may be considered as, in a measure, palliating the offense of the husband, and as abridging her claim to an allowance from his estate for her separate maintenance. *Jeter v. Jeter*, 38 Ala. 391; *Lovett v. Lovett*, 11 Ala. 763. The complainant herself testifies: "Dr. Jones was a kind husband to me; one of the kindest in the world." The evidence shows without contradiction, that he was a man of excellent character, enjoying the respect of the community in which he has lived for many years. There is nothing to indicate that he was at fault in his relations with his wife, until he required her to leave his house. It is unnecessary to detail the evidence as to the misconduct of the wife. Some of the more serious charges against her are not satisfactorily established. Enough, however, is proved to show that she was principally responsible for the unhappy state of feeling in her husband's household. Her conduct was well calculated to foment discord. To say the least of it, she was far from discreet or forbearing in her treatment of her husband's children by a former marriage. Her course towards her husband, and towards

those who were naturally the objects of his affection and solicitude, was well calculated to destroy his regard for her and to overtax his forbearance. True, it was the duty of the husband to persevere in his effort to prevent an estrangement between himself and his wife, and to avoid, even at the expense of his own comfort and peace of mind, an open breach of the marriage relation. He should not have yielded to the impulse to abandon his wife, as she had committed no offense to justify him in that course. But the wife's own folly in acting so as to forfeit the regard of a kind husband is not to be overlooked in determining the provision to be made in her favor. The evidence indicates that the husband owns property, including his interest in a stock of goods, worth about \$8,000 in excess of his liabilities. He is engaged in business as a country merchant, and is also a practicing physician, though he has been trying to give up his practice, and gets but little income from that source. Three of his children by a former marriage—two daughters and one son—are living with him, and are dependent upon him for their support. They are all minors. His home is in a small hamlet in Fayette county. The habits of life there are simple and inexpensive. The price of board in respectable

families in that neighborhood is 'from \$5 to \$7½ per month, with everything furnished. Boarders have been received in the defendant's family at such prices. The complainant has no property which yields her any income. She is entitled to have provision made for her maintenance in the condition in life of her husband. The amount is not to be swelled because she chooses to reside in one of the suburbs of the city of Birmingham, where the cost of living is greater. In view of the course pursued by the wife before the separation, and of all the circumstances of the case, our conclusion is that she should receive \$15 per month as a provision for her maintenance after the divorce. If she had been wholly without fault, a more liberal allowance would have been proper. This is less than was allowed by the chancellor. In this respect his decree will be here modified. The appellant has nothing to complain of in the amounts he was required to pay for compensation to the solicitors for the appellee and for temporary alimony. With the modification above ordered, the decree will be affirmed.

Modified and affirmed.

Rehearing denied.

PENNSYLVANIA SUPREME COURT.

Edwin M. SCHAEFFER, by Next Friend,

JACKSON TOWNSHIP, *Appt.*

(.....Pa.....)

A defect in a highway does not give a cause of action to a traveler who after safely passing it is taken back by his horse which

became frightened at an independent cause, and uncontrollable, and turned suddenly round in the road, breaking the vehicle and dragging it back to the defective portion of the highway where the traveler is thrown out and injured.

(July 12, 1892.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Lebanon

NOTE.—Effect upon right of recovery, of fact that horse was frightened when accident occurred on defective highway.

In Maine and Massachusetts, where the statutory liability of municipalities for accidents resulting from defective highways has always been strictly construed, there can seldom be a recovery for an injury received while the horse was frightened and uncontrollable. To permit a recovery in those states the defect in the highway must have been the sole cause of the injury, and the driver must at the very instant of the injury have been exercising due care.

In *Snow v. Adams*, 1 Cush. 444, a recovery was permitted although the fright of the horse brought the carriage in contact with the obstruction, but there is no discussion of the effect of the fright.

But as soon as the question was directly raised the recovery seems to have been denied. Thus where a bolt connecting the shaft with the cutter broke causing it to drop on the horse's heels and him to escape from the driver and run away, and after running a short distance he ran upon a pile of wood within the limits of the highway and broke his leg, the owner was held not entitled to recover because at the time of the breaking of the leg he was failing to exercise due care over the horse, and because the running of the horse was the proximate cause of the injury. *Davis v. Dudley*, 4 Allen, 559.

So where a horse on a bridge was frightened by

some animal jumping into the water below, and shied so that the carriage was thrown off from the side of the bridge, which had no railing, the court held there could be no recovery, saying that if there were two independent proximate causes of an injury sustained by a driver upon a highway, the primary cause being one for which the town is not responsible, and the other being a defect in the highway, the injury cannot be said to be received through such defect, and the town is not liable. *Moulton v. Sanford*, 51 Me. 127.

So it has been held that where the frightened and uncontrollable condition of the horse contributed to the injury there can be no recovery. *Coombs v. Topsham*, 88 Me. 207.

Where by reason of fright the horse backed several rods before coming on the defect the court held there could be no recovery. *Horton v. Taunton*, 97 Mass. 236.

The Wisconsin court is to some extent inclined to follow the above decisions, for it has been held that where the town is without fault and the horse escapes from the control of its driver and in his flight is injured by a defect in the highway which he would have escaped if under proper control, there can be no recovery. *Jackson v. Bellevieu*, 30 Wis. 258.

In these jurisdictions uncontrollableness from any cause is fatal to recovery, although the horse may not at the time have been frightened.

Thus where by reason of disease a horse became

County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by a defect in one of defendant's highways. *Reversed.*

The facts are stated in the opinion.;

Mr. W. M. Derr for appellant.

Messrs. Grant Weidman and P. S. Keiser for appellee.

Heydrick, J., delivered the opinion of the court:

The plaintiff, an infant of less than four years of age, brought suit in the court below to recover damages for injuries received in the same accident out of which *Jackson Twp. v. Wagner*, 127 Pa. 184, grew. According to the plaintiff's witnesses, he started in company with his mother, two younger children, and Miss Wagner, the plaintiff below in *Jackson Twp. v. Wagner*, to drive over one of the highways of the defendant township. At this time, there was upon the side of the road in question a stone pile about 25 feet in length by from 1 to 3 feet in height, and at the side of the stone pile a hole, in respect to the dimensions of which these witnesses differed widely, varying as to the depth from 8 to 18 inches; as to the width, from 8 inches to 8 feet; and as to the length, from 1 foot to 5 feet. The same witnesses differed as to the width of the road

between this hole and the gutter almost as much; one of them asserting that it was but 7 or 8 feet, while four others testified that it was from 12 to 14 feet wide. Upon this evidence, to which greater credit seems to have been given than to that on the part of the defendant, the jury found, under proper instructions as to the duty of the supervisors, that the road was not, on the day and at the place of the accident, suitable and sufficient for public travel, conducted in the ordinary manner and by the ordinary means of conveyance. It must therefore be assumed that the township was guilty of negligence; and as there could be no question of contributory negligence on the part of an infant of such tender years as the plaintiff, the only question to be determined is whether, upon the further facts testified to by the plaintiff's witnesses, the township is liable for the injury sustained by the plaintiff upon this road.

Whatever the condition of the road may have been, the party passed over it safely, and without noticing any defect therein, but when they had reached a point about 120 feet beyond the stone pile, where the road was in good condition, they met a donkey drawing a cart loaded with tin cans, and another donkey, which, in the language of the witnesses, was "loose, and came towards the horse." Thereat the horse became frightened, the driver lost control of

uncontrollable and bore to one side of the road until he went off from the unguarded embankment, the court held there could be no recovery unless it was shown that the accident would have occurred if the horse had remained under control. *Titus v. Northbridge*, 97 Mass. 258, 38 Am. Dec. 91. So no recovery can be had where the accident would not have happened had not one of the horses thrown his tail over the line in such a manner that for the time being the team was entirely free from any effective control or guidance by their driver. *Fogg v. Nahant*, 98 Mass. 580, 106 Mass. 273.

So where one rein is broken, which prevents the guiding of the horse, there can be no recovery. *Anderson v. Bath*, 42 Me. 348.

If the vicious habits of the horse contributed to the accident there can be no recovery. *Murdock v. Warwick*, 4 Gray, 178.

If the horse was vicious and unruly, and because of such character escaped from the control of his driver and caused the injury, there can be no recovery. *Bliss v. Wilbraham*, 8 Allen, 584.

The courts of other states have refused to follow the extreme doctrine of these decisions, as appears from the authorities cited below, and these courts have themselves modified the doctrine to some extent thus:

Mere starting or shying will not be regarded as unmanageableness. *Spaulding v. Winalow*, 74 Me. 528.

If the horse simply shies at an object which would naturally frighten an ordinarily gentle horse whereby the carriage is thrown down an unguarded embankment, there may be a recovery. *Stone v. Hubbardston*, 100 Mass. 49. See also *Bigelow v. Weston*, 3 Pick. 267; *Cushing v. Bedford*, 125 Mass. 526.

So mere shying at something outside of the roadway for which the town is not responsible is not sufficient to relieve the town from liability if the horse has not broken away from the control of his driver, and the obstacle is encountered at the instant of the shying. *Aldrich v. Gorham*, 77 Me. 291.

That the shying of the horse contributed to the 18 L. R. A.

accident is not sufficient to cause the setting aside of an award against the town by arbitrators to whom the question of the amount of liability had been submitted. *Wood v. Groton*, 11: Mass. 387.

And this is the law in other states. *Lower Muncie Twp. v. Merkhoffer*, 71 Pa. 279; *Baltimore & Y. Turnp. Co. v. Crowther*, 68 Md. 558.

Although to warrant a recovery the loss of control must have been only momentary. *Wright v. Templeton*, 122 Mass. 49.

And in Maine it was held that although at the time of the injury the traveler's horse may without fault of the town have been running violently, it cannot be ruled as matter of law that the town is not responsible for the injury if caused by a defect in the highway, which would not have occurred excepting for such defect. *Verrill v. Minot*, 81 Me. 206.

The following cases illustrate the fine distinctions into which the court has been led by this doctrine:

Where a horse backs a wagon over an embankment and it gets so far over before the driver loses control of the horse as to be beyond the horse's control, a recovery may be had. *Babson v. Rockport*, 101 Mass. 96; *Britton v. Cummington*, 107 Mass. 348.

Where a horse shied and sprang upon and partly over a wall two feet high which had been erected as a barrier at the side of the road the court held that if the injury was received because the wall was not high enough, and the want of height made it insufficient as a railing or barrier, the plaintiff could recover if the horse was a reasonably safe horse to drive and if the plaintiff was in the exercise of due care and did not lose control of the horse, or lost control for a moment only, and either regained the control or would have regained it before the horse would have run against the wall, if it had been of sufficient height. *Hinckley v. Somerset*, 145 Mass. 826.

Where fright is caused by defect in highway.

The general doctrine is that if the fright was caused by a defect in the highway it will be no de-

him, and he turned suddenly around, wrenching the spokes of one of the front wheels out of the hub, and fled in the opposite direction; the hub of the broken wheel falling to and dragging upon the ground. When the buggy reached the hole already described, the end of the axle dropped into it, and the plaintiff was thrown out upon the stone pile. The testimony upon the part of the defense showed very clearly that the occurrence was as is stated by the reporter and in the opinion in *Jackson Twp. v. Wagner, supra*, differing somewhat from the foregoing statement; but in considering the assignments of error in this case, the plaintiff's testimony will be accepted as verity. So accepting it, was the defendant township answerable for the injury received by the plaintiff? It is a general rule, as well settled as anything in the law of negligence, that a man is responsible for such consequences of his fault as are natural and probable, and might therefore be foreseen by ordinary forecast, but if his fault happen to concur with something extraordinary, and therefore not likely to be foreseen, he will not be answerable for the extraordinary result. This rule applies in actions against municipal and quasi municipal corporations as well as to natural persons and private corporations. The concurrence of that which is ordinary with a party's negligence

does not relieve him from responsibility for the resultant injury. Examples of such concurrence may be found in cases where, by reason of causes known to the public authorities, horses are likely to become frightened, and in their sudden fright plunge over an unguarded precipice, or rush upon some danger within the highway, for the existence of which the authorities are responsible. In such cases the consequences of the neglect of duty are natural and probable, and ought therefore to be foreseen. But when, from extraordinary causes, for the existence of which the supervisors are not responsible, and of which they cannot be presumed to have had notice, a driver loses control of his horses, and they come in contact with a defect in the highway, there is no more reason for holding the township answerable for a resultant injury than there is for holding any other party responsible for the result of the concurrence of something which he could not foresee with his negligence. In Massachusetts, it was held, in a well considered case, that when a horse, by reason of fright, disease, or viciousness, becomes actually uncontrollable, so that the driver cannot stop him or direct his course, or exercise or regain control over his movements, and in this condition comes upon a defect in the highway, or upon a place which is defective for want of a railing, by which an

fence. See note to *Bowes v. Boston (Mass.)* 15 L. R. A. 385.

A recovery may be had for an injury resulting from fright of the horses at a defect in the highway. *Brookville & C. Twp. Co. v. Pumphrey*, 59 Ind. 78, 26 Am. Rep. 76.

If a defect in a highway causes a well-broken and kind horse to run away, and while running he falls down and injures his driver, the town may be held liable. *Willey v. Belfast*, 61 Me. 570.

If an accident results from the fact that the team is in a state of fright or not under the driver's control the town will be liable if the condition of the team is caused by some defect in the highway, but not otherwise. *Kelley v. Fond du Lac*, 81 Wis. 180.

If the defect caused the runaway there may be a recovery. *Hodge v. Bennington*, 43 Vt. 450.

In *Hey v. Philadelphia*, 81 Pa. 44, 22 Am. Rep. 757, the court drew a distinction between loss of control occasioned by accidents unconnected with the condition of the road and those where the condition of the road caused the loss of control, and held the city liable for the death of a horse which fell off from an embankment because of the narrowness of the road, the unguarded condition of the embankment, and the proximity of a railroad track.

Where the runaway is caused by a defect in the highway the town may be liable for injuries caused thereby to a third person. *Merrill v. Claremont*, 58 N. H. 468.

Duty of town to provide for safety of runaway horse.

Towns are not obliged to fence their roads to prevent frightened horses from escaping out of the limits of the highway, even though the near location of a railroad may render such occurrences probable. Whether a railing must be erected is to be determined by the character of the place between which and the traveled road it is claimed the barrier should be erected. *Adams v. Natick*, 13 Allen, 432.

During the process of repairing a bridge barriers need not be erected which are strong enough to 18 L. R. A.

stop a runaway team. *Lane v. Wheeler*, 35 Hun, 608.

Where the injury to a runaway team occurred at a place where the road was sufficiently wide for all the travel usual thereon, so that the exercise of only an ordinary amount of care would prevent an injury thereby, a recovery was denied although at the side of the road and outside of the traveled part there was a ditch or gully. *Brown v. Glasgow*, 57 Mo. 158.

Where the horses became frightened at an obstacle at a place where the roadway was sufficient for all ordinary purposes and dragged the wagon over the curb and sidewalk and down an embankment, a recovery was denied. *Hubbell v. Yonkers*, 104 N. Y. 434.

Where the horse broke loose from a post to which he was hitched and ran to a part of a street which was impassable to travelers but across which no barrier was erected, a recovery was denied. *Moss v. Burlington*, 60 Iowa, 449, 46 Am. Rep. 82.

Where the runaway was caused by the overturning of the cutter because of a snowdrift, and the horse ran to a portion of the road not used by the public, and which was not safe, and plunged down an embankment and was killed, the town was held not liable. *Bishop v. Schuylkill Twp. (Pa.)* Mar. 7, 1887.

Stones between which and the traveled part of the way a gutter is constructed are not a defect which will render the town liable in case a horse runs upon them and is injured. *Howard v. North Bridgewater*, 16 Pick. 189.

Where a horse became frightened by cows having boards on their horns and turned out of the traveled part of the way towards the fence where the carriage came in contact with an obstruction causing the injury complained of, no recovery was permitted. *Perkins v. Fayette*, 68 Me. 152.

When liability exists.

Municipalities are not bound to furnish roads upon which it will be safe for horses to run away, but they are bound to furnish reasonably safe roads, and if they do not and a traveler is injured

injury is occasioned, the town is not liable for the injury, unless it appears that it would have occurred if the horse had not been so uncontrollable. *Titus v. Northbridge*, 97 Mass. 258, 93 Am. Dec. 91. The doctrine of this case was reiterated in *Horton v. Taunton*, 97 Mass. 266; *Fogg v. Nahant*, 98 Mass. 578; and *Stone v. Hubbardston*, 100 Mass. 49. Similarly, it has been held in Wisconsin that a town is not liable for an injury received upon a defective highway by a horse that has escaped from the control of its driver, unless it be made to appear affirmatively that the disability of the driver to control him was caused by the same or some other defect in the highway. *Jackson v. Believieu*, 80 Wis. 250. In Maine, also, the same subject has been much considered, and with the like result. *Moor v. Abbot*, 82 Me. 46; *Coombs v. Topsham*, 88 Me. 204; *Anderson v. Bath*, 42 Me. 346; *Moulton v. Sanford*, 51 Me. 127. In the latest of these cases, it was determined that if there be two efficient, independent, proximate causes of an injury sustained by a traveler upon a highway, the primary cause being one for which the town is not responsible, and the other being a defect in such highway, the injury cannot be said to have been received through such defect, and the town is not liable therefor, though the traveler himself is in no default. It is true that

in these states there are statutes defining the right of action for such injuries, but they are merely declaratory of the common law. This precise question has not been as frequently considered in this state as in the states referred to; but in *Chartiers Twp. v. Philips*, 122 Pa. 601, it was distinctly raised by a point in which the court was asked to charge that, to "render a township liable for an injury by a defect in a highway, it must have been the sole, efficient cause of the injury, and if the jury find from the evidence that this accident to the plaintiff was caused by the uncontrollable struggle of a choking horse, or from this cause concurring with a defect in the highway, then their verdict must be for the defendant. For refusal to affirm this point without qualification, the judgment of the common pleas was reversed. To the same effect is *Herr v. Lebanon* (Pa.) 16 L. R. A. 106 (decided at this term). These judgments require no vindication. They are logical deductions from the rule of law which must be invoked by every plaintiff who seeks redress for an injury received through the negligence of another. The injury must have been the natural and probable result of the defendant's negligence. But the cases must be rare in which an injury can be said to be the result of the negligence of a party when there is another and primary, efficient, proximate

by culpable defects in the road it is no defense that at the time his horse was running away or was beyond his control. *Ring v. Cohoes*, 77 N. Y. 58, 38 Am. Rep. 574.

In an action against a turnpike company the rule of liability was stated as follows: If the road was wide enough for the customary travel with safety and the injury was caused by want of care or skill in driving the horse or by the vicious disposition of the horse not excited by any defect in, or unlawful object upon, the road, there can be no recovery; but if the road was so narrow as to render it in any degree dangerous or unsafe to persons driving horses of ordinary gentleness but which might be liable to shy or take fright and plunge into the ditch, then if the accident was caused by such defect in the road liability would ensue. If a horse running away comes in contact with a defect within the reasonable limits of the highway and damage ensues the managers of the road are liable. *Baltimore & H. Turnp. Co. v. Bateman*, 68 Md. 399.

Hunt v. Pownal, 9 Vt. 411, although not a case of a runaway or frightened horse, is a valuable authority in that it establishes the rule that the town is liable although the injury is the result of accident and a defect in the highway.

Where plaintiff is in no fault but the injury is the combined result of accident and neglect to repair the road, the town must be held liable. *Winship v. Enfield*, 43 N. H. 215.

Although the fact that the horses were beyond the control of the driver may have been a proximate cause of the injury, it will not, providing the driver was free from fault, relieve the town from liability if the danger and his injury are a consequence resulting from the negligence of the town officers. *Irony v. Deerpark*, 116 N. Y. 439.

Where from the proximity of a railroad the probability is that horses will be frightened the town must provide suitable barriers to prevent accident. *Campbell v. Stillwater*, 32 Minn. 308, 50 Am. Rep. 567.

Where there was no barrier between the highway and the railroad track which ran parallel with it, and a horse became frightened and ran in front

of a passing train, the court said the question is whether or not the dangerous place is in such close proximity to the highway as traveled and used as to render the use of the highway unsafe. *Plymouth Twp. v. Graver*, 126 Pa. 84.

That the horse was frightened at the time the accident occurred will not prevent a recovery if ordinary care on the part of the town in providing a proper railing would have prevented the accident. *Rockford v. Russell*, 9 Ill. App. 229.

If notwithstanding the fright of the horse the injury would not have happened but for the defect, a recovery may be had providing the driver was exercising due care. *Stark v. Lancaster*, 57 N. H. 92.

Though plaintiff's horse took fright, turned over the wagon, and threw it down an embankment of the street on which he was driving and thus he was injured, it will not prevent his recovery if the city was negligent in not providing suitable barriers. *Atlanta v. Wilson*, 59 Ga. 544, 27 Am. Rep. 896.

The fact that horses are running away when the wagon comes in contact with a defect in the highway and injures the driver will not prevent a recovery against the town. *Lacon v. Page*, 43 Ill. 500.

The fact that the horses were running away will not prevent recovery if the defect is found to be the direct cause of the injury. *Martin v. Algona*, 40 Iowa, 398.

That the horse was frightened at the time he backed off from a dock which had no string piece, will not prevent a recovery. *Kennedy v. New York*, 73 N. Y. 385. See also *Macaulay v. New York*, 67 N. Y. 602.

The mere fact that at the time the accident occurred the horses had become unmanageable and were running away will not prevent a recovery unless the driver was guilty of want of reasonable care and skill. *Sherwood v. Hamilton*, 37 U. C. Q. B. 410; *Toms v. Whithy*, 35 U. C. Q. B. 195.

The fact that the horse was uncontrolled for some distance before the injury will not affect in any way the liability of the town. *Baldwin v. Greenwoods Turnp. Co.* 40 Conn. 238, 16 Am. Rep. 83.

cause, wholly independent of such negligence, and for which the party charged with negligence is in no way responsible. In such cases, it would be incumbent on the plaintiff to show that the accident would have happened without the concurrence of the primary, efficient, proximate cause. In this case the driver lost control of the horse the moment he took fright at the donkeys and tin cans, and she had not regained efficient control at the moment of the accident. Her own testimony is that she was trying to stop him, but had not succeeded. He was still pursuing his flight, dragging the wrecked buggy after him, when the occupants were thrown out. It may be conceded that the township would have been answerable for the injuries if it had appeared that the plaintiff would have been thrown out in the same manner if the horse had not received this extraordinary fright, and wrecked the buggy, but this did not appear. On the contrary, it appeared in the plaintiff's evidence that the party had passed the place of the accident in

safety a few minutes before, without noticing any defect. But for the fright of the horse, and the driver's loss of control, they would have continued their journey, and of course the accident would not have happened. How much the wreck of the buggy may have had to do with the final catastrophe may be inferred from the account given by plaintiff's witnesses, and the belief expressed by the driver that if the wheel, instead of the hub, had gone into the hole, the buggy would not have been upset. But the loss of the wheel was not in any manner attributable to any defect in the highway. It was admitted that the road was in good condition at the point where this beginning of the accident occurred. It is therefore clear that the proximate cause of the plaintiff's injury was the fright of the horse, and that that fright was not caused by any defect in the highway, or by any neglect of duty on the part of the supervisors.

For this reason the judgment must be reversed.

Where a horse was taken apparently sick and staggered over the edge of an unguarded bridge, a recovery was permitted. *Houfe v. Fulton*, 29 Wis. 804, 9 Am. Rep. 568.

Illustrations.

In *Newlin v. Davis*, 77 Pa. 818, recovery was permitted where a horse became frightened and backed off from an unguarded bridge, but there is no discussion of the effect of the fright of the horse.

Where a team became frightened at something in a mill by the road-side and backed off from an unguarded embankment within the limits of the road, a recovery was permitted. *Olson v. Chipewa Falls*, 71 Wis. 568.

Where a horse became frightened at a railroad locomotive and escaped from the control of the driver so that it went over an unguarded embankment by the side of the road, the city was held liable. *Byerly v. Anamosa*, 79 Iowa, 208.

Where the horse became frightened in some way not stated, and threw their driver from the sleigh and then ran upon a bridge with a hole in the flooring through which one of them stepped and broke his leg, a recovery was permitted. *Mandershid v. Dubuque*, 26 Iowa, 109.

Where the horse got his tail over the line and backed into a hole a recovery was permitted. *Hull v. Kansas City*, 54 Mo. 600, 14 Am. Rep. 487.

Where the horse became frightened by the breaking of the harness through no defect which was known to plaintiff and ran away, and, while running furiously came upon a bridge over the side of which he fell because of a defective railing, a recovery was permitted. *Baldwin v. Greenwood Turnp. Co.* 40 Conn. 238, 16 Am. Rep. 83.

Where a horse takes fright and runs away and is injured because of the neglect of the municipality in leaving a dangerous excavation in the street unprotected, an action may be maintained against the corporation if the driver of the horse exer-

cised due care and skill in managing it. *Crawfordville v. Smith*, 79 Ind. 809, 41 Am. Rep. 612.

Where the condition of the road was such as to cause a collision between a runaway horse and plaintiff's team, a recovery was permitted. *Kelsey v. Glover*, 15 Vt. 712.

Where a horse frightened at passing cars jumped from an unguarded bridge, a recovery was permitted. *Fowler v. Strawberry Hill*, 74 Iowa, 648.

Where the horse because of sudden fright at a traction engine plunged sideways over an unguarded embankment, a recovery was permitted. *Burrell Twp. v. Uncapher*, 117 Pa. 863.

Where the breaking of the harness alarmed the horse a recovery was permitted. *Clark v. Barrington*, 41 N. H. 48.

Where a horse which was hitched in front of a shop broke loose and eventually fell into a chasm which constituted a defect in the highway, a recovery was permitted. *Tallahassee v. Fortune*, 3 Fla. 26, 52 Am. Dec. 368.

Fright occurring outside of highway.

The Massachusetts doctrine is that where a horse tied outside the limits of the highway escapes and runs upon the highway and suffers an injury from a defect therein, no action can be maintained against the town. *Richards v. Enfield*, 13 Gray, 844.

Where a horse approaching a highway along a private way became frightened and uncontrollable and when the highway was reached instead of turning into it went directly across and down an unguarded embankment on the opposite side, a recovery was denied. *Higgins v. Boston*, 148 Mass. 484.

But in Connecticut it has been held that the mere fact that at the time of the fright the horses were not upon the highway will not prevent recovery if they subsequently reached and ran along it until the accident occurred. *Ward v. North Haven*, 43 Conn. 148.

H. P. F.

INDIANA SUPREME COURT.

LOUISVILLE, EVANSVILLE & ST. LOUIS CONSOLIDATED R. CO., *App't.*,John H. WILSON *et al.*

(.....Ind.....)

1. **Payment of an overcharge of freight to a railroad company engaged as a common carrier of goods is not voluntary so as to prevent recovering it.**

NOTE.—Right of a carrier at common law to discriminate between passengers or shippers.

The right of a common carrier at common law to discriminate between customers in the matter of charges, which is denied in the above case, is affirmed in the California case, *Cowden v. Pacific Coast S. S. Co.*, post, —.

This right is also alleged to exist in *Johnson v. Pensacola & P. R. Co.* 16 Fla. 632, 26 Am. Rep. 781; *Ragan v. Aiken*, 9 Lea, 609, 42 Am. Rep. 634; *Mena-cho v. Ward*, 27 Fed. Rep. 529; *Ex parte Benson*, 18 S. C. 38, 44 Am. Rep. 564.

The same rule is declared in *Avinger v. South Carolina R. Co.*, 29 S. C. 265, although this was not necessary to the decision, which was that a carrier cannot discriminate between shippers in taking freight for transportation.

In *Fitchburg R. Co. v. Gage*, 13 Gray, 306, it is said that the common law requires equal justice to all but the equality is in a right to a reasonable compensation, and that "for specified reasons in isolated cases" the carrier may give lower rates to one than to another.

So in *Spofoord v. Boston & M. R. Co.*, 126 Mass. 326, substantially the same doctrine is held under the Massachusetts statute requiring "reasonable and equal terms," and it is held that one purchasing a season ticket at an established and reasonable price cannot complain because for special reasons not disclosed such tickets are sold to certain persons at a less price.

In *Ragan v. Aiken*, *supra*, the discrimination upheld was in favor of a person at a distance and was made to secure shipments which would otherwise have been sent by another carrier.

But a majority of the recent cases at least sustain the decision in the main case and hold that at common law a carrier cannot unjustly discriminate in rates between persons in the same circumstances. *Root v. Long Island R. Co.* 4 L. R. A. 331, 23 N. Y. S. R. 226; *Cleveland, C. C. & I. R. Co. v. Closser*, 9 L. R. A. 754, 126 Ind. 348; *Cook v. Chicago, R. I. & P. R. Co.* 9 L. R. A. 764, 81 Iowa, 551; *Fitzgerald v. Grand Trunk R. Co.* 13 L. R. A. 70, 63 Vt. 166; *Messergers v. Pennsylvania R. Co.* 37 N. J. L. 531, aff. 36 N. J. L. 457, 13 Am. Rep. 542; *Atwater v. Delaware, L. & W. R. Co.* 49 N. J. L. 55; *Hays v. Pennsylvania R. Co.* 12 Fed. Rep. 309.

Statutes prohibiting discrimination between shippers or passengers have been held to be merely declaratory of the common law. *Shipper v. Pennsylvania R. Co.* 47 Pa. 388; *Houston & T. C. R. Co. v. Smith*, 63 Tex. 362; *Concord & P. R. Co. v. Forsaith*, 59 N. H. 122, 47 Am. Rep. 181.

Some of the cases without positively limiting the extent to which discrimination in rates is unlawful hold that it is so where, as in the main case, it is unjust and tends to build up the business of one shipper at the expense of another. *Vincent v. Chicago & A. R. Co.* 49 Ill. 32; *State v. Cincinnati, W. & B. R. Co.* 7 L. R. A. 819, 47 Ohio St. 130; *Scofield v. Lake Shore & M. S. R. Co.* 43 Ohio St. 571.

In *Chicago, B. & Q. R. Co. v. Parks*, 13 Ill. 460, 69 18 L. R. A.

2. **An allegation in a suit to recover an overcharge of freight that an excess was paid authorizes an inference that it was paid by the shipper, at least as against a demurrer.**

3. **A railroad company cannot discriminate in favor of a shipper who is able to furnish a large amount of freight over one engaged in the same business who is unable to furnish the same quantity, at least where both ship in car-load lots.**

4. **Whether the agreement of a shipper**

Am. Dec. 552, it is said, though not necessarily decided, that rates charged by a carrier must be uniform although special favor may be shown to individuals or classes by carrying them free or for half price.

So in *Christie v. Missouri Pac. R. Co.*, 94 Mo. 453, it is held that the illegality of rebates to shippers depends on the exclusiveness of such privilege.

A contract for the monopoly of transportation of certain kinds of freight is illegal. *Union Locomotive & Exp. Co. v. Erie R. Co.* 37 N. J. L. 23.

A carrier cannot arbitrarily refuse to carry a passenger over a line in which it is transporting other passengers as a common carrier. *Wheeler v. San Francisco & A. R. Co.* 81 Cal. 45, 89 Am. Dec. 147.

And a carrier has no right to discriminate by selling tickets to some persons and not to others. *Indianapolis, P. & C. R. Co. v. Rindard*, 46 Ind. 293.

Neither can a railroad company refuse to sell to a particular person a commutation ticket such as it sells to people generally. *Atwater v. Delaware, L. & W. R. Co.* 49 N. J. L. 55.

Neither is discrimination allowed between shippers to the prejudice of one as to forwarding their property. *Keeney v. Grand Trunk R. Co. of Canada*, 47 N. Y. 525, 59 Barb. 104; *Avinger v. South Carolina R. Co.* 29 S. C. 265.

It is unlawful for a railroad company to discriminate unjustly between two rival lines of steamboats. *Samuels v. Louisville & N. R. Co.* 51 Fed. Rep. 67.

For discrimination by a railroad company between express companies wishing to do business over its line and in general for the right to compel service by a carrier or other party whose business it is to serve the public, see *note to Rushville v. Rushville Nat. Gas Co. (Ind.)* 15 L. R. A. 321.

In England the question of discrimination by a railroad company between its patrons has long been regulated by statute, which secures substantial equality in the service. *Ransome v. Western Counties R. Co.* 1 C. B. N. S. 437; *Oxlade v. Northeastern R. Co.* 1 C. B. N. S. 454, 26 L. J. N. S. C. P. 129; *Baxendale v. Eastern Counties R. Co.* 4 C. B. N. S. 61; *Nicholson v. Great Western R. Co.* 5 C. B. N. S. 306; *Garton v. Bristol & E. R. Co.* 6 C. B. N. S. 639; *Branley v. Southeastern R. Co.* 12 C. B. N. S. 68; *London & N. W. R. Co. v. Evershed*, 3 App. Cas. 1029.

The recent decisions strongly tend to deny the right of a carrier to ruin or injure one man's business and build up that of his rival by discrimination in rates, and to this extent it seems safe to say the weight of authority restricts discrimination, but, on the other hand, it seems to be a fair implication from a majority of the decisions that a carrier may in the absence of statutory restrictions show special favor to particular individuals by carrying them or their goods free or for less than the usual reasonable rates so long as it is merely a matter of favor to those individuals and works no injury to others.

B. A. R.

to furnish a railroad company certain goods at a given price relieves a discrimination of rates in his favor of its objectionable features is a question of fact for the jury.

5. A carrier cannot rightfully establish rates in order to keep on its own line material for which it has use, or to keep the price low for its own advantage.

6. A contract with a shipper of such character as to destroy the business of his rivals by giving him a monopoly is unjust without regard to the consideration upon which it is based.

(October 27, 1902.)

APPEAL by defendant from a judgment of the Superior Court for Vanderburgh County in favor of plaintiffs in an action brought to recover back certain alleged overcharges for freight transportation. *Affirmed.*

The facts are stated in the opinion.

Messrs. Gilchrist & DeBruler for appellant.

Messrs. Buchanan & Buchanan and *William Hamill*, for appellees:

As between a railroad company and a shipper, the parties do not stand on an equal footing, and the payment of an unlawful and unreasonable freight can be recovered by the shipper without protest at the time of its payment.

Heiserman v. Burlington, C. R. & N. R. Co. 63 Iowa, 732, 16 Am. & Eng. R. R. Cas. 49; *Chicago & A. R. Co. v. Chicago, V. & W. Coal Co.* 79 Ill. 121; *Mobile & M. R. Co. v. Steiner*, 61 Ala. 559; *Peters v. Marietta & C. R. Co.* 42 Ohio St. 275, 18 Am. & Eng. R. R. Cas. 492; *Parker v. Great Western R. Co.* 7 Man. & G. 253; *Addison, Cont. § 1048*; *Swift Co. v. United States*, 111 U. S. 29, 28 L. ed. 843; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 875, 21 L. ed. 638; *Beckwith v. Friable*, 83 Vt. 559; *West Virginia Transp. Co. v. Sweetzer*, 25 W. Va. 435, 22 Am. & Eng. R. R. Cas. 469; *Lafayette & I. R. Co. v. Pattison*, 41 Ind. 812.

The obligation arising from the public employment of common carriers, and the prerogatives and franchises which they possess as corporations by gift of the public, impose a quasi duty which prevents their demanding a different hire from various persons for the same kind of service under the same conditions.

New England Exp. Co. v. Maine Cent. R. Co. 57 Me. 188, 2 Am. Rep. 81; *Scotfield v. Lake Shore & M. S. R. Co.* 43 Ohio St. 617; *Sandford v. Catawissa, W. & E. R. Co.* 24 Pa. 378, 64 Am. Dec. 667; *Hays v. Pennsylvania Co.* 12 Fed. Rep. 309.

The right to take such tolls as the company may think reasonable does not vest an absolute discretion in the corporation, but the courts have authority to limit the right to reasonable tolls.

Atty-Gen. v. Chicago & N. W. R. Co. 85 Wis. 426.

The fact that a higher charge is not unreasonable, does not affect the fact of discrimination.

Samuels v. Louisville & N. R. Co. 81 Fed. Rep. 57.

A carrier cannot establish rates in order to keep on carrier's line material for which the road has use, or keep the price low for its own
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advantage. Producers of railroad material are entitled to sell it when they wish, and in the most available market. Common carriers are forbidden to attempt to prevent this by applying disproportionate or unreasonable rates.

Reynolds v. Western N. Y. & P. R. Co. 1 Inters. Com. Rep. 685; 8 Am. & Eng. Encyclop. Law, p. 947.

While there may be such a thing as just discrimination under certain circumstances, it is not so under the circumstances surrounding this case.

Chicago & N. W. R. Co. v. People, 56 Ill. 378, 8 Am. Rep. 690; *Garton v. Bristol & E. R. Co.* 6 C. B. N. S. 641; *Crouch v. London & N. W. R. Co.* 14 C. B. 254; *Sandford v. Catawissa, W. & E. R. Co.* 24 Pa. 382, 64 Am. Dec. 667.

The appellant is a common carrier, and as such must carry for all, and all goods, without discrimination.

Chicago & A. R. Co. v. Thompson, 19 Ill. 584; *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760; *Redfield, Com. Carriers*, 15, 27.

The duty of a common carrier is one of law, growing out of their office, and not of contract.

Western Transp. Co. v. Newhall, *supra*; *Redfield, Com. Carriers*, 30, 40.

The very definition of a common carrier excludes the right to grant monopolies or to give special or unequal preferences.

Hutchinson, Carr. § 297; *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188, 2 Am. Rep. 81; *McDuffee v. Portland & R. R. Co.* 52 N. H. 450, 13 Am. Rep. 72; *Messenger v. Pennsylvania Co.* 36 N. J. L. 407, 13 Am. Rep. 457; *Chicago & N. W. R. Co. v. People*, 56 Ill. 365, 8 Am. Rep. 690; *Sandford v. Catawissa, W. & E. R. Co.* 24 Pa. 378, 64 Am. Dec. 667.

Where a railroad company has made known a usual rate, it is so far bound by it that on tender of the rate it must receive the goods, and can recover no more if freight is not prepaid and it carries the goods; and whether the compensation be fixed by law or its own established usage, it must be applied equally and indifferently, all persons being charged the same price for carriage of the same quantity of similar goods for the same distance.

2 Parsons, Cont. p. 206.

No distinction must be made between one class of persons and another.

2 Addison, Cont. § 1007; 2 Kent, Com. p. 599.

Coffey, J., delivered the opinion of the court:

This case is here for the second time. See 119 Ind. 358.

Upon a return of the case to the court below the appellee filed an amended complaint consisting of seven paragraphs. There was a verdict against the appellees on the first, second, and third paragraphs of the complaint, so they need no further notice. The appellant contends that the superior court erred, first, in overruling its demurrer to the fifth, sixth, and seventh paragraphs of the complaint; second, in overruling its motion for a new trial.

The fifth paragraph of the complaint alleges substantially that the appellees, as partners, were engaged in the business of

purchasing and shipping railroad ties; that the appellant owned and operated a railroad running by and through the stations and towns of Tennyson, Chandler, Gentryville, and Ferdinand, in Indiana; that there was no other railroad through or near these places for the transportation of freight; that after the construction of the appellant's road the appellees engaged in the business of purchasing railroad cross-ties and shipping the same from the above-named stations to the city of Evansville; that the regular and reasonable charge and tariff rate of freight for cross-ties from these stations to the city of Evansville was \$14 per car; and that such price had been charged from the date of the construction of the road until the 1st day of January, 1887, and that such price and rate of freight is still the amount charged for the shipment of cross-ties from these stations to Evansville; that such sum was the full and reasonable charge for such freights and was and has been so recognized by the appellant; that prior to the 1st day of January, 1887, there were several parties engaged in the purchase and shipment of cross-ties from said stations; that after the 1st day of January, 1887, the appellant wrongfully and unjustly charged as freight for cars loaded with cross-ties the sum of \$24 for each car from said stations to the city of Evansville; that such charge was unreasonable and excessive and destructive of the business of the appellees; that at the time such increased rate of freight was charged by the appellant, appellees had at said stations and along the line of said railroad 100,000 cross-ties, which had cost them \$25,000, that said ties could not be shipped by any other railroad, as appellant knew, that the appellees had contracted for the sale of the ties and were compelled to fill and complete such contract; that they were unable to purchase ties at any other place to fill the same and were compelled to ship the same over the appellant's road; that the appellant collected from the consignees of said ties the sum of \$24 freight on each car so shipped by the appellees from said stations to the city of Evansville; that they shipped 84 cars of said ties between the 1st day of January, 1887, and the 1st day of August, of that year, from the above-named stations to the city of Evansville to fill their contract and dispose of such cross-ties; that the excess of freight so charged and received by the appellant was \$2,800 that at the same time the appellant was so charging the appellees the sum of \$24 per car it was charging other parties for similar shipments the sum of \$14 only, that before the commencement of this suit the appellees demanded of the appellant said sum of \$2,800 which it refused to pay, and thereupon they demanded of the appellant \$2,800 damages, which it refused to pay.

The sixth paragraph of the complaint is similar to the fifth except that it contains the further allegations that the appellant entered into a contract with one Dickerson, whereby Dickerson was permitted to ship cross-ties over the appellant's road at \$14 per carload, each load containing 200 ties,

while it charged the appellees and all others the sum of \$24 per car for like shipments; that the contract with Dickerson was made for the purpose of giving him a monopoly of the business of purchasing and shipping cross-ties over the line of the appellant's road; that by reason of such unjust discrimination the business of the appellees was destroyed, to their damage in the sum of \$2,800.

The seventh paragraph is substantially the same as the fifth, except that it contains the further allegation that it received receipts from the appellants for the cross-ties shipped, which the appellants called bills of lading, but which the appellees refused to accept as such, but did receive them as receipts for ties shipped.

It is claimed by the appellant that the court erred in overruling the demurrer to the fifth and seventh paragraphs of the complaint because it appears from each of these paragraphs that the payments therein set forth were voluntary payments. It is said by counsel in their brief that no kind of extortion is shown, no pretense that the appellant refused to carry the cross-ties or refused to deliver them unless the rates charged were paid, nor is there any claim that the appellees were ignorant of the facts stated in these paragraphs at the time the freight was paid.

On the other hand it is contended by the appellees that payments made to a railroad company or other common carrier for overcharges for carrying freight are not voluntary payments for the reason that the shipper and the carrier do not stand upon an equality.

The only authorities cited by the appellant holding that a payment without protest to a common carrier for an overcharge is a voluntary payment, are the cases of *Evershed v. London & N. W. R. Co.* L. R. 8 Q. B. Div. 184, and *DuBose v. Georgia R. & B. Co.* 50 Ga. 804:

We are of the opinion, however, that the decided weight of authority is that the payment of an overcharge of freight to a railroad company engaged as the common carrier of goods is not a voluntary payment within the ordinary meaning of that term.

In the case of *Heiserman v. Burlington, C. R. & N. R. Co.*, 68 Iowa, 732, 16 Am. & Eng. R. R. Cas. 46, which was an action to recover for overpayment of freights, the court said: "Nor need the plaintiff, in a case brought to enforce such an obligation, show objection or protest prior to the payment made in excess of reasonable compensation. These rules are founded upon the consideration that railroad companies are public carriers, and those who employ them are in their power and must bow to the rod of authority which they hold over the consignors and consignees of property transported by them. . . . The law does not require objection or protest to the payment of unjust charges for the reason that they would be vain, being addressed to those who occupy the commanding position of power to enforce obedience to their requirements. For another reason they are not required. Those who do business with the railroads never come in

contact with the officers who possess authority to fix or abate rates of charges; indeed, they usually hardly know their names or where to find them. . . . These considerations take the case from the operation of the familiar rule which forbids recovery on account of payments voluntarily made without objection or protest."

In the case of *Chicago & A. R. Co. v. Chicago, V. & W. Coal Co.*, 79 Ill. 121, it was said by the Supreme Court of Illinois: "In such a case, where the coal company has no other outlet for its coal, and the railroad company exacts more freight than by the terms of the contract they are entitled to, the coal company should be considered as under a kind of moral duress and the payment by them of the freight demanded, under such circumstances, could not be considered voluntary, and they would have the right to sue upon the contract and recover back the excess of freight paid over the contract price."

In the case of *Mobile & M. R. Co. v. Steiner*, 61 Ala. 559, which was an action to recover for over-payment of freights on the transportation of cotton, the court said: "The nature of the business considered, the shipper does not stand on equal terms with the carrier in contracting for charges for transportation, and if the shipper pays the rates established in violation of law by the carrier, rather than forego his services such payment is not voluntary in the legal sense, and the shipper may maintain his action for money had and received to recover back the illegal charge."

Indeed, there seems to be but little conflict in the authorities in this country holding that the payment to a railroad company engaged in the business of common carrier of an overcharge of freight for goods transported over the road of such company is not a voluntary payment, as the law interprets that term. *Peters v. Marietta & O. R. Co.* 42 Ohio St. 275, 18 Am. & Eng. R. R. Cas. 492; *Parker v. Great Western R. Co.* 7 Man. & G. 253; Addison, Cont. § 1048; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 375, 21 L. ed. 638; *Beckwith v. Frisbie*, 32 Vt. 559; *West Virginia Transp. Co. v. Sweetser*, 25 W. Va. 435; *LaFayette & I. R. Co. v. Pattison*, 41 Ind. 812.

In the case of *LaFayette & I. R. Co. v. Pattison*, *supra*, which was an action to recover back an excessive payment of freight made under an agreement that such payment should not be regarded as voluntary, this court said: "In the second place, we are of the opinion that money so paid could be recovered back, if there had been no valid agreement that it might be; while the appellants were not in the actual possession of the cattle of appellee, they possessed such power and control over the shipment and delivery thereof as gave them an undue advantage over the appellees and the necessity of the appellee was so great as to deprive him of the freedom of his will."

Under these authorities we are constrained to hold that the payments which appellees in this case are seeking to recover from the appellant are not to be regarded as voluntary payments, and for that reason the complaint 18 L. R. A.

is not subject to the objection here urged against it.

The appellant is in error in its contention that it does not appear by the allegations found in the sixth paragraph of the complaint that any excessive freight was paid. It is alleged that the excess of freight so charged and received by the appellant was \$2,800. It is true that it does not appear by affirmative allegation that it was paid by the appellees, but as they were the shippers we think such an inference should be made. This paragraph was, perhaps, subject to a motion to make it more specific, but such a defect is not reached by demurrer.

In our opinion the court did not err in overruling the demurrer of the appellant to either the fifth, sixth, or seventh paragraphs of the complaint.

Under the second assignment of error it is contended by the appellant that the court erred in giving to the jury certain instructions asked by the appellees, in giving a certain instruction to the jury on its own motion and in refusing to give certain instructions which at the proper time it asked the court to give to the jury.

As instructions must be pertinent to the case made by the evidence in the cause it is proper to state the case now before us, as it is made by the evidence introduced by the parties on the trial of the cause, before we examine the instructions given and refused. It appears from the proofs in this case that the appellant's road runs for some considerable distance through a heavily timbered country. For some years prior to the first day of January, 1887, the appellees and several other parties had been engaged in the business of purchasing and shipping railroad ties over the appellant's road from the stations named in the complaint to the city of Evansville. Prior to that date the uniform rate of freight from these stations to the city of Evansville was fourteen dollars per carload of two hundred ties. In the fall and early winter of 1886, the appellees had purchased and had piled up on the appellant's road at the stations named, a large number of railroad ties, which they could ship in no way except over the road operated by the appellant. On the 1st day of January, 1887, the appellant raised the price of freight on railroad ties from said stations to the city of Evansville from \$14 to \$24 per car on all shippers except one Dickerson. The appellant entered into a contract with Dickerson by the terms of which he was permitted to ship ties from these stations at the price of \$14 per car in consideration that he would ship over the road 500 cars per month and would sell it such ties as it would need at twenty-five cents each. The evidence tends to prove that the price of ties on this road was twenty-six cents at the time the contract was made. After the freight was so raised the appellees shipped the ties they then had on hand over the appellant's road, amounting to about 353 cars, upon which the appellant collected from the consignees \$24 per car, which was deducted by the consignees from the agreed price to be paid for the ties on settlement with the appellees. The result.

of the discrimination in favor of Dickerson was to drive the appellees and other dealers in ties off the appellant's road and thus give Dickerson a monopoly of the business of purchasing and shipping ties.

Upon these facts the court of its own motion, as well as at the request of the appellees, instructed the jury substantially that if during seven months of the year 1887 the appellees shipped 853 carloads of cross-ties, in the usual manner, over the appellant's railroad, and during the same time Dickerson shipped a greater number of carloads under a special contract, which in addition to the contract of affreightment contained other stipulations of advantage to the appellant that the natural and necessary effect of these transactions considered in detail and altogether was a substantial discrimination in favor of Dickerson and against the appellees who were made to pay to the appellant many hundred dollars in excess of that paid by Dickerson for similar services and in excess of the value of all that was done or furnished or to be done or furnished by him under the special contract, then the appellees upon making a demand would be entitled to recover for the excess of freight so paid by them.

If any objection at all can be urged against these instructions it is, we think, that they are, under the facts in this case, too favorable to the appellant. It is not true that a railroad company, engaged in the business of a common carrier, possesses the same liberty to make contracts for its profit in carrying freight or passengers that a private person engaged in a private business possesses in making contracts in relation to private affairs.

Railroad companies are granted charters and are given the right of eminent domain because when the roads are constructed, though owned by the corporation, they are nevertheless for public use, and are, in a qualified sense, public highways. Every one constituting a part of the public for whose use they are constructed is entitled to an equal and impartial participation in the use of the facilities for transportation which they afford. While power to fix rates is conferred upon them by law such rates are always open to investigation by the courts, for it is an elementary rule that common carriers can charge no more than a reasonable compensation for the services performed. While it is true that there is apparently some conflict in the authorities, the principles here announced we think are supported by the weight of authority. *Root v. Long Island R. Co.* 114 N. Y. 300, 4 L. R. A. 331; *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188; *Scotfield v. Lake Shore & M. S. R. Co.* 43 Ohio St. 617, 54 Am. Rep. 846; *Sandford v. Catawissa, W. & E. R. Co.* 24 Pa. 378, 64 Am. Dec. 676; *Hays v. Pennsylvania Co.* 12 Fed. Rep. 309; *Atty-Gen. v. Chicago & N. W. R. Co.* 35 Wis. 426; *Samuels v. Louisville & N. R. Co.* 81 Fed. Rep. 57; *Providence Coal Co. v. Providence & W. R. Co.* 1 Inters. Com. Rep. 363.

A writer on railway law thus expresses the general rule: "Railways are held to the

strictest impartiality in the conduct of their business, in withholding all privileges or preferences from one customer which are not extended to all others." 1 Wood, *Railway Law*, 565. Of course there are some exceptions to the general rule, and we are not unmindful of the rule which permits a common carrier to discriminate in favor of a shipper who transports large quantities of a given commodity in one parcel at a time, as against a shipper who transports the same commodity in small quantities in broken packages. Such discrimination is rendered necessary by the increased expense of handling, storing, and caring for the smaller quantities, and is not unreasonable. Nor have we overlooked the rule which permits the common carrier to discriminate in favor of one class of goods over others of a different class. These rules constitute an exception to the general rule but in our opinion they have no application here. In this case the commodity shipped for Dickerson and the commodity shipped for the appellees was the same. All was shipped in full carloads and from the same stations. It is difficult to perceive how it is possible that it should cost more to ship a carload of cross-ties for the appellees than to ship a carload for Dickerson. It is plain, therefore, we think, that discrimination of \$10 on the car was unreasonable unless there was something in the special contract between the appellant and Dickerson which rendered such discrimination reasonable.

It is contended by the appellant that in view of the fact it secured by its contract with Dickerson a certain income of \$7,000 per month that it could as well afford to carry ties for him at \$14 per car as to carry them for the appellees at \$24 per car.

We find it unnecessary to inquire whether the appellant is correct or otherwise in this contention, for as we understand the law a railroad company engaged in the business of a common carrier is not permitted by the law to discriminate in favor of a shipper who is able to furnish a large amount of freight over one engaged in the same business who is unable to furnish the same quantity as that shipped by his more opulent rival. The reasons for prohibiting such discrimination are well stated in the case of *Hays v. Pennsylvania Co.*, *supra*. In that case it was said: "The discrimination complained of rests exclusively on the amount of freight shipped by the respective shippers during the year. Ought a discrimination resting exclusively on such a basis to be sustained. If so, the business of the country is in some degree subject to the will of railroad officials; for if one man engaged in mining coal and dependent on the same railroad for transportation to the same market can obtain transportation thereof at from twenty-five to fifty cents per ton less than another competing with him in the same business solely on the ground that he is able to furnish, and does furnish the larger quantity for shipment, the small operator will sooner or later be forced to abandon the unequal contest and surrender to his more opulent rival. If the principle is sound in its application to rival parties engaged in mining coal, it is equally applicable to

merchants, millers, dealers in grain and everybody else interested in any business requiring any considerable amount of transportation by rail, and it follows that the success of all such enterprises would depend as much on the favor of the railroad officials as upon the energies and capacities of the parties prosecuting the same. . . . The men who control railroads would be quick to appreciate the power with which such a hold would invest them, and, it may be, not slow to make the most of their opportunities, and perhaps tempted to favor their friends to the detriment of their personal or political opponents, or demand a division of the profits realized from such collateral pursuits as could be favored or depressed by discrimination for or against them, or else seeing the augmented power of capital, organize into overshadowing combinations and extinguish all petty competition, monopolize business and dictate the price of coal and every other commodity to the consumers."

In our opinion, the fact that Dickerson was able to furnish a larger number of carloads of ties for shipment than the appellees could, constituted no sufficient reason for a discrimination in his favor over the rates charged to the appellees. As to whether the fact that Dickerson agreed to furnish the appellant such ties as it desired for its own use, at a given price, relieved the discrimination of its objectionable features by which it became a reasonable discrimination was a question of fact which was properly submitted to the jury for its determination.

The court at the request of the appellees, instructed the jury in substance that a carrier cannot rightfully establish rates in order to keep on its line material for which it has use or to keep the price low for its own advantage; that the producers are entitled to sell it when they wish and in the most available market. Common carriers are forbidden to attempt this by applying disproportionate or unreasonable rates.

It is contended by the appellant that there was no evidence in the cause to which this instruction could apply, but we think otherwise. The fact that the appellant made a contract with Dickerson for cross-ties, to be used by it, at less than the selling price, and then discriminated against all other dealers

in such a manner as to drive them from its road authorized the inference that one object in view was to keep the ties it desired to use upon its line and to keep down the price. We think the instruction stated the law correctly and that it was applicable to the evidence in the cause. *Reynolds v. Western N. Y. & P. R. Co.* 1 Inters. Com. Rep. 685.

We are of the opinion that there is no error in the instructions given by the court of which the appellant has the right to complain.

Instruction No. 8 asked by the appellant and refused by the court was vicious in that it was calculated to create the impression upon the minds of the jury that the contract between the appellant and Dickerson did not amount to an unjust discrimination if it was based upon an adequate consideration.

If the contract was of such a character as to destroy the business of the appellees by reason of the discrimination in favor of Dickerson and thus enable Dickerson to acquire a monopoly of the business of purchasing and shipping cross-ties on appellant's road, the discrimination was unjust without regard to the consideration upon which it was based. *Chicago & A. R. Co. v. People*, 67 Ill. 11, 16 Am. Rep. 599; *People v. Chicago & A. R. Co.* 55 Ill. 111, 8 Am. Rep. 681; *Chicago & N. W. R. Co. v. People*, 56 Ill. 365, 8 Am. Rep. 690; *Garton v. Bristol & E. R. Co.* 6 C. B. N. S. 641; *Orouch v. London & N. W. R. Co.* 14 C. B. 254; *Sandford v. Catawissa, W. & E. R. Co.* 24 Pa. 882, 64 Am. Dec. 667; *Chicago & A. R. Co. v. Thompson*, 19 Ill. 584; *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760.

There was no evidence in the record to which the fourth instruction asked by the appellant was applicable, and for that reason it was properly excluded.

The sixth instruction asked by the appellant and refused by the court was defective in that it excluded from the consideration of the jury the question as to whether there had been an unjust discrimination made by the appellant in favor of Dickerson, whereby the appellees had been damaged.

In our opinion, there is no error in the record for which the judgment in this case should be reversed.

Judgment affirmed.

ARKANSAS SUPREME COURT.

ST. LOUIS, IRON MOUNTAIN &
SOUTHERN R. CO. *Appt.*,

v.

A. B. FERGUSON

(.....Ark.....)

Injury to a colt by running into a barbed-wire fence along a railroad when frightened off the track by a train whistle does not make the railroad company liable al-

NOTE.—For notes as to liability of railroad company for lack of fence, see *Gallagher v. New York & N. E. R. Co.* (Conn.) 5 L. R. A. 737; *Moses v. Southern Pac. R. Co.* (Or.) 8 L. R. A. 135. 18 L. R. A.

though the colt got upon the track through defects in the fence where the railroad company is not required by statute to fence out stock.

(December 3, 1902.)

APPEAL by defendant from a judgment of the Circuit Court for Hempstead County in favor of plaintiff in an action brought to recover damages for the loss of a colt alleged to have been killed by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Dodge & Johnson, for appellant; In the absence of a statute requiring a rail-

road to fence its track, there is no legal obligation resting on it to do so.

Campbell v. New York & N. E. R. Co. 50 Conn. 128, 18 Am. & Eng. R. R. Cas. 589; *Ward v. Paducah & M. R. Co.* 4 Fed. Rep. 862, 1 Am. & Eng. R. R. Cas. 620; *St. Louis, K. C. & N. R. Co. v. Busby*, 81 Mo. 48, 22 Am. & Eng. R. R. Cas. 589; *Boston & A. R. Co. v. Briggs*, 182 Mass. 24, 7 Am. & Eng. R. R. Cas. 541; *St. Louis, I. M. & S. R. Co. v. Walbrink*, 47 Ark. 330.

The doctrine laid down in *Hot Springs R. Co. v. Newman*, 36 Ark. 607, and *Little Rock & Ft. S. R. Co. v. Trotter*, 37 Ark. 593, is conclusive as to this case. In each of these cases the animals were injured by getting into a culvert. As in this case the engine or any part of the train did not strike the animals. They were frightened into going into the culvert.

The court said: "Though the injury might not have happened if the train had been sooner stopped, yet it was not to have been foreseen or anticipated by the person in charge of it, as a natural and probable consequence of the cars not stopping sooner, that the cars would attempt to pass over the culvert, or be injured, and which they, as persons of ordinary care and prudence, should have guarded against. Negligence cannot be imputed to them or the defendant.

Mr. James H. McCollum, for appellee:

All railroads which are now or may be hereafter built shall be responsible for all damages to persons and property done or caused by the running of trains in this state.

Mansf. Ark. Dig. § 5537.

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

Blyth v. Birmingham Waterworks Co. 11 Exch. 764. See *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. ed. 506.

It is lawful in this state to permit stock to graze upon the commons.

Little Rock & Ft. S. R. Co. v. Finley, 37 Ark. 593; *Jones v. Nichols*, 46 Ark. 207, 55 Am. Rep. 575.

Defendant is well aware of the fact that stock running at large and feeding upon the commons are liable to, and frequently do, stray upon its right of way and track. The defendant further knows that stock become frightened and wildly flee for safety at the approach of railway trains, and blindly run over precipices and into hollows, ditches, wire fences or anything else in the way, in their wild and frantic efforts to escape destruction. For the defendant, with a full knowledge of all this, to fence its track with a wire fence, and fail to connect same at the ends with its track, and fail to repair it for three years, and suffer it to become greatly dilapidated, and permit it to remain for months in that condition, as to allow stock running at large to stray on the inside and across same, upon its right of way and track, where such stock would be greatly endangered, entrapped, and liable to almost certain destruction, by being frightened and driven into the fence by the defend-

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ant's passing trains, unquestionably is culpable negligence.

The fence was the proximate cause of the accident.

Bizzell v. Booker, 16 Ark. 308; *Jones v. Nichols*, *supra*; *Cameron v. Vandergriff*, 53 Ark. 381; *St. Louis, I. M. & S. R. Co. v. Hopkins*, 12 L. R. A. 189, 54 Ark. 209; *Millen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Sisk v. Crump*, 112 Ind. 504, 2 Am. St. Rep. 213; *Bishop*, Non-contract Law, § 415; *Young v. Harvey*, 16 Ind. 814; 16 Am. & Eng. Encyclop. Law, p. 889, and *note*.

It is wholly immaterial as to who actually built the fence, or for whose benefit it was built.

Bond v. Evansville & T. H. R. Co. 100 Ind. 301, 23 Am. & Eng. R. R. Cas. 200; *Wabash R. Co. v. Williamson*, 104 Ind. 154, 23 Am. & Eng. R. R. Cas. 208.

The defendant was not required by law to build the fence; but as it undertook to erect and maintain the same, the law declares that it should have been kept in a good and safe condition.

Sisk v. Crump, *supra*; *Chicago & E. I. R. Co. v. Guertin*, 115 Ill. 466, 24 Am. & Eng. R. R. Cas. 385.

The fence was a nuisance and the defendant should be held liable for any damages flowing therefrom.

Wood, Nuisances, §§ 118, 184, 188.

Battle, J., delivered the opinion of the court:

Appellant inclosed a part of its railway track and right of way with a wire fence. For three years the fence was permitted to stand without repairs. The result was, at the end of that time, it was in a very bad condition. There were several gaps in it, and it was not connected with the track at the ends. While it was in this condition the colt of appellee strayed on the right of way of appellant, and upon the part of its railway track so inclosed; and an engineer of an approaching train, discovering it upon the track, sounded the alarm, frightened the colt, and it ran from the track against the wire fence by which its throat was cut, and the colt died from the wound.

Was the appellant liable to the appellee for the loss occasioned by the failure to construct the fence so as to make it harmless to stock, and keep the same in good repair?

A well-established rule of law is that the owner of private grounds is under no obligations to keep them in a safe condition for the benefit of trespassers or those who may go upon them uninvited, from motives of private convenience in no way connected with the owner, or from curiosity. He is under no obligation to fence or guard any wells, ditches, stone quarries, or other pitfalls, or dangerous places on his uninclosed grounds, in order to protect animals staying thereon against injuries, and is not liable for the damages suffered because he failed to do so. *Hughes v. Hannibal & St. J. R. Co.* 66 Mo. 325; *Clary v. Burlington & M. R. Co.* 14 Neb. 232; *Leesman v. South Carolina R. Co.* 4 Rich. L. 413; *Gilman v. Sioux City & P.*

R. Co. 62 Iowa, 299; 1 Thomp. Neg. pp. 298, 303; 8 Lawson, Rights, Rem. & Pr. §§ 1149, 1151, and cases cited.

In *St. Louis, I. M. & S. R. Co. v. Fairbairn*, 48 Ark. 493, Chief Justice Cockrill, speaking for the court, said: "The appellee was injured by stepping into a cavity caused by a rotten plank, in the appellant's platform at Biene station. The jury found the issues in his favor, and the question whether the appellee was lawfully on the platform at the time when he was injured is the only one properly left for our consideration. If he was there merely from curiosity, or for his own convenience for the transaction of business in no way connected with the railway company, no relation existed between him and the company which imposed upon the latter the duty of exercising even ordinary care in maintaining a safe platform for his own use, and it is not liable for his injury."

Is an owner of private grounds under greater obligation to owners of livestock as to such stock? In *Kansas City, S. & M. R. Co. v. Kirksey*, 48 Ark. 368, the court said: "The railroad's obligation as a carrier, or its duty to a person rightfully upon its track, are not coincident with the negative duty not to injure, unnecessarily, stock that wanders upon its right of way and track. It is held to a rigid observance of its public duties, but, as to stock straying upon its right of way, its obligation is not different from that of other owners or occupants of real estate. . . . The statute has placed no obligation upon the railroad in that respect, and the rights and liabilities of the company and stock owner are governed by the common law. The company is not required to fence out the stock, and the stock owner enjoys the passive license of free pasturage upon its open premises as upon those of natural persons, without being held to accountability as a trespasser. . . . The technical wrong that the landowner suffers by the entry of another's stock is regarded as too slight to engage the attention of the law,—*damnum absque injuria*. But the privilege of entry and free pasturage is not a right which can be demanded and enforced,—it is only an immunity from suit or punishment; and the company or other landowner is under no obligation to expend money or labor in preparing the land for a convenient or a safe enjoyment of it." And this court, in that case, held that "the duty of railroad companies to avoid unnecessary injury to stock upon their tracks does not require them to keep their entire right of way clear of obstructions which conceal stock from view of the engineer of the train until they rush upon the track unseen, and too late to avoid the injury."

The law upon this subject, and the reason for it are clearly and succinctly stated by Chief Justice Gibson in *Knight v. Abert*, 6 Pa. 472, 47 Am. Dec. 478. He said: "In this, and perhaps every American, state, an owner of cattle is not liable to an action for their browsing on their neighbor's uninclosed woodland. But it follows not, because such browsing is excusable as a trespass, it is a matter of right. It is an immunity, not a privilege, or, at most, a license revocable at 18 L. R. A.

the will of the tenant, who may turn his neighbor's cattle away from his grounds at pleasure. Their entry is, in strictness, a trespass, which, for its insignificance, is not noticed by the law, probably on the foot of the maxim, *de minimis*, or perhaps because it is better that all waste lands should be treated as common without stint. It certainly saves vexatious litigation. The particular loss from it is inappreciable, even as a subject of nominal damages, and would probably be held so even in England, where waste land is altogether worthless. But, even if an owner of cattle had the right claimed for him, the tenant would not be bound to expend his money or his labor in preparing his land for the safe and convenient enjoyment of it. A man must use his property so as not to incommode his neighbor, but the maxim extends only to neighbors who do not interfere with it or enter upon it. He who suffers his cattle to go at large takes upon himself the risks incident to it. If it were not so, a proprietor could not sink a well or a sand pit, dig a ditch or a mill race, or open a stone quarry or a mine hole, on his own land, except at the risk of being liable for consequential damages from it, which would be a most unreasonable restriction of his enjoyment. He might as well be required to level a precipice, put a fence round a swamp, or cut down reclining trees. It is enough, in all reason, that his neighbor's cattle have the range of his forest, without imposing on him the duty of looking to their safety. If the owner of them does not choose to enjoy his license on that footing, let him keep them at home, or send a herdsman along with them. The law imposes no such duty on the tenant."

Upon the principle stated in the cases we have cited, railroad companies are not required to cover culverts and bridges in their tracks so as to permit stock to pass over them in safety; yet it is a notorious fact, as attested by the records of this court, that cattle frightened by approaching trains have run into uncovered culverts and been killed; and it never has been suggested by any court, so far as known to us, that a railroad company was liable for such injuries because the culverts were uncovered. *Hot Springs R. Co. v. Newman*, 36 Ark. 607; *Little Rock & Ft. S. R. Co. v. Trotter*, 37 Ark. 593.

There is, however a class of authorities which holds, by way of exception to the general rule, that it is the duty of the owners of private grounds to erect suitable guards around the excavations made by them thereon, so near a public road that persons and animals passing on the road might accidentally fall into the same, and that they are liable to any one who may be injured by accidents resulting from their failure to do so. *Clary v. Burlington & M. R. Co.* 14 Neb. 232, and cases cited; 3 Lawson, Rights, Rem. & Pr. § 1157, and cases cited; 1 Thomp. Neg. p. 807. In *Townsend v. Wathen*, 9 East, 277, A. kept on his open grounds near the highway, without notice, certain traps baited with flesh, for the purpose of catching his neighbor's dogs, and B's dog, led by his natural instinct, ran into one of these traps

and was killed, and it was held that A. was liable to B. for the damages caused by the killing of the dog. And in a case in which the defendant had dug a pit under a cotton gin, near a highway, and kept it uninclosed, with corn and cotton seed scattered about it, and the plaintiff's cow, which he had turned out at a place remote from the gin, fell into it and was killed, this court held that the defendant was guilty of negligence, and liable to the plaintiff for the value of the cow. *Jones v. Nichols*, 46 Ark. 207, 55 Am. Rep. 575.

In this case the appellant was under no obligation to construct and maintain a fence along its track or highway, or to place guards around wells or other pitfalls or dangerous agencies on its right of way, to protect animals, uninvited, wandering thereon against injuries. It was under no greater obligations to provide safeguards against wire fences than it was to place them round pits or other dangerous places. The peculiarity of the danger does not alter the duty or liability. The owner of animals, in permitting them to run at large, assumes all the risks to which the animals are exposed by reason of such dangers.

In the trial of this case no evidence was adduced tending to show that the appellant placed anything on its right of way calculated to invite or induce horses and cattle to go thereon between its track and the wire

fence, and that appellee's colt was thereby invited or induced by appellant to go upon the same at the time it was killed, as in the case of *Sisk v. Crump*, 112 Ind. 504, 12 West. Rep. 184, 2 Am. St. Rep. 213, cited by appellee. There was no evidence tending to show that the wire fence was constructed or maintained in such manner and so near a public street or road as to make it dangerous for horses or cattle passing along the street or road. There was no evidence to show that this case comes within any exception to the general rule. The evidence tended to prove, in short, the following facts: That the wire fence was in bad condition by reason of the gaps in it; that appellee's colt, uninvited, wandered upon the right of way and track of appellant, was frightened by an alarm lawfully given on a passing train, and ran against the fence, and was thereby wounded and killed. The case comes clearly within the general rule, as we have stated it.

But appellant did owe to appellee the duty, when it discovered his colt upon its track, to use ordinary or reasonable care to avoid injury to it by running its train against it, or by frightening and driving it by unnecessary alarms against the wire fence. *St. Louis, I. M. & S. R. Co. v. Roberts* (Ark.) 19 S. W. Rep. 1055; *Atlanta & W. P. R. Co. v. Hudson*, 62 Ga. 679.

Reversed, and remanded for a new trial.

KANSAS SUPREME COURT.

J. C. GOODRICH & Wife, *Plffs. in Err.*,
v.
BOARD OF COUNTY COMMISSIONERS
of Atchison County.

(.....Kan.....)

*1. On the trial of a cause a defendant may object to the reception by the

*Headnotes by STRANG, C.

court of any evidence under the petition, although his demurrer to the same petition has previously been overruled; and the court commits no error by entertaining and passing upon said objection.

2. For all purposes of establishing and opening highways under our statute through mortgaged premises the mortgagor in possession is to be regarded as the owner of the land.

(November 7, 1891.)

NOTE.—Rights of mortgages of premises taken by eminent domain.

- a. As between mortgagor and mortgagee.
- b. As between mortgagee and appropriator.
- a. As between mortgagee and mortgagee.

It seems to be universally admitted that a mortgage of land taken for public use under eminent domain proceedings has some rights which a court will protect, but there is considerable diversity of opinion as to the precise extent of those rights and as to the most appropriate means for protecting them. As between mortgagor and mortgagee the general rule is that the award takes the place of the land appropriated, under the rule that when land is turned into money the mortgage becomes a lien upon the fund instead of the land. *Astor v. Miller*, 2 Paige, 68, 2 L. ed. 816.

The money represents the land for the purpose of satisfying the mortgage. *Gimbel v. Stolte*, 59 Ind. 453.

The damages awarded take the place of the land in respect to all the rights and interests dependent thereon. 18 L. R. A.

upon and incident to it. *Utter v. Richmond*, 112 N. Y. 610.

Consequently it has been held that in a road proceeding the court will not award the damages assessed to the owner of the soil without first inquiring whether or not there are incumbrances, and if there are an equitable distribution of the fund will be made. *Re Noble Street*, 1 Ashm. 276.

The jury should apportion the damages between the owners of the land and those having interests as mortgagees, leasees, or otherwise. *Rentz v. Detroit*, 48 Mich. 547.

If the mortgagee seeks to appropriate the fund it must be paid to him although he was not made a party to the condemnation proceedings. *Bright v. Platt*, 32 N. J. Eq. 370.

And the mortgagee is entitled to be satisfied out of the fund before the mortgagor is entitled to any part of it. *Union Mut. L. Ins. Co. v. Slee*, 10 West. Rep. 154, 123 Ill. 95.

The fund must be first applied on the mortgage. *Dodge v. Omaha & S. W. R. Co.* 20 Neb. 281.

As between a mortgagor and mortgagee the fund belongs to the latter to the extent of the mortgage debt. *South Park Comrs. v. Todd*, 112 Ill. 383.

ERROR to the District Court for Atchison County to review a judgment in favor of defendant in an action brought to recover the value of a strip of land which had been taken for the purposes of a highway. *Affirmed.*

The facts are stated in the commissioner's opinion.

Mr. J. T. Allensworth, for plaintiffs in error:

The Constitution of the United States provides: "Nor shall private property be taken for public use without just compensation."

Amend. 1789, art. 5.

No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land.

Ord. 1787, art. 2, § 9.

No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or secured by a deposit of money to the owner irrespective of any benefit from any improvement proposed by such corporation.

Kan. Const. art. 13, § 4.

Are the plaintiffs, mortgagees out of possession, and before foreclosure, "owners" within the protection of those provisions.

The mortgagor, it is true, holds the legal title, but the mortgagee has an equitable interest in, or right to, the mortgaged property, and under the statute, is an owner of the property.

Severin v. Cole, 38 Iowa, 468.

The term "owner" in this statute includes every person having an interest in real estate

capable of being damaged by the laying out of a street.

Parks v. Boston, 15 Pick. 208; *Ellis v. Welch*, 6 Mass. 646, 4 Am. Dec. 122; *Cool v. Crompton*, 18 Me. 250; *Platt v. Bright*, 39 N. J. Eq. 128; *Sherwood v. LaFayette*, 7 West. Rep. 524, 109 Ind. 411, and authorities cited.

Certainly the mortgagee's interest is "property" within the provisions of the Constitution. It has value, is taxable, is the subject of commercial transactions.

Lewis, Em. Dom. § 824; 1 Jones, Mortgages, § 708; *Bank of Auburn v. Roberts*, 44 N. Y. 192; *Rosa v. Missouri, K. & T. R. Co.* 18 Kan. 124; *Smith County Comrs. v. Labore*, 37 Kan. 480; *Burlington, K. & S. W. R. Co. v. Johnson*, 38 Kan. 142; *Chicago, K. & W. R. Co. v. Hurst*, 41 Kan. 740; *Utter v. Richmond*, 112 N. Y. 610; *Dyer v. Wightman*, 66 Pa. 425; *Dodge v. Omaha & S. W. R. Co.* 20 Neb. 276; *Galena & S. W. R. Co. v. Haslam*, 73 Ill. 494; *Adams v. St. Johnsbury & L. O. & L. V. R. Co.* 57 Vt. 240; *Wilson v. European & N. A. R. Co.* 67 Me. 358; *Chicago v. Garrity*, 7 Ill. App. 474.

The plaintiffs in error could have brought an action in ejectment foreclosure having been had, to recover possession of the land embraced by the road, but have elected to prosecute the present action which they can do.

Lewis, Em. Dom. § 628, notes 1, 5; *Warwick Sav. Inst. v. Providence*, 12 R. I. 144.

On Petition for Rehearing.

While it is true the Legislature has the power to provide a tribunal which shall adju-

The mortgagees have a right to the damages awarded. *Chicago, M. & St. P. R. Co. v. Baker*, 102 Mo. 560.

The sum due on foreclosure should be ordered paid out of the condemnation money rather than to order a sale of the land. *Colehour v. State Sav. Inst.* 40 Ill. 153.

A mortgagee who is not made a party to the condemnation proceedings may waive the omission and assert his claim to the award, and such claim, where it is shown that the property is insufficient to pay the mortgage debt and that the mortgagor is insolvent, constitutes a lien thereon superior to that of a prior attachment levied by a creditor of the mortgagor. *Sawyer v. Landers*, 56 Iowa, 422.

Some of the authorities, however, hold that the award cannot be resorted to by the mortgagee until the remainder of the mortgaged property has been exhausted. Thus, in an action to determine the right to the award in which it does not appear whether or not the mortgagee was made a party to the condemnation proceedings the court said that the property condemned was no longer liable to be sold under the mortgage, and that the lien was transferred to the fund awarded, and decreed that such fund could not be resorted to by the mortgagee until they had exhausted the remainder of the land. *Home Ins. Co. v. Smith*, 28 Hun, 800.

An award to owners will be construed to include mortgagees. Therefore when the state on abandoning a canal made compensation to landowners for damages thereby occasioned they are subject to the lien of a mortgage upon the land to an extent sufficient to satisfy any deficiency upon a foreclosure of the mortgage. *Bank of Auburn v. Roberts*, 44 N. Y. 192.

Where an award is made for land taken for a street, and an assessment made on the remaining land for benefits, the award may be allotted to the mortgagee without deduction of the assessment, 18 L. R. A.

and a decree rendered for foreclosure of the remaining property to satisfy the unpaid balance of the mortgage. *Hooker v. Martin*, 10 Hun, 308.

The agreed rate of interest will continue on the mortgage during the time payment is delayed by proceedings for the assessment of damages under a proceeding for the assessment of the damages for a taking of the land for public use. *Union Sav. Inst. v. Boston*, 129 Mass. 82, 37 Am. Rep. 305.

Where the mortgagee foreclosed and purchased the land he was held to have lost all claim to the fund awarded in condemnation proceedings and new proceedings must be taken to determine what the corporation must pay to retain possession of the land. *Lehigh Coal & Nav. Co. v. Central R. Co.* 35 N. J. Eq. 870.

b. As between mortgagee and appropriator.

Upon the questions how far the one seeking to appropriate land for public use must take notice of a mortgage thereon and what steps he must take to protect himself against such mortgage there is considerable conflict among the authorities. It has been said that a railroad company cannot obtain by proceedings under the statute greater rights than it can acquire as an innocent purchaser for value from the mortgagor. *Severin v. Cole*, 38 Iowa, 467.

And it seems, in many jurisdictions at least, to be necessary for the corporation to take some measures to protect itself against the claim of the mortgagee. *Wooster v. Sugar River V. R. Co.* 57 Wis. 312.

It has been said that the corporation must see to the discharge of a prior mortgage in order to secure its own title, and may award the sum allowed as damages to the mortgagee or keep sufficient of the fund until the mortgage falls due. *Re John & Cherry Streets*, 19 Wend. 659.

The corporation may require or provide for the

dicating the rights of a nonresident party whose property is taken under the exercise of the right of eminent domain, yet when such tribunal consists of a jury, or commissioners, or road viewers, the notice to the nonresident must be given in such manner that the property holder could have the opportunity of appearing at the selection of such tribunal, and exercising his right of securing impartial and fair men to pass upon his rights in the premises, and the notice referred to in section 8 is given after the road viewers are appointed, and he could not, even if such notice were jurisdictional, have his day in court, as the Constitution and the law of the land provide, and is not the taking of private property by "due process of law."

Langford v. Ramsey County Comrs. 16 Minn. 375; *Lewis, Em. Dom.* § 865, and authorities cited, § 866, and authorities cited in notes 7, 9.

Because said Act under which the road in question was condemned does not provide for any notice whatever to nonresidents, mortgagees, or lienholders, the entire Act as to the taking of their property is unconstitutional and void.

Lewis, Em. Dom. § 865, and authorities cited, § 868, and notes 1, 2; *Langford v. Ramsey County Comrs. supra.*

The right of the mortgagees in the property referred to is property within the constitutional prohibition against the taking of private property without compensation and without "due process of law."

Grand Rapids Boom Co. v. Jarvis, 80 Mich.

308; *Wilson v. European & N. A. R. Co.* 67 Me. 358; *Ellis v. Welsh*, 6 Mass. 246, 4 Am. Dec. 122; *Parks v. Boston*, 15 Pick. 303; *Patterson v. Boston*, 20 Pick. 165; *Hager v. Brainard*, 44 Vt. 302; *Wade v. Hennessey*, 55 Vt. 207; *Adams v. St. Johnsbury & L. C. & L. V. R. Co.* 57 Vt. 240; *Watson v. New York Cent. R. Co.* 47 N. Y. 161; *Baltimore & O. R. Co. v. Thompson*, 10 Md. 76; *Kennedy v. Milwaukee & St. P. R. Co.* 22 Wis. 581.

Messrs. W. T. Bland, County Atty., and James W. Orr, for defendant in error:

The law which requires a notice to be given to owners does not include mortgagees not in possession.

Chick v. Willetts, 2 Kan. 384; *Burhans v. Hutcheson*, 25 Kan. 625; *Waterson v. Devoe*, 18 Kan. 223; *Vanderliffe v. Knapp*, 20 Kan. 647.

A mortgagee of real estate is in no sense an owner of the land, either legal or equitable.

Kuhn v. Freeman, 15 Kan. 428; *St. Louis, L. & D. R. Co. v. Wilder*, 17 Kan. 289; *Parish v. Gilmanton*, 11 N. H. 298; *Astor v. Miller*, 2 Paige, 68, 2 L. ed. 816; *Ballard v. Ballard Vale Co.* 5 Gray, 470; *Watson v. New York Cent. R. Co.* 47 N. Y. 157; *Farnsworth v. Boston*, 126 Mass. 1.

It is urged that if the plaintiffs can be deprived of a portion of their security by the taking away of so much thereof as is necessary to make a road through the land, then, by the same reasoning, they could be deprived of the whole security, and have no remedy.

This court, in the case of *Kuhn v. Freeman, supra*, said: "The exercise of the right of

satisfaction of the mortgage. *Devlin v. New York*, 121 N. Y. 127.

The mortgagee has such an interest in the proceedings that in case he is omitted therefrom by mistake the corporation may maintain an injunction suit to withhold the fund from the mortgagor until the rights of the mortgagees may be ascertained and provided for. *Calumet River R. Co. v. Brown (Ill.)* 12 L. R. A. 84.

On the other side, it has been held that notwithstanding the existence of mortgages on the property the mortgagor may have his damages assessed to the same extent as if they did not exist. *Breed v. Eastern R. Co.* 5 Gray, 470, note.

How far mortgagees must be made a party and given notice.

Expressions are found as broad as that the term "owner" includes everyone having any title or interest in the land. *Baltimore & O. R. Co. v. Thompson*, 10 Md. 87.

And it would seem that at least the numerical weight of the cases in which the question has been passed upon recognize the right of the mortgagee to notice, and in many cases in which no opinion is expressed on the point there seems to be an assumption that notice to him was necessary.

In *Siman v. Rhoades*, 24 Minn. 25, the court said the interest of the mortgagee could have been bound by making him a party to the proceedings.

A requirement of notice to all parties "interested in the land" to be taken includes the mortgagee. *Warwick Sav. Inst. v. Providence*, 12 R. I. 144; *State Easton & A. R. Co.* 36 N. J. L. 184.

Under a charter requiring notice to persons interested if the mortgagee is not notified he will not be bound by the proceedings. *Platt v. Bright*, 29 N. J. Eq. 123.

Under a statute requiring notice to all persons 18 L. R. A.

whose interests are to be affected by the proceedings notice must be given to the mortgagee; and the existence of a mortgage which is a lien on the land taken is a defect in the title within the meaning of a statute authorizing the company in case of the existence of such defect to proceed anew to acquire a valid title in the same manner as if no appraisal had been made. *Re New York Cent. R. Co.* 20 Barb. 419.

The same rule has been applied when the statute provides for notice to the "owner."

The term "owner" is to be regarded as descriptive of the persons equitably entitled to receive compensation for damages rather than as designating the person having a legal title to the land. And between the mortgagor and mortgagee the latter is entitled to the fund. *Danforth v. Suydam*, 4 N. Y. 68.

The mortgagee is an owner in such sense that he is entitled to notice of the assessment of damages for a right of way over the mortgaged property. *Severin v. Cole*, 38 Iowa, 467.

It is only by treating the mortgagee as having a right to notice that the statute can be upheld. Payment of the award to the mortgagor without any notice to the mortgagee will not protect the corporation from being held liable to pay it to the mortgagee. *Sherwood v. Lafayette*, 7 West. Rep. 524, 108 Ind. 411.

A condemnation of property upon which there is a mortgage of record without notice to the mortgagee and without his knowledge will not affect his rights in the premises. The mortgagee's rights are protected by the constitutional provision that property shall not be taken for public use without compensation. *Dodge v. Omaha & S. W. R. Co.* 20 Neb. 281.

A mortgagee out of possession whose mortgage is recorded should be made a party to proceedings by a railroad company to ascertain the damages of

eminent domain is the exercise of a sovereign power, and no person is presumed to covenant against the acts of sovereignty."

Mr. T. M. Pierce also for defendant in error.

Strang, C., filed the following opinion:

September 24, 1881, one Silas H. Hamilton and Francis B. Hamilton gave Alexander M. Sutherland a mortgage upon a quarter section of land in Atchison county, to secure the sum of \$5,800, which mortgage was placed upon record October 9, 1888. Sutherland duly assigned said mortgage to J. C. Goodrich, and on the same day Goodrich assigned an interest in said mortgage of the value of \$2,818.05 to Ann B. Sutherland, both of which assignments were placed of record on the 12th day of October, 1888. January 8, 1884, a petition was filed with the county clerk of Atchison county, asking the board of county commissioners to cause a public road to be laid out, in part across and over the land covered by the mortgage above described. March 25, 1884, the road prayed for was established across said land, the viewers assessing damages to the said land in the sum of \$250 and awarding the same in the name of T. C. Beard, agent of the mortgagors. Afterwards said T. C. Beard appeared

before the board of county commissioners, and procured an increased allowance of damages in the sum of \$100, making a total award of damages of \$350, which was paid to said Beard. During the time when said road was being laid out, as well as when the award of damages was paid to Beard, the mortgagors were in possession of the land, and had been ever since the execution of the mortgage. February 8, 1885, the mortgage was foreclosed in the United States circuit court, and the land sold by a master to the plaintiff J. C. Goodrich for the sum of \$2,500. April 11, 1887, this action was begun by the plaintiffs to recover the amount of said award from the board of county commissioners of Atchison county, claiming that they were entitled to the damages as mortgagees of the land, and alleging that said damages were wrongfully paid by said board to the agent of the mortgagors. March 7, 1888, defendants filed a demurrer to the petition, which demurrer was overruled by the *Hon. S. H. Glenn*, judge *pro tem.*, the regular judge being disqualified to sit in the case. Answer and reply were afterwards filed, and the case came on for trial February 5, 1889, before the regular judge of the district, *Hon. Robert M. Eaton*, who in the mean time had been elected and qualified. A jury was ob-

the landowners for land taken for its road. *Wilson v. European & N. A. R. Co.* 37 Me. 368.

If the mortgagee is not made party to the condemnation proceedings he will not be bound by the award. *Calumet River R. Co. v. Brown* (Ill.) 12 L. R. A. 84.

If the mortgagee is not made a party the company may be compelled to make payment for his rights although having once paid the mortgagor and the mortgagee may insist on another appraisal of the value of the land taken. *Bright v. Pratt*, 32 N. J. Eq. 370.

Mortgagees are necessary parties to a suit to recover the damages for the taking of the property. *Davis v. Lacrosse & M. R. Co.* 12 Wis. 18.

A mortgagee in possession is entitled to notice. *Parker v. Petitioners for Highway in Manchester*, 36 N. H. 84.

The company must treat with the mortgagees after condition broken. *Adams v. St. Johnsbury & L. C. & L. V. R. Co.* 57 Vt. 248.

And if they do not they will be liable to him in trespass although they have condemned the right of the mortgagor and paid damages to him. *Hagar v. Brainerd*, 44 Vt. 302.

Under the English statutes the mortgagee must be made a party and his rights provided for. *Ran-kin v. East & W. India D. R. Co.* 12 Beav. 304; *Martin v. London, C. & D. R. Co.* L. R. 1 Eq. 145.

Under the Michigan statute mortgagees must be made defendants to proceedings to condemn land. *Michigan Air Line R. Co. v. Barnes*, 40 Mich. 382.

Under the Massachusetts Statutes of 1881, chap. 110, notice must be given to all persons interested as mortgagors or mortgagees, and the award must be distributed in accordance with the equitable interests of those interested; but that statute does not exclude the equitable remedy of a mortgagee who is not made a party against the mortgagor to reach the amount awarded to him. *Wood v. West-borough*, 1 New Eng. Rep. 594, 140 Mass. 403.

It seems that the mortgagee must be made a party under the Vermont statute. *Wade v. Hen-nessy*, 55 Vt. 210.

But where the mortgagee is made a party to the proceedings the damages awarded may cover the 18 L. R. A.

full value of the property taken and be assessed to the mortgagor leaving the rights of the mortgagor and mortgagee to be settled between themselves, and the damages awarded stand in place of the land; and in such case the company cannot be com-pelled to pay a second time by the fact that the mortgagee permitted payment to be made to the mortgagor and the fund to be wasted. *Thompson v. Chicago & S. F. & C. R. Co.* (Mo.) March 2, 1892.

In contrast with the above the following cases have held that no notice need be given to the mort-gagee:

For the purpose of receiving notice of the open-ing of a highway the mortgagee cannot be regarded as the owner of the land mortgaged under the terms of the statute. *Parish v. Gilmanton*, 11 N. H. 298.

After notice and compensation to the mortgagor the city is not liable to the mortgagee for lands taken for a city street under a charter providing for notice and compensation to the owner. *Whit-ing v. New Haven*, 45 Conn. 303.

In a taking of land for public use the mortgagor is regarded as having the entire estate in the prem-ises and entitled to receive the whole value thereof without any deduction on account of any mort-gages thereon. *Read v. Cambridge*, 126 Mass. 427.

In *Farnsworth v. Boston*, 126 Mass. 1, the mort-gagee is held not entitled to join in a petition for the assessment of damages on the ground that equity will regard the fund awarded as land and protect his rights, and that the proceeding being a public one the mortgagee has equal knowledge with the mortgagor of the proceeding.

A mortgagee cannot recover for consequential injuries to the mortgaged property from the con-struction of a railroad where the mortgagor has without fraud made an amicable settlement for such damages with the company. *Knoll v. New York C. & St. L. R. Co.* 1 L. R. A. 386, 121 Pa. 467.

If the company submits the matter to arbitration as provided by statute the mortgagee will be bound by the appraisal, but if the company pays the money to the mortgagor in pursuance thereof when it should have been paid to the mortgagee, it will be compelled to pay it over again to the

tained, and a witness placed upon the stand, when the defendants objected to any evidence being received under the petition for the following reasons: "(1) Because this court has no jurisdiction to try this case; (2) because the petition does not state facts sufficient to constitute a cause of action against the defendant." This motion was sustained. A motion for a new trial was then filed, which, upon a hearing, was overruled, and the case brought here for review.

The first question presented is raised by the contention of the plaintiff that the action of the court in overruling the demurrer to the petition settled the law of the petition so far as the trial court was concerned; that, having overruled a demurrer to the petition, thus holding the petition to state a cause of action, the trial court could not subsequently in the same trial, when evidence was offered under the petition, sustain an objection to the reception of such evidence on the ground that the petition did not state facts sufficient to constitute a cause of action; that, when the court overruled the demurrer to the petition, such action of the court was a final adjudication in favor of the plaintiff as to the sufficiency of the petition, and, if the defendant felt aggrieved thereby, its only remedy was by ap-

peal, and not by objecting to the introduction of the testimony. We do not think this position is tenable. This is a jurisdictional question, and we think the defendant may raise it at every stage of the trial. Though the court has overruled a demurrer, a party defendant may, in the same trial, object to the reception of evidence under the petition, and thus again secure the attention of the court to and challenge its judgment upon the same question raised by the demurrer; and if the court overrules its objection it may still raise the question before the final judgment against it by a motion for a new trial. The object of a motion for a new trial is to call the attention of the court to alleged errors, that the court may have an opportunity to correct its own errors, if it concludes, even after the trial, it has made any, or suffered any to be made. If it is proper to permit the defendant to argue the question raised by the demurrer anew on a motion for a new trial, we know of no reason why it is not proper to raise and argue the question by an objection to the reception of evidence under the petition. The object sought to be obtained is the same. By filing an answer the defendant waives his right to demur, but he does not thereby waive his right to raise the same question that he could have

right party. *Kennedy v. Milwaukee & St. P. R. Co.* 22 Wis. 586.

Under the West Virginia statute the mortgagee need not be made a party to a proceeding to open a road. *Keystone Bridge Co. v. Summers*, 13 W. Va. 462.

It seems that in California the mortgagee is not a necessary party in street-opening proceedings. *Schumacher v. Toberman*, 56 Cal. 508.

Special circumstances under which no notice need be given.

When the statute does not provide for notice in case of the opening of a town way a notice must be given on general principles of justice to the owners of land over which it is to be located, but for that purpose a notice given to the one in possession is sufficient whether mortgagor or mortgagee. *Cool v. Crommet*, 13 Me. 254.

Under a statute providing that premises taken for a street shall be discharged of all rents and contracts after the land is taken, a prior mortgage cannot be enforced against the part taken but the fund awarded will represent the land and the lien of the mortgage will be good against it. *Astor v. Hoyt*, 5 Wend. 610.

A mortgagee of land taken for a railroad need not be made a party to proceedings for the assessment of damages if he gives his assent thereto in writing filed in the case. *Meacham v. Fitchburg R. Co.* 4 Cush. 291.

The mortgagees of the franchises and easements of a railroad company need not be made parties to a proceeding to condemn a right of way across its track for a street if the track is not disturbed and the company is left in control of its road. *Grand Rapids v. Grand Rapids & I. R. Co.* 58 Mich. 641.

The mortgagee has no interest in the amount awarded to a mortgagor for flowage under the Mill Acts since they relate only to the damages suffered prior to the time of the rendering of the decree and are like any other annual product or inquiry thereto or to the possession of the land merely, and the mortgagee is therefore not a necessary party. *Paine v. Woods*, 106 Mass. 162; *Vaughn v. Wetherell*, 116 Mass. 188.

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Effect of failure to give notice.

The mortgagee must resort first to the land remaining after the condemnation before resorting to the condemned land. *Dodge v. Omaha & S. W. R. Co.* 20 Neb. 281.

If after sale of the remaining land there is a deficiency the corporation must satisfy it to the amount of the value of the land taken and damages for taking it estimated as of the time of the taking, and it cannot redeem by simply paying such a proportion of the mortgage debt as will be equal to the relative value which its condemned land bears to the whole tract. *Mutual L. Ins. Co. of New York v. Easton & A. R. Co.* 38 N. J. Eq. 152.

Where the company took title to the land under the statute upon agreement with the mortgagor as to the price to be paid the court held that upon foreclosure of the mortgage the company was bound to contribute towards the satisfaction of the mortgage if anything remained due after applying the remainder of the land upon it to the full value of the property taken at the time of the taking. *Dows v. Congdon*, 16 How. Pr. 571.

The amount to be paid the mortgagee is the value of the lands at the time of the taking. *Aspinwall v. Chicago & N. W. R. Co.* 41 Wis. 474.

In New Jersey it was held that where condemnation proceedings are not instituted but the road is constructed under agreement with the mortgagor the land will be subject to be sold to satisfy the mortgage and the sale may include improvements. *Price v. Weehawken Ferry*, 31 N. J. Eq. 81.

But in North Hudson County R. Co. v. Booraem, 28 N. J. Eq. 457, in which possession of the land had been obtained by agreement with the mortgagor, the court held that the company was compelled to contribute towards payment of the mortgage, and that the amount of the contribution might be ascertained by condemnation proceedings to which the mortgagee was made a party. Reversing 27 N. J. Eq. 372, where the chancellor held that the mortgagee was entitled to apply the full value of the property taken including improvements in satisfaction of his mortgage.

H. P. F.

raised by demurrer to the petition by objecting to the reception of evidence under the petition. We have examined the cases cited. The case of *Sanford v. Weeks*, 89 Kan. 649, instead of supporting the position of the plaintiffs, seems to militate against such position, so far as it is in point. In that case Sanford demurred to the petition, which was overruled, and no exception taken. He then objected to the reception of evidence under the petition, which was the same practice that prevailed in this case, and which is now objected to. That case also holds that, if the defendant had taken exceptions to the overruling of his demurrer, the question raised thereby might have been reviewed by this court. There is nothing in the case of *Union Pac. R. Co. v. Estes*, 37 Kan. 229, that supports the contention of the plaintiff. That case simply holds that a party who seeks to have a ruling on a demurrer to a petition reviewed by this court may either stand on his demurrer, and bring the case direct to this court for review, or take his exception to the ruling, file his answer, and go to trial, and, after trial, bring his case here, and have the ruling on the demurrer reviewed. That a defendant, whose demurrer to the petition is overruled, may except and stand on his demurrer, and come to this court at once, and have the question settled as to the sufficiency of the petition, is not denied in this case. That question is not involved in the case. The case cited, however, settles the question that he need not stand on his demurrer, and come at once to this court, but may take his exception, answer over, and at the end of the trial come to this court and have the question raised by his demurrer reviewed. The cases cited from Ohio, Nebraska, and New York, relate simply to the question as to whether a defendant whose demurrer has been overruled can answer over, and afterwards at the end of the trial have the ruling on his demurrer reviewed by the superior court. What the law may be in those states upon that question is not very material, as that precise question is not raised in this case, and, if it were, the cases in 87 Kan., and 89 Kan., above cited, settle the law so far as this state is concerned.

The next and more important question in this case is: "Are the plaintiffs, mortgagees out of possession, owners," within the meaning of paragraph 5477, General Statutes of 1889? Mr. Lewis, in his work on Eminent Domain, (section 324,) enters upon the discussion of the general subject as to whether mortgagees are necessary parties to condemnation proceedings by saying that "the authorities on the question are not only conflicting, but very unsatisfactory." The same author adds: "The cases go almost entirely upon the language of the statutes, as though it was a matter entirely within the control of the Legislature." So, in our examination of the question, we have found the authorities thereon inharmonious, and depending very largely upon the language of the statutes, and upon the law relating to mortgages in the states where the decisions are found. In those states where the common-law doctrine relating to mortgages prevails, where the mortgagee is held to be the possessor of a defensible title to the land, it is generally held that he is a necessary party to the condemna-

tion proceeding; while in states where the mortgage is held to be a mere security creating a lien upon the property, but vesting no estate in the mortgagee, it is generally held that the mortgagee is not a necessary party to condemnation proceedings. In some of the states, where the decisions depend upon the language of statutes, such language is broader than it is in others. In some states the statute simply requires notice to be given to the "owner," while in other states the language of the statute in relation to notice requires it to be given to the owner, mortgagee, lienholder, lessee, or other person having an interest therein. The law of mortgages is well defined in our state. In *Chick v. Willetts*, 2 Kan. 389, a mortgage is declared to be a mere security, creating a lien upon the property, but vesting no estate whatever in the mortgagee, either before or after condition broken. "It gives no right of possession, and does not limit the mortgagor's right to control the property." In *Vanderlice v. Knapp*, 20 Kan. 647, Justice Valentine, writing the opinion, says "that a mortgagor of real estate has the right to the possession of the mortgaged property, and to sever and remove timber, wood, sand, earth, coal, stone, or anything else therefrom, and to sell the same, unless it unreasonably impairs the mortgage security. When it unreasonably impairs the mortgage security, the remedy of the mortgagee is not at law, but in equity; not replevin to recover the property severed from the realty, but generally injunction to restrain the commission of waste upon the realty." Upon this question of the law of mortgages, see *Clark v. Heyburn*, 1 Kan. 281; *Curtis v. Buckley*, 14 Kan. 456; *Pritchett v. Mitchell*, 17 Kan. 358, 23 Am. Rep. 287; *Alexander v. Shonyo*, 20 Kan. 705; *Robbins v. Sackett*, 23 Kan. 804; *Seckler v. Deife*, 25 Kan. 185; *Tomlinson v. Thompson*, 27 Kan. 72; *Perkins v. Dibble*, 10 Ohio, 439, 36 Am. Dec. 97; *Norwich v. Hubbard*, 22 Conn. 587; *Astor v. Hoyt*, 5 Wend. 615. The statute of our state upon the question under discussion (par. 5477, Gen. Stat. 1889) reads as follows: "It shall be the duty of at least one of the petitioners to cause six days' notice to be given in writing to the owner or owners or their agents, if residing in the county, through whose land such road is to be laid out and established, of the time and place of meeting, as specified in the notice of the commissioners." The notice of the commissioners is pointed out in paragraph 5476 of the same statutes, and requires the county clerk to give notice "by advertisement set up in the county clerk's office and every municipal township through which any part of said road is designated to be laid out for at least twenty days, and by publication for two consecutive weeks in a newspaper, if there be one published in the county, setting forth that such petition has been presented, giving the substance thereof, and that viewers will on the day designated proceed to view said road, and give all parties a hearing." In view of the statute in our state in relation to notice in road proceedings, and the law relating to mortgages, and rights of mortgagors and mortgagees, we do not think it was necessary to serve notice on the plaintiffs for the purpose of establishing the road which was laid out across the lands upon

which they at the time held a mortgage. There is nothing in our statutes that requires service of notice upon any one in such proceeding except the "owner." It has been seen that in our state a mortgagee of land is not the owner thereof. The mortgagor holds the legal title, and, in the absence of stipulations to the contrary, the right of possession. He is regarded as the owner of the land, and, when in possession by himself or agent, notice to him or his agent is, in proceedings to establish a public road, notice to the "owner," to the full intent of our statute requiring such notice.

The case of *St. Louis, L. & D. R. Co. v. Wilder*, 17 Kan. 246, goes a long way towards settling the law of this case. In that case, *Mr. Justice Valentine*, speaking for the court, says: "We think Wilder is entitled to the same damages as though he owned the unincumbered fee of the land. Da Lee is not entitled to any portion of such damages. Da Lee is entitled to the \$3,000 which Wilder owes him, and to nothing more, except that he holds the legal title to the land (and possibly a lien on the damages awarded if he choose to assert that lien) as a security for his claim on Wilder." The case of *Kuhn v. Freeman*, 13 Kan. 423, is in line with the above case. The law upon this question is fully settled in many of the states. In *Parish v. Gilmanton*, 11 N. H. 298, *Justice Woods* says: "In the third place it is objected that certain mortgagees of land over which the road is laid were not notified of the proposed laying out of the way, and that no damages were awarded them. By the first section of the statute, as already seen, it is provided that notice shall be given to the owners of the land through which the highway is to be laid out. Whether the exception can prevail depends upon the proper decision of the question whether the mortgagee is to be regarded as the owner of the land for the purpose of receiving notice, and having damages awarded for the injury done in taking easement to the lands mortgaged. It does not appear in the present case that the mortgagees was in possession. In such cases we think that the mortgagor in possession is to be regarded as the owner, and as such is entitled to the notice. Indeed, it would now seem to be a firmly established doctrine in this state, that the mortgagee is entitled to have his mortgage interest regarded as real estate, and himself as the owner of the land mortgaged, so far only as to enable him to protect and avail himself of his just rights intended to be secured to him by the mortgage, and to give him all necessary and appropriate remedies for that purpose, and that in all other respects, and for all other purposes, it is to be treated as a chattel interest; and we think this is not one of the cases in which the mortgagee is entitled to be regarded as the owner of the land mortgaged." In *Read v. Cambridge*, 126 Mass. 427, the court says: "In every taking of land for public use the mortgagor is regarded in this commonwealth as having, at law, the entire estate in the premises, and entitled to recover the whole value thereof, estimated according to the provisions of the statute, without any deduction on account of the mortgages and liens thereon." In *Paine v. Woods*, 108 Mass. 160, *Wells, J.*, delivering the opinion 18 L. R. A.

of the court, says: "This is a complaint for flowage under the Mill Act. The complainant is the mortgagor in possession of the land flowed. The mortgage was given before the erection of the dam of the respondents. The mortgagee has never entered or taken any steps towards foreclosure. The ground of defense is that the complaint cannot be maintained by the mortgagor without joining the mortgagee. The respondents insist that, as the mortgagee will not be bound by the judgment, they will be exposed to the risk of making double compensation for the same injury, if these proceedings are maintained. This objection is not tenable. For all the purposes of these proceedings, the mortgagor in possession is a sufficient party, without joining the mortgagee." A mortgagee out of possession is not the proprietor of the mortgaged premises, and, in common parlance, is never spoken of as such, nor is he so recognized in a legal sense. In truth, the mortgagee has only a lien, and cannot be considered or treated as a proprietor or owner of the mortgaged estate." *Norwich v. Hubbard*, 23 Conn. 587. "In laying out new highways, either by selectmen or by the county courts, or in repairing old ones, no provision is made by law for notice to be given to mortgagees; nor in practice is this ever done. The interests of the mortgagees are not regarded in these proceedings. They are necessarily connected with the interests of the mortgagor, and, in this respect, subject to them." *Whiting v. New Haven*, 45 Conn. 806. "In a complaint under the Mill Act by a mortgagor it is no defense that the respondent has acquired the right of the mortgagee by an assignment of the mortgage." *Vaugh v. Wetherell*, 116 Mass. 188. "The mortgagor of land taken by a railroad corporation for the purpose of their road may recover the full amount of damages, without regard to the mortgagees." *Ballard v. Ballard Vale Co.*, 5 Gray, 468. We have examined the case of *Severin v. Cole*, 88 Iowa, 468. The cases therein referred to in 2 Ohio St. 114, and 4 Ohio St. 101, in support of the position taken in that case, relate to mechanics' liens, and are not analogous cases, and do not depend upon the same principle as the case in which they are cited, nor upon the same principle as the case at bar. The case of *Ballard v. Ballard Vale Co.*, 5 Gray, 468, does not sustain the opinion promulgated in the Iowa case. The case in 5 Gray was under the Mill Act of Massachusetts. It was brought by the mortgagee in possession after foreclosure, and did not claim damages for any of the period of time during which the mortgagor was in possession of the premises. In fact, the case conceded that under the statute, which provided for the assessment of annual damages, the mortgagor is entitled to such annual damages while in possession; and it was undecided and left an open question as to whether the mortgagor in possession could, under the same statute, which provided also for the assessment of damages in gross,—that is, damages for all time,—elect to take damages in gross, and thus deprive the mortgagee of the right to recover annual damages after the reduction of the land to his possession; and whether the mortgagor in possession could release the owners of the

mill, the dam to which caused the overflow, from the damages for all time, and thus conclude the mortgagees after obtaining possession. Merrick, J., in that case uses the following language: "The respondents [assignees of the mortgagor] have never had any interest except that which they derived from Marland, the mortgagor. His deed to them was a mere quitclaim and release of all his right, title, and interest in the premises; and these consisted only of the right of redemption, and the right of possession, previous to a breach of the condition of the mortgage. Of the former the respondents have never availed themselves; and of the latter they have had the uninterrupted advantage and enjoyment,—no claim being made for damages occasioned by the flowing before the time when the complainant entered upon and took possession of the premises for the breach of the condition of the mortgage, and to foreclose the right in equity of redemption. The right of the respondents is now superseded by the paramount title of the complainant; and they have, therefore, no defense to set up against the complaint, and can show no reason why it should not be maintained. It has been argued for the respondents that a mortgagor in possession has the power and right effectually to release and discharge a millowner from all claims for damages which have been or which may be occasioned to the mortgaged premises, either by the past or future maintenance of the dam, used and to be used forever, for the purpose of raising water to work his mill. Without intending in any degree to sanction that position, as a principle of law resulting from a just interpretation of the provision of the statute for the support and regulation of mills it is sufficient to say that the determination of this question is not requisite in this case: for it does not appear that Marland (mortgagor) has released or discharged, or even attempted to release or discharge, the respondents from all the claim to which they were or might become liable by reason of the maintenance of their dam, and the consequence to the complainants' land by overflowing it with water." Justice Cole, in the opinion of the Iowa case, says: "The case of *Breed v. Eastern*

R. Co. is only reported as a note to the case of *Ballard v. Ballard Vale Co.*" That is true; but the principle decided in the case of *Breed v. Eastern R. Co.* is carried back and made a part of the syllabus in the case of *Ballard v. Ballard Vale Co.* With this examination the Iowa case loses some of its force, and we prefer to follow the precedents cited from other states, as being in line with our authorities so far as this court has already gone in analogous cases, and also in line with our numerous decisions affecting the law of mortgages, and the rights, respectively, of mortgagors and mortgagees, and hold that for all the purposes of opening highways the mortgagor in possession is to be regarded as the owner of the land. Whether a mortgagee may by a proceeding in equity intervene, and have the damages applied in accordance with what the court under all the circumstances might consider as equitable, we are not called upon in this case to decide, and therefore leave that question open to be settled in a case wherein it is raised. It will be seen that there is no provision in paragraph 5477 for notice to nonresident owners who have no agent in the county; nor is there elsewhere in our statute any provision for notice to them except the notice required to be given by the county clerk in paragraph 5476, above referred to. As that notice is required to be posted in the county clerk's office, and each municipal township through which the road or any part of it is to be established, and also published in a newspaper of the county, if there is one in the county, the Legislature probably intended this notice to reach nonresident owners; but as, under our view of the law, the plaintiffs—mortgagees out of possession at the time the road was established—are not to be regarded as "owners," it matters little, so far as this case is concerned, what the Legislature might have intended as to nonresident owners.

We recommend that the judgment of the District Court be affirmed.

Per Curiam:

It is so ordered.

All the Justices concur.

Rehearing denied.

NEW YORK COURT OF APPEALS.

Clark R. GRIGGS, *Respt.*,

v.

Melville C. DAY *et al.*, Exrs., etc., of Cornelius K. Garrison, Deceased, *Appts.*

(.....N.Y.)

1. A private entry on one's own book of accounts which shows an intention to take at seventy-five cents on the dollar certain notes held as collateral which he surrenders to the maker in exchange for

bonds cannot be used by the pledgor, who did not consent to such entry or to such use of the notes as evidence of a sale thereof to the pledgee at their face value.

2. For the conversion of notes by a pledgee by surrendering them to the maker in exchange for bonds without authority from the pledgor he is liable to the latter for their actual value only if that is less than their face value.

(November 29, 1892.)

NOTE.—On the measure of recovery for securities converted see, in connection with the above case, *Haas v. Sackett*, 2 L. R. A. 449, and note, 40 Minn. 53; *Hayes v. Massachusetts Mut. L. Ins. Co.* 1 L. R. A. 503, and note on p. 306, 125 Ill. 623. 18 L. R. A.

APPEAL by defendants from a judgment of the General Term of the Superior Court for the City of New York, affirming a judgment entered upon the report of a referee in favor of plaintiff in an action brought to

obtain an accounting upon certain transactions between plaintiff and defendant's testator. *Reversed.*

The facts are stated in the opinion.

Mr. Melville C. Day, with **Mr. William R. Bronk**, for appellants:

If the plaintiff, after the entries came to his knowledge, had not rejected, but had elected to ratify and adopt them, this adoption would have constituted Garrison the unqualified purchaser of the certificates at the price of 75 per cent as specified in the original entry.

Whenever a plaintiff avails himself of a statement, admission, or confession of the defendant to charge him, the defendant is equally entitled to the benefit of that, or any other statement made by him at the same time and in respect to the same transaction, tending to explain or qualify or destroy the use which the plaintiff might otherwise make of the admission or statement called out by him.

1 Greenleaf, Ev. § 901; 1 Phillipps, Ev. *pp. 406, 409, 411; *Rouse v. Whited*, 25 N. Y. 170, 82 Am. Dec. 887; *Grattan v. Metropolitan L. Ins. Co.* 92 N. Y. 284; *Gildersleeve v. Landon*, 73 N. Y. 609; *Moore v. Wright*, 90 Ill. 470.

It was legally impossible for plaintiffs to reject or ratify one of the entries without rejecting or ratifying all.

Story, Agency, § 250; 1 Parsons, Contracts, *51; *Benedict v. Smith*, 10 Paige, 126, 4 L. ed. 913; *Merchants Bank v. The Meyers, S. & W. & Iron Co.* 2 N. Y. Week. Dig. 214; *Daniels v. Brodie*, 11 L. R. A. 81, 54 Ark. 216; *Dewey v. Hotchkiss*, 80 N. Y. 497; *Pendleton v. Wood*, 17 N. Y. 72; *Biglow v. Sanders*, 22 Barb. 146; *Clinton v. Rowland*, 24 Barb. 634; *Winants v. Sherman*, 3 Hill, 74; *Waggoner v. Gray*, 2 Hen. & M. 608; *Jones v. Jones*, 4 Hen. & M. 447; *Morris v. Herst*, 1 Wash. C. C. 438; *Walden v. Sherburne*, 15 Johns. 409; *Griffith v. Ketchum*, 12 Johns. 879.

A creditor holding negotiable paper as collateral security has an undoubted right to exchange the security without the consent of the debt, or unless restrained by the express terms of the pledge. And it is only in case loss results to the debtor from want of proper care and diligence in the exchange, that the creditor becomes responsible to the debtor for the loss sustained.

Jones, Pledges, § 718; *Colebrooke*, Collateral Securities, § 15; *Girard F. & M. Ins. Co. v. Marr*, 46 Pa. 504; *Hunter v. Moul*, 98 Pa. 13, 43 Am. Rep. 610.

The taking by a creditor even of a negotiable promissory note does not constitute the payment of a debt unless so agreed by the parties, and the creditor can recover on the original indebtedness upon surrendering or canceling the note.

Story, Promissory Notes, § 438; *Burdick v. Green*, 15 Johns. 247.

If the certificates were valid and their surrender constituted an unlawful conversion, then the defendants would be only liable for their actual value as the obligations of an insolvent debtor.

Potter v. Merchants Bank, 28 N. Y. 642, 86 Am. Dec. 278; *Vose v. Florida R. Co.* 50 N. Y. 869; *Booth v. Powers*, 56 N. Y. 27; *Thayer v. Manley*, 78 N. Y. 805.

Mr. Esek Cowen, also for appellants:

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If a party chooses to prove the declarations of his adversary they are evidence not only against but for such adversary.

Vibbard v. Staats, 8 Hill, 143; *Clinton v. Rowland*, 24 Barb. 634; *Low v. Payne*, 4 N. Y. 247.

If the plaintiff in this case had put the entry charging the notes to the company, as creditor, and crediting it with the bonds, in evidence, and had stopped there, the defendants would have had a clear right to prove the entry, showing the purchase of the notes at twenty-five per cent discount, upon the principle that, where a party puts his opponents' books in evidence and proves entries favorable to himself, those entries may be explained by other entries in the same books.

Low v. Payne, *supra*; *Dewey v. Hotchkiss*, 80 N. Y. 497.

The referee was in error in holding that the surrender of these notes to the company, without consideration, discharged an equivalent amount of the plaintiff's debt to him. A pledgee of a promissory note has no right of disposition of the pledge, except to collect it and apply the proceeds on his debt. He cannot sell or even compromise it.

Wheeler v. Newbould, 16 N. Y. 392.

Much less can he extinguish it, without consideration, by its surrender to the maker.

Nothing done by Garrison either destroyed or prejudiced Griggs' right of action.

Garlick v. James, 12 Johns. 150.

There was ample evidence in the case to show the utter insolvency of the company, and a refusal to find either way as to a material fact on the ground that it was immaterial, presents a question of law that may be reviewed by this court.

James v. Cowing, 82 N. Y. 449.

Messrs. Robert G. Ingersoll and Calvin Frost, with **Mr. John H. Post**, for respondent:

The creditor holds all collaterals as a trustee, to be collected for the benefit of the debtor, and whenever he transfers them absolutely, without authority, he takes them at their face in satisfaction, to that extent, of the principal debt. The debtor can ask nothing more, and he is not obliged to accept anything less.

Edwards, Bailments, § 319, citing *Hawks v. Hinchcliff*, 17 Barb. 492. See also *Vose v. Florida R. Co.* 50 N. Y. 875; *Germania Bank v. Frost*, 11 Jones & S. 124.

A release of the maker of a promissory note by the holder discharges the indorsers.

Farmers Bank of Amsterdam v. Blair, 44 Barb. 641.

Whatever amounts to satisfaction of the bill or note by the maker or acceptor operates as an absolute discharge of all parties collaterally liable.

2 Daniel, Neg. Inst. § 1810.

Nothing could more effectually release or satisfy a promissory note than its surrender to the maker and its cancellation by him.

Beach v. Endress, 51 Barb. 570; *Morris v. Harveys*, 75 Va. 726. See also *Cadens v. Teasdale*, 53 Vt. 469.

The delivery by the company to Garrison of the 2280 bonds at the agreed price of 75 per cent was equivalent to the payment of so much money by the company upon its notes.

Howard v. Norton, 65 Barb. 161.

Earl, Ch. J., delivered the opinion of the court:

This action was brought against Cornelius K. Garrison, since deceased, for an accounting. It was referred to a referee, and he ordered judgment in favor of the plaintiff for upwards of \$188,000. The record is very voluminous, and in the briefs submitted and the arguments of counsel many questions of law and fact were presented for our consideration. A careful study of the record has satisfied me that the judgment appealed from is both illegal and unjust. In September, 1879, the plaintiff entered into a contract with the Wheeling & Lake Erie Railroad Company, an Ohio corporation, for the construction and equipment of its line of railroad in that state according to the specifications and upon the terms and conditions mentioned in the contract. By one of the provisions of the contract the railroad company was "to furnish the contractor available subscriptions, or proceeds thereof, and aid, to the amount of \$4,000 per mile of main track, branches, and sidings, or so much as may be necessary to furnish right of way, grade, bridge, and tie said railroad between Hudson's and Martin's Ferry," a distance of 148 miles, and "to use its best endeavors to secure for the contractor available subscriptions and aid to the extent of \$4,000 per mile, or so much as may be necessary," for a similar purpose, as to the balance of the road, a distance of 58 miles. For the performance of this contract, besides the aid to be furnished as above stated, the plaintiff was to receive bonds and stock of the company. He was without financial ability, and he applied to Garrison for financial aid to enable him to perform his contract; and upon his application Garrison, from time to time, advanced him large sums of money, amounting in all, besides interest, to nearly \$4,500,000. For the money so advanced the plaintiff assigned and delivered to Garrison as collateral security his construction contract and bonds and stock of the company, and some of it was repaid by the sales to him of bonds and stock. In 1882 the plaintiff received from the company for extra work claimed to have been done by him, and on account of its failure to perform the portions of the contract above quoted, its promissory notes, amounting to \$1,949,710.72, and they were delivered by him to Garrison for moneys advanced and to be advanced by him for the construction of the road. Garrison held these notes until May, 1883, when there was due to him for moneys advanced to the plaintiff for the construction of the road nearly \$2,500,000. He then received from the company 2,280 of its second mortgage bonds of the denomination of \$1,000 each, at seventy-five cents on the dollar, amounting, with some interest, to \$1,736,600, to apply upon his claims, and he then surrendered to it all of the above-mentioned promissory notes, and they were canceled. On the same day he caused an original entry to be made in his journal,—one of his accounts books,—as follows: "This amount of notes and interest, \$2,062,648.13, taken from contractor at 75 per cent,

\$1,546,982.85." He then charged the company in his books of account with the whole amount of the notes and interest, and gave it credit for \$1,736,600,—the price, including interest, at which he took the second mortgage bonds; and he credited the plaintiff with the sum of \$1,546,982.85. The difference between the total amount due upon the notes and the amount allowed by him for the second mortgage bonds was \$326,048.13, and thus he had in his hands, not used for the payment of the bonds, the notes to that amount which he then surrendered to the company without any consideration whatever; and, as the referee found, he elected to look to the company as his debtor on open account for that amount. The referee also found that by reason of the surrender of the notes in consideration of the purchase of the bonds, and by reason of the surrender of the balance of the notes, and by reason of the election before mentioned, Garrison discharged the indebtedness of the plaintiff to him to the amount of the face value of the notes at the time of the surrender. He also found that the plaintiff's rights as pledgor in the construction contract, and in the bonds, stock, and other property transferred to Garrison as collateral security, were never cut off by foreclosure of his rights, or in any other way. These facts having been found by the referee, he found, among other conclusions of law, that the legal effect of the surrender by Garrison to the railroad company of the promissory notes held by him as collateral security for moneys advanced to the plaintiff, and of the charge by him against the railroad company of the full amount of the notes and interest, was to relieve the plaintiff from any liability to him for the amount thereof; and in the accounting he charged Garrison with the full amount of the notes, with interest. The only question which I deem it important now to consider is whether the learned referee was right in making that charge.

The further fact must be taken into consideration that the notes surrendered were of no value as against the company. It was utterly insolvent, with property no more than sufficient to pay its first mortgage bonds. The second mortgage bonds were absolutely of no intrinsic value. The referee held these facts to be immaterial, and that, under the circumstances, Garrison had made himself chargeable with the full amount of the notes, without reference to their value. Such a conclusion is somewhat startling, and should not be sanctioned unless it has support in well-recognized principles of law or authorities which we feel constrained to follow. The entries in Garrison's books of account in reference to these notes have very little bearing upon the controversy between these parties. They were private entries, made by Garrison, undisclosed to the plaintiff, and without his authority. They were important simply as evidence, and are entitled to no more weight than would have been the oral declarations or admissions of Garrison made to any third party. They show what use he made of the notes, and about that there is no dispute. They did not bind

the plaintiff, and he has never, so far as appears, assented to them. They show that Garrison intended to take the notes at seventy-five cents on the dollar, and that he was willing to allow the plaintiff that sum for them. But there was no actual purchase of them. If that entry had come to the knowledge of the plaintiff, and he had adopted it, and so notified Garrison, he could probably have held him to a purchase of the notes for that sum. But he repudiates that entry, and refuses to let Garrison have the notes for that sum. He cannot use that entry to fasten upon him a purchase of the notes at their face value. The minds of the parties never met upon such a contract. Garrison either purchased the notes used in exchange for the bonds at 75 per cent of their face value, or he did not purchase them at all. Therefore, as the plaintiff repudiates the purchase at the price named, there was no contract of purchase; and as to these notes, pledged for collateral security, Garrison must be held to have wrongfully converted them to his own use. It would make no difference whether we consider these notes as having been exchanged for the bonds, or as having been used in payment for the bonds. In either view, Garrison was, at most, guilty of a conversion of them. As to the balance of the notes, which were surrendered to the company without any consideration, there was simply a wrongful conversion of them. They had no value as obligations against the company, and it is preposterous to suppose that Garrison intended by the surrender to charge himself for their full face value against an indebtedness of the plaintiff to him for money actually loaned. By the surrender he did not intend to release the company from its indebtedness evidenced by the notes, but he intended and elected still to hold the indebtedness, evidenced by his charge in open account upon his books. The obligation of the company was not impaired or lessened by the transaction, and it owed just as much after it as before. Even if he made the notes his own by surrendering them, there was simply a conversion of them. It is true that he elected to hold the company as his debtor upon open account, just as it was his debtor before for the same amount evidenced by the notes. He did not take a new debtor, but he retained and intended to retain the same debtor. Here there was no novation, and nothing resembling it. It usually, if not always, takes three parties to make a novation, and they must all concur upon sufficient consideration in making a new contract to take the place of another contract, and in substituting a new debtor in the place of another debtor. "Novation" is thus briefly defined: "A transaction whereby a debtor is discharged from his liability to his original creditor by contracting a new obligation in favor of a new creditor by the order of the original creditor." 1 Pars. Cont. 217. Here there was no element answering to this definition. There was no intention to make a novation, no consideration for a new contract, no concurrence of the three or even of the two parties. So we

reach the conclusion as to all the notes that Garrison, by their surrender, made himself liable for a wrongful conversion of them to his own use, and thus became responsible to the plaintiff for the damages caused by the wrong; and the question is, What were such damages? The answer must be, the value of the notes converted. There can be no other measure, as that measures the entire damage of the plaintiff absolutely. As to the notes surrendered for the bonds, the plaintiff could have elected to take the bonds or their value; but this he refuses to do, as the bonds have no value, and thus he is confined absolutely to the value of the notes.

Now, how does the case stand upon authority? In *Garlick v. James*, 12 Johns. 146, the plaintiff deposited with the defendant a promissory note of a third person as collateral security for a debt, and the defendant, without the knowledge or consent of the plaintiff, compromised with the maker of the note, and surrendered the note to him upon payment of one half of the face thereof. It was found that the maker was at the time of the compromise abundantly able to pay the full amount of the note, and under such circumstances it was properly held that the pledgee was liable for the balance unpaid upon the note. In *Hawks v. Hinchcliff*, 17 Barb. 492, the plaintiff sued the defendant upon an account for merchandise delivered, and the defendant showed that the plaintiff took two notes for the amount of the account as collateral security for the payment thereof; that he transferred one of the notes to a person, who recovered judgment thereon against the makers, and afterwards assigned the judgment to one Prindle; that he recovered judgment upon the other note, and assigned that to Prindle; and it appeared that the defendants in those judgments had never paid the notes or the judgments. It was held that the plaintiff, the pledgee, could not recover upon his account. It was not shown upon what consideration the notes and the judgments were transferred by the pledgee, or that at the time of the transfer the makers of the notes were not perfectly solvent. The plaintiff there relied upon the simple fact that the notes and judgments were not paid. Upon this state of the facts the court held that the presumption, nothing appearing to the contrary, was that the note and judgment were transferred by the plaintiff for the full amount appearing to be due upon them, and hence he was charged with the full amount. There are some broad expressions contained in the opinion, which, when isolated from the facts of the case, tend to give some countenance to the plaintiff's contention here. In *Voss v. Florida R. Co.*, 50 N. Y. 369, it was held that a wrongful sale by a creditor of collateral securities placed in his hands by the principal debtor does not, *per se*, discharge even a surety for the debt (much less the principal debtor) *in toto*, but that by such sale the creditor makes the securities his own to the extent of discharging surety only to an amount equal to their actual value. In *Potter v. Merchants Bank*, 28 N. Y. 641, 86 Am. Dec. 273; *Booth v. Powers*, 56 N. Y.

22; and *Thayer v. Manley*, 37 N. Y. 305,—it was held that in an action to recover damages for the conversion of a promissory note the amount appearing to be unpaid thereon at the time of the conversion, with interest, is *prima facie* the measure of damages, but that the defendant has the right to show in reduction of damages the insolvency or inability of the maker, or any other fact impugning the value of the note. In *Exeter Bank v. Gordon*, 8 N. H. 66, where the bank had received a note as collateral security, and had subsequently, without the consent of the pledgor, compromised it by receiving the one half thereof from the maker, it was held that the bank was bound to credit the pledgor with only the amount received upon compromise, upon proof that the compromise was advantageous, and that the maker was insolvent, and unable to pay the balance; and the general rule was laid down which was announced in the cases last above cited. If the pledges of the note of an insolvent maker may surrender it upon a compromise for one dollar without being made liable for more than he receives, upon what conceivable principle can a pledgee be held for the face value of a worthless note by surrendering it without any consideration whatever? If one intrusted with a note as agent, or holding it as pledgee, loses it by his carelessness, or even willfully destroys it, he

can, in an action against him by the principal or pledgor, be held liable only for the value of the note. If Garrison had broken into the plaintiff's safe and taken these notes without any right whatever, in an action for their conversion the plaintiff could have recovered against him as damages only the actual, not the face, value of the notes. I need go no further. Other illustrations are not needed. Our attention has been called to no case in law or equity which upholds the plaintiff's contention as to these notes. I should be greatly surprised to find any, and do not believe there are any. I have assumed, without a careful examination of the defendants' objections to the notes, that they were valid, and properly issued by the company for their full amount. I have also assumed, without examining the matter, that upon this record we must hold against the contention of the defendants that the second mortgage bonds took the place of the notes given for them, and were held in their stead as collateral security.

Statements made upon the argument by the counsel for the appellants render it unnecessary for us to consider any other objections to the judgment, and for the reasons stated *the judgment should be reversed*, and new trial granted, costs to abide the event.

All concur; **Gray, J.**, in result.

CALIFORNIA SUPREME COURT.

Louis KAUFFMAN, Appt.,

v.

Joseph MAIER *et al.*, Repts.

(94 Cal. 299.)

1. The appellate court is not limited upon appeal from an order granting a new trial to an exclusive consideration of the grounds upon which the new trial was allowed although all other grounds relied on were distinctly overruled; but all the grounds embraced in the motion excepting an allegation of insufficiency of evidence to justify the verdict, will be examined and the order sustained if justified by any of them irrespective of the ones mentioned by the trial court.

NOTE.—*Liability of master for injuries caused by defects in machinery while used for a purpose not contemplated.*

In *Felch v. Allen*, 98 Mass. 572, cited in the principal case, the servant used a defective elevator for a purpose for which it was not designed or intended, and it was held that there could be no recovery.

In *Cahill v. Hilton*, 9 Cent. Rep. 255, 106 N. Y. 512, the plaintiff was injured while standing on a ladder attempting to repair machinery. One of the grounds on which the right to recover was denied was that there was no proof that the ladder had been designed for the use to which the plaintiff put it.

An employer is not liable for injury to an employee caused by the latter's contributory negligence and his use of an elevator for a purpose unauthorized by the employer, although he failed to

2. A master is not liable to his servant for injuries received by the latter in attempting to remove a towel from a shaft with which his service was in no way connected, where he had hung it for his own convenience to get it out of his way, while engaged in the performance of his duties, where the shaft was not designed for, and the master could not have contemplated, such use, although the construction of the shaft was defective.

3. The motives which prompted a servant to inform the foreman about the condition of machinery as well as his opinions concerning it are immaterial upon the question of the master's liability to another servant for injuries caused by it.

4. The opinion of an expert cannot be

provide the safeguards for the elevator shaft required by statute. *Guenther v. Lookhart*, 40 N. Y. S. R. 942, 16 N. Y. Supp. 717.

An employee in a flouring mill who is injured while climbing upon a spout which, under his weight, gives way and precipitates his arm into a set of cog-wheels, cannot recover against the mill-owner for the injury, where the spouting did not give way because of any defect in its construction, but only because of its being used by plaintiff for a purpose and in a manner for which it was not designed, especially where the same spouting had previously given way under his weight. *Schmidt v. Leistikow*, 6 Dak. 386.

The court said that the defendant "was not bound to anticipate that the spouting running through the different stories of his mill, for the purpose of passing grain and mill stuffs from one place to another, would be used by one familiar

taken upon the question whether or not it is dangerous for a revolving shaft with a rough surface to project into a room where there are workmen who may come in contact with it; nor can it be taken as to the relative danger which would attend the removal of a towel from such shaft in comparison with one having a smooth surface.

5. The court cannot properly charge the jury that the statements of a witness as to verbal admissions of another should be received with caution under a constitutional provision that judges "shall not charge juries with respect to matters of fact."

(April 2, 1892.)

APPEAL by plaintiff from a judgment of the Superior Court for Los Angeles County, in favor of defendants, in an action brought to recover damages for personal injuries alleged to have resulted from defendants' negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Max Loewenthal, George J. Dennis and J. L. Murphey, for appellant:

There is not as a matter of law contributory negligence where a servant, not having the control or supervision of a shaft which unnecessarily and negligently is permitted by a master to protrude into the apartment where the servant is at work, the shaft being in a dangerous condition, which fact is unknown to the servant and known to the master, for the purpose of more efficiently doing his work, places a towel which he carries, as all servants in his work do, upon the shaft under which he is at work while such shaft is not in motion, and when the shaft is set in motion without the customary notice or order, apprehending possible danger from continuing his work under the shaft now revolving with the towel hung upon it, he thinks it better in the hurry of work carefully to slip the towel from the shaft rather than to cause the stopping of all the machinery, and in the attempt is injured—not because he placed the towel on a stationary shaft, nor because he attempted to take it from a revolving shaft, but because the edge of the shaft itself was in such a jagged and splintered condition that owing thereto the injury was inevitable.

Mages v. North, Pacific Coast R. Co. 78 Cal. 430; **Colbert v. Rankin**, 72 Cal. 197; **Sayward v. Carlson**, 1 Wash. 29; **Sioux City & P. R. Co. v. Stout**, 84 U. S. 17 Wall. 657, 21 L. ed.

with the purpose for which they were designed and used to bear his weight, or serve in the office of a ladder, floor, or platform.

In **Durgan v. Munson**, 9 Allen, 386, 85 Am. Dec. 770, the defect in an engine, which was alleged as the cause of the plaintiff's injury, was the insufficiency of the brake to prevent the engine from running off while it was turned on the turn-table. It was held that the trial court should have permitted the defendant to show that, before the accident, instructions had been given to the engineers to have the wheels of their engines "chocked" while turning on the turn-table, and that the accident occurred by failure of some servant of the company to obey instructions. Said Hoar, J.: "The defects of the engine in the abstract were not the gist of the plaintiff's complaint; but its defects at the time and for the service in which the defendant allowed it to be used when it ran on to the

745; **Tetherow v. St. Joseph & D. M. R. Co.** 98 Mo. 74; **Barry v. Hannibal & St. J. R. Co.** 98 Mo. 62; **Ingerman v. Moore**, 90 Cal. 410.

The risks of the business did not cause the loss in this case; it is the danger to which the business is exposed by permitting this unnecessary shaft to remain at the place where plaintiff must work without proper safeguards.

Negligence of the defendants was gross in omitting all appliances for safety in a situation absolutely of great and needless exposure to injury.

The master is bound to inform his servants of facts within his knowledge affecting the safety of the servant in the service to be performed, when the latter is ignorant of the facts.

Nadav v. White River Lumber Co. 76 Wis. 120; **Baxter v. Roberts**, 44 Cal. 187, 13 Am. Rep. 610; **Coombs v. New Bedford Cordage Co.** 103 Mass. 578, 8 Am. Rep. 506; **O'Connor v. Adams**, 120 Mass. 427; **McGowan v. La Platte Min. & Smelt. Co.** 3 McCrary, 893; **Smith v. Oxford Iron Co.** 43 N. J. L. 487, 36 Am. Rep. 535; **Strahlendorf v. Rosenthal**, 30 Wis. 675; **Kranz v. Long Island R. Co.** 128 N. Y. 1.

The master, whether a corporation or an individual, is bound to furnish its employes safe materials and structures. The employe has the right to presume that the master has discharged this obligation.

Beeson v. Green Mountain Min. Co. 57 Cal. 29.

The servant only takes risks of what are called "seen dangers." If the master knows or ought to know of defects in the machinery where he sets his servant to work, it is his duty to inform the servant, and if he fails in this duty, he will be liable for any injury that may result from such failure.

2 Thomp. Neg. 980; **Deering, Neg.** 197; **Wood, Mast. & S.** § 849; **Buzzell v. Laconia Mfg. Co.** 48 Me. 118, 77 Am. Dec. 223.

It is also the duty of the master to furnish a reasonably safe place for his servant to work in, and if he fails to perform this duty he will be liable for any injury that may result therefrom.

Kranz v. Long Island R. Co. and Nadav v. White River Lumber Co. supra; Atlanta Cotton Factory Co. v. Speer, 69 Ga. 137, 47 Am. Rep. 750; **Fairbank v. Haetzsche**, 78 Ill. 236; **Hill v. Gust**, 55 Ind. 45; **Coombs v. New Bedford Cordage Co.** 103 Mass. 572, 8 Am. Rep. 506; **O'Connor v. Adams**, 120 Mass. 427; **Swo-**

plaintiff. If it were fit and sufficient for use in the manner in which the defendant then allowed it to be used, its insufficiency for other service, at other times, would not concern the plaintiff. Now, it is plain that a machine may be safe and fit for one use when it is not for another. To put an extreme case, by way of illustration: Suppose the defendant had a worn-out engine, unfit for any service, and he had given orders that it should not be run at all, yet some workman had, without his knowledge, undertaken to run it; could the master be held responsible to the fellow servant? Suppose a car that was not fit to run with steam power was kept for use only when drawn by horses; or an engine which had not the proper appliances for a locomotive, was employed solely as a stationary engine; would an unauthorized change of the use make the master liable?" A. P. W.

boda v. Ward, 40 Mich. 420; *Corcoran v. Holbrook*, 59 N. Y. 517, 17 Am. Rep. 389; *Honor v. Albrighton*, 93 Pa. 475; *Hulehan v. Green Bay & M. Canal Co.* 58 Wis. 819.

The servant has the right to presume, in the absence of notice to the contrary, and except as to matters that come within the range of his own peculiar skill, that the master will perform the duty imposed upon him of furnishing proper, adequate, and perfect implements and appliances necessary for the performance of any duty required of the servant.

Gibson v. Pacific R. Co. 46 Mo. 163, 2 Am. Rep. 497; *Kain v. Smith*, 89 N. Y. 375.

If the shaft was dangerous, and the accident and condition and position of it show it to have been so, it should have been boxed or cut off.

Sioux City & P. R. Co. v. Stout, 84 U. S. 17 Wall. 657, 21 L. ed. 745; *Nadau v. White River Lumber Co.* 76 Wis. 120.

Messrs. Hutton & Swanwick and Chapman & Hendrick, for respondents:

The master is not liable for the injuries of the employé if the latter knew or had means of knowledge of the defects of the machinery, and of the dangers and risks likely to result from its use.

Sanborn v. Madera Flume & T. Co. 70 Cal. 261; *Murphy v. Greeley*, 5 New Eng. Rep. 751, 146 Mass. 196; *Palmer v. Harrison*, 57 Mich. 182; *Delaware Iron-Ship Bldg. & L. Works v. Nuttall*, 11 Cent. Rep. 662, 119 Pa. 149; *Little Rock, M. R. & T. R. Co. v. Leorett*, 48 Ark. 833; *Sappenfeld v. Main Street & A. P. R. Co.* 91 Cal. 48; *State v. Kepper*, 65 Iowa, 747.

If the circumstances are such that the servant could not, if he exercised his reason, but know of the danger, or if the danger is such as to suggest itself to a man of ordinary intelligence, he must know it, and he must govern himself with the prudence which the circumstances require if he undertakes the service at all.

Nelson v. Allen Paper Car-Wheel Co. 29 Fed. Rep. 840.

Where the negligence relied on consists of defective machinery, the question is as to the fitness of the machinery for the purposes for which it was intended, and its fitness for other uses is wholly immaterial.

Durgin v. Munson, 9 Allen, 397, 85 Am. Dec. 770; *Hickey v. Taaffe*, 7 Cent. Rep. 72, 105 N. Y. 26.

When the plaintiff applied the defendants' machinery to purposes for which it was never intended by them, but was making use of it for his own purpose, he assumed the entire risk himself, and the negligence of the defendants became of no consequence whatever.

Felch v. Allen, 98 Mass. 572.

The contributory negligence of the plaintiff is such that he could not recover.

Cahill v. Hilton, 9 Cent. Rep. 255, 106 N. Y. 512; *Cunningham v. Chicago, M. & St. P. R. Co.* 17 Fed. Rep. 882.

Harrison, J., delivered the opinion of the court:

The plaintiff brought this action against the defendants to recover damages for personal injuries alleged to have resulted from their negligence. He was in their employ 18 L. R. A.

at the time of the injury, and the negligence charged upon them was their permitting the shaft of a wheel to protrude into the room where he was at work, by reason of which his sleeve was caught upon the jagged end of the shaft, causing him to be carried around it, whereby his arm was so injured as to require amputation. The plaintiff recovered judgment in the court below, and a new trial was granted upon the motion of the defendants, and from this order the plaintiff has appealed. In their statement upon the motion for a new trial the defendants have assigned various errors of law on the part of the court, as well as many particulars in which the evidence is claimed to be insufficient.

1. In its order granting a new trial the court included the following as a part thereof, viz.: "The new trial is hereby granted upon the following ground specifically, and upon no other ground or grounds, no error being by this court deemed to have occurred at the trial on account whereof a new trial should be granted to defendants, except such ground above referred to, which ground is as follows, to wit: The court erred in denying defendant's motion for a nonsuit, which motion should have been granted on the sole ground that the placing of the towel on the shaft, as shown by the evidence, constituted such contributory negligence on his part as to preclude him from recovering in this action. On all other grounds embraced in said motion save said ground aforesaid, said motion for a new trial is denied." The proposition of the appellant that this court is limited upon this appeal to a consideration of the grounds specified in the order granting the new trial is untenable. A party has the right to move for a new trial upon any or all of the grounds permitted by the statute; and, if the record on which his motion is based discloses more than one ground for which a new trial should be granted, the court cannot, by stating in its order that the motion is granted upon one ground only, and denied upon the others, deprive the other party of the right to a review by this court of the entire record. The action of the court below is limited to granting or refusing a new trial, and, excepting those cases in which it is justified in limiting the new trial to one or more designated issues, the effect of an order granting a new trial is to place the cause in the position it held before any trial had been had. Upon an appeal from that order this court will review the entire record upon which the order was based, and, if there be found any error in the record which would have justified the court in making the order, the order will be affirmed, upon the same principles that an order sustaining a demurrer to a defective complaint will be sustained, even though the ground upon which the trial court sustained it may be held untenable. A motion for a new trial is a proceeding of the nature of a new action, wherein the statement or bill of exceptions corresponds to the complaint, and the specifications of error to a demurrer thereto, and the action of the trial court in sustaining the motion is to be treated on the same principles. If there be any grounds upon which its action can be upheld, the order will

be sustained, irrespective of the particular ground given by that court, whether in an opinion or by a statement in the order itself. A contrary rule might work great injustice. If a new trial is granted, the former decision is set aside, and the party whose motion has prevailed is not "aggrieved," and has no ground for an appeal. By the order granting the new trial the judgment is vacated, and the cause is in the same condition as when the issues were joined. But if, upon an appeal from that order, the action by this court is limited to a review of merely the ground designated by the lower court, and that ground should be held insufficient, the moving party would be deprived of the new trial to which the record might show that he is manifestly entitled. This rule has a limitation in cases where one of the grounds upon which the new trial is sought is the insufficiency of the evidence to justify the verdict or decision. If in such a case the trial court in its order granting a new trial excludes this as a ground of its action, by direct language, and the record shows that there was a conflict of evidence, this court, upon the same principles that cause it to affirm an order granting or denying a new trial upon that ground, will accept the conclusion of the trial court, and not re-examine the evidence.

2. The plaintiff was employed in the malt-room, and at the time of the injury was engaged in cleaning the elevator,—an endless belt, with buckets attached thereto, for carrying the malt from this room to the upper portion of the building. This elevator passed into a hopper about a foot in depth below the surface of the floor, into which the malt was shoved in order that it might be taken up by the buckets attached to the elevator, and was carried around a wheel, whose shaft, an inch and a half in diameter, and about six feet above the floor of the room, projected into the room about eighteen inches beyond the timbers upon which it rested. The end of the shaft had been battered by hammering, so that it had a crown a little larger than the shaft itself, with its edges jagged and rough. On this day, after the malt that had been spread upon the floor had been all carried to the upper part of the building, the plaintiff commenced to clean the elevator, and, having an endless towel upon his shoulder which impeded him in his work, he threw it over the projecting end of the shaft, and went across the room to get a broom. After he left, the engine started, and on his return he saw the towel going around with the shaft, and as he was to work directly under the shaft, thinking that the towel in its movements might interfere with his work, he attempted to remove it, and in so doing was in some way caught by the shaft, and sustained the injury complained of. At the close of the plaintiff's case the defendants asked for a nonsuit, upon the ground that the evidence showed that the injury was not the result of any negligence on their part, but resulted solely from an act of the plaintiff unconnected with his employment. The plaintiff's right to recover from the defendants for injuries received by him from de-

fective machinery depends upon the negligence of the defendants in respect to the machinery upon which he was employed to work, and cannot be maintained by showing negligence on their part in reference to other machinery with which his employment had no connection, unless such machinery was in some way incidental to the service in which he was engaged. The fact that certain machinery furnished by an employer is defective does not furnish a basis for recovery for an injury, unless that machinery is the proximate cause of the injury. The negligence for which the employer is held responsible is his failure to supply his employé with suitable machinery for the service for which he is employed; but, if that machinery is sufficient, it is no ground of action that other machinery, not furnished for his service, is defective, or that the employé makes use of the machinery which is furnished him in a mode unauthorized by his employment, or for a purpose not contemplated by the employer. "If the servants undertake to use machinery or instruments for purposes for which they were not designed, and for which the employer had no reason to suppose they would be used, it is their own fault or folly if harm comes from it." *Felch v. Allen*, 98 Mass. 575.

The act of the plaintiff in hanging the towel upon the shaft had no connection with the service for which he was employed, but was an act done by him for his own convenience, and in which he voluntarily selected the means by which he would subserve that convenience. The projecting shaft was not a part of the machinery with which his service was connected, and was never intended for the use to which he applied it. Even if its condition was such that the defendants would have been liable for an injury sustained by one of their employés in case he had accidentally come in contact with it while engaged in the service for which he was employed, that condition does not establish any negligence on their part towards the plaintiff in the present case. The plaintiff was not injured by any accidental contact with it while engaged in his employment, but his injury was the result of an unauthorized act of his own, which he did for his own convenience, and at his own risk. He was looking for a place on which to hang his towel, and, seeing this projection, availed himself of it as being the most convenient. The defendants cannot be held liable for the injury received in taking it off, any more than if he had thrown it across a saw, or hung it upon a sharp hook, and been injured in its removal. Not being under the necessity of making use of the shaft for any purpose connected with his employment, whatever risk attended his selection of it for his own purposes was a risk assumed by himself. As his selection of it as a place on which to hang his towel could not have been contemplated by the defendants, they were under no obligation to make it suitable for that purpose, and cannot be held liable for the injury sustained therefrom. See *Pennsylvania Co. v. Lynch*, 90 Ill. 333; *Pittsburg & O. R. Co. v. Bentmeyer*, 92 Pa. 276, 87 Am. Rep.

684; *Union Pac. R. Co. v. Estes*, 87 Kan. 786; *Cuhill v. Hilton*, 106 N. Y. 512, 9 Cent. Rep. 255; *Jenney Electric Light & Power Co. v. Murphy*, 115 Ind. 571; *St. Louis Bolt & Iron Co. v. Burke*, 12 Ill. App. 369; *Shearm. & Redf. Neg.* § 207.

The proximity of the shaft to the place where he was working was but an incident, and does not affect the liability of the defendants. That proximity doubtless determined his selection of it as the place on which to hang the towel; but as this was a use of the shaft never intended by the defendants, its selection by him for such use cannot render them liable for the injury any more than if it had been at the end of the room opposite to the place in which he was at work. When, therefore, it appeared from the testimony of the plaintiff that the injury received by him resulted from his voluntary act, unconnected with the service for which he was employed, the court should have granted the nonsuit asked by the defendants, and its order granting a new trial for the error committed in refusing this motion must be affirmed.

3. For the purpose of showing that the defendants had knowledge of the character of the shaft, the witness Geiger was allowed to testify that previous to the injury to the plaintiff he had informed the foreman Geisner, of its character. He was then asked "What made you tell August Geisner?" to which objection was made by the defendants. The court reserved its ruling upon the objection, and allowed the witness to answer, who said: "I told Geisner that the shaft was of no value there, and it should be cut off; and it was said then that I had nothing to say about it, and it was left as of yore. As foreman, it was Geisner's business to look out and do what was stated to him, but nothing was done there. He was the head man in the malt-house." After the answer had been given, the court overruled the objection to the question, and allowed the testimony to remain. The reason for permitting this witness to give testimony of what he had told Geisner was merely that the knowledge of the defendants concerning the condition of the shaft might be shown as a fact from which their negligence could be inferred, but the motives which prompted the witness to inform the foreman, as well as the opinions of the witness concerning the shaft were immaterial, and should not have been allowed in evidence.

4. A witness (Ekman) having been shown to be a machinist, and conversant with machinery, was asked the following question: "Question. If that shaft on the end had been pounded or battered, or was in a battered or splintered condition,—that is, having something in the nature of a crown, that made it wider there than it was in further, nearer the wall,—would that make it dangerous or not?" to which he answered: "Answer. If the shaft was battered or split or splintered, in motion it would be dangerous." Also the following question: "Q. If this shaft was smooth, and a towel had been hung upon it, and it in motion, would there be any danger in drawing that towel off?" to which he answered: "A. If the shaft is smooth, and

the towel hung on the shaft in motion, it would not be dangerous to take it off. If the shaft were not smooth, it is likely to come in contact with clothing, and, if it comes in contact with clothing, will certainly wind the clothing up." Another witness (Johnson) was asked: "Q. What is your opinion as to whether a shaft protruding about eighteen inches, at the height mentioned by him, into a room where workmen are working, against which they might come in contact, if the surface of the same is jagged, rough, and broken,—whether it is dangerous or not;" to which he answered: "A. It is. Q. Why is it so? A. It is very likely to catch the clothing of the operator." These questions were objected to by the defendants upon the ground that they were incompetent, irrelevant, and immaterial, and not a subject of expert testimony; but their objections were overruled. The court erred in not excluding this testimony. An answer to the questions did not involve the knowledge of any science or art, and was not the subject of testimony by an expert in machinery. The facts sought to be shown by the questions did not involve a knowledge of the construction or working of machinery, or in any respect depend upon such knowledge. Whether it is dangerous for a shaft with a rough surface or end to project into a room where there are workmen who may come into contact with it, is not in any case to be determined by expert testimony, but depends in every instance upon the circumstances of the particular case, and must be determined by the jury from all the facts of that case. Whether a towel can be safely taken from a smooth, revolving shaft is a matter of common observation, and is not to be determined by one who is an expert in machinery, any more than by an expert in any other branch of knowledge. Such questions are to be determined by the jury themselves, either from their own experience in matters of common observation, or from all the evidence in the case, and cannot be asked of witnesses, even if such witnesses are experts in some particular art or science. *Sappenfield v. Main Street & A. P. R. Co.* 91 Cal. 80. If the court permits the jury to be influenced by the judgment of such witnesses, it deprives the litigants of their right to have the jury render its verdict upon the facts in the case, and to this extent substitutes the judgment of the expert for what should be the judgment of the jury.

5. Evidence was given at the trial tending to show that shortly after the injury the plaintiff had made statements to the effect that it was the result of his own fault, and that the accident had been brought about by a different cause from that shown at the present trial. In its instructions to the jury the court said: "The court instructs the jury that, although parol proof of the verbal admissions of a party to a suit, when it appears that the admissions were understandingly and deliberately made, often afford satisfactory evidence, yet as a general rule the statements of the witnesses as to the verbal admissions of a party should be received by the jury with great caution, as that kind of evidence is subject to much imperfection and mistake. The

party himself may have been misinformed, or may not have clearly expressed his meaning; or the witness may have misunderstood him; and it frequently happens that the witness, by unintentionally altering a few expressions really used, gives an effect to the statement completely at variance with what the party did actually say. But it is the province of the jury to weigh such evidence, and give it the consideration to which it is entitled in view of all the other evidence in the case." In thus instructing the jury the court disregarded the provision of the Constitution that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." While it is a matter of common knowledge that the statements of a witness as to the verbal admissions of another are liable to be erroneous, and for that reason should be received with caution, yet such conclusion is only an inference of fact which must be made by the jury, and is not a presumption or a conclusion of law to be declared by the court. The reasons which are to be urged in favor of receiving such statements with caution are based upon human experience, and vary in strength and conclusiveness with the facts and circumstances of each case, and their sufficiency in any particular case is an inference which the reason of the jury makes from those facts and circumstances; but there is no rule of law which directs the jury to invariably make such an inference from the mere fact that the proof of the admission is by oral testimony. That deduction, called a "presumption," which the law expressly directs to be made from particular facts, is uniform, and

not dependent upon the varying conditions and circumstances of individual cases. To weigh the evidence and find the facts in any case is the province of the jury, and that province is invaded by the court whenever it instructs them that any particular evidence which has been laid before them is or is not entitled to receive weight or consideration from them. *People v. Walden*, 51 Cal. 588; *People v. Fong Ching*, 78 Cal. 178; *Mauro v. Platt*, 62 Ill. 450; *Com. v. Galligan*, 118 Mass. 202; *McNeil v. Barney*, 51 Cal. 603; *People v. Dick*, 84 Cal. 666.

The instruction above quoted is, in substance, an argument to the jury with "respect to matters of fact" that had been presented at the trial, and a comment by the court, upon the weight which they should give to that testimony. Whether the facts and circumstances proved in the case were sufficient to cause the reason of the jury to make this inference was fair matter of argument for the counsel of the respective parties; but the court forsook its judicial position when it assumed the office of commenting upon the weight and credibility of this evidence. The closing paragraph in the instruction, to the effect that it was for the jury to give to the evidence the consideration to which it was entitled, did not obviate the error, as by its remarks the court had in substance said to them that as matter of law the evidence was not entitled to any great consideration.

The order is affirmed.

We concur: *Sharpstein, J.; Garoutte, J.; McFarland, J.*
Rehearing denied.

ARKANSAS SUPREME COURT.

David REEVE, *Appt.*,
v.

LADIES' BUILDING ASSOCIATION, PER-
PETUAL.

(.....Ark.....)

1. The contract of a member borrowing money from a building and loan

NOTE.—Usury in loans by building associations.

A usurious transaction is one in which more is taken for the use of money than the statute allows. *Thompson, Building Associations*, 102.

The form of the contract is immaterial. *Endlich, Building Associations*, § 869.

The courts of many of the states have followed the English rule as laid down in *Silver v. Barnes*, 6 Bing. N. C. 180, and uniformly adhered to in that country. That was the case of an unincorporated association, and the court said that "the rules of the society were in effect a mere agreement by partners that their joint contributions should be advanced for the use of one or the other."

This rule was subsequently applied to the case of societies incorporated under § 6 & 7 Wm. IV., chap. 82.

In this country the cases of unincorporated associations have been confined almost entirely to the states of Massachusetts, New Hampshire and Penn-
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association is not within the Usury Laws where the rate of interest to be paid cannot be known until the maturity of the shares and whether it will be greater or less than the legal rate is wholly contingent on the prosperity of the association.

2. A borrowing member of a building and loan association has no right to receive interest on his stock payments or to

sylvania and where the association is unincorporated the weight of authority is in favor of holding that the redemption of a share should be regarded, not as a loan, but as an advance out of partnership funds.

In *Delano v. Wild*, 6 Allen, 1, 83 Am. Dec. 605, it was said that it was proper to make the interest of the subscriber in the accumulating fund a subject of bargain and sale; and that the parties were bound by the contract into which they had entered. It was also held, following *Silver v. Barnes*, *supra*, that the transaction was a dealing as between partners in relation to a partnership fund. Followed in *Bowker v. Mill River L. F. Assn.*, 7 Allen, 106.

In the earlier case of *Merrill v. McIntire*, 18 Gray, 165,—where the association was unincorporated,—the court took the same view and held the contract not usurious.

In *Shannon v. Dunn*, 42 N. H. 194, the association was unincorporated. It was held that the trans-

have such payments applied in reduction of his indebtedness unless such right is expressly reserved.

(June 11, 1892.)

APPEAL by plaintiff from a decree of the A Chancery Court for Pulaski County in favor of defendant in a proceeding brought to obtain the cancellation of certain mortgages. *Affirmed.*

The facts are stated in the opinion.

Mr. John B. Jones, for appellant:

In 1886, in England, parliament exempted loan associations from Usury Laws.

Encyclopedia Britannica, title, *Building Societies*.

In many states in this country Legislatures have expressly exempted them from operation of Usury Laws.

In Pennsylvania there was an Act passed in 1850 under which associations could incorporate, but under that Act they were not exempt from operation of the Usury Laws. In 1859 it was enacted that all associations incorporated under the Act of 1850 should be exempted from Usury Laws.

In *Kupfert v. Guttentberg Bldg. Asso.*, 80 Pa. 465, under the Act of 1850, the court says: "No institution is more cruel in theory; the contract is usurious."

In *Reiser v. William Tell Sav. Fund Asso.*, 89 Pa. 137, the court says: "These associations have been in the habit of loaning their funds to those who bid the highest premium, at the rate of 6 per cent on the nominal amount of

the loan. And this court has several times decided that they can only recover the actual amount loaned with interest thereon.

Bris & N. E. R. Co. v. Casey, 26 Pa. 296; *Kupfert v. Guttentberg Bldg. Asso.*, *supra*.

In *Link v. Germantown Bldg. Asso.*, 89 Pa. 15, the court says: "One point may be considered thoroughly settled; that prior to the Act of 1859 building associations, corporate or incorporate, could only recover on the mortgage the money loaned, with legal interest."

In *Martin v. Nashville Bldg. Asso.*, 2 Coldw. 418, the court said: "It is the duty of the court to look into the transaction. If it is a shift or device to cover usury, or a contract for an advance of money, and thereby evade the Usury Laws, it cannot stand."

In *Bibb County Loan Asso. v. Richards*, 21 Ga. 592, the court, after giving the origin of these associations, says: "It is asked why so much complication and mystery about a system designed for the benefit of the masses, especially the poor and the humble. That it is all for the purpose of concealing the repulsive interest which they charge; that nothing can be understood of its workings, except that it produces most gratifying gains to the capitalist, who invests his money in it to accumulate; that the borrower, once in the web, may, like the little fly, struggle in vain to escape the entanglement."

In *Montgomery Mut. Bldg. & Loan Asso. v. Robinson*, 69 Ala. 419, the court says: "In the absence of this legislative sanction we would not hesitate to pronounce the transaction usurious."

action was not usurious unless the association was a cover for usury. Whether it was so or not was said to be a question for the jury.

To the same effect was *Parker v. Fulton Loan & Bldg. Asso.*, 46 Ga. 163, followed in *City Loan & Bldg. Asso. v. Goodrich*, 48 Ga. 445; *Redwine v. Gate City Loan & Bldg. Asso.* 84 Ga. 474; *Van Pelt v. Home Bldg. & Loan Asso.* 79 Ga. 439.

In Pennsylvania prior to the Act of 1859, which declared that premiums should not be usurious, building associations, corporate or incorporate, could recover on their loans only the sum loaned with legal interest.

In *Philanthropic Bldg. Asso. v. McKnight*, 85 Pa. 470, recovery was allowed of all that the borrower had paid beyond the sum actually lent and 6 per cent interest thereon.

Jarrett v. Cope, 68 Pa. 67, reaffirmed the earlier cases as to unincorporated associations. Followed in *Link v. Germantown Bldg. Asso.* 89 Pa. 15.

By the Pennsylvania Act of 1859, it was provided "that no premiums, fines or interest on such premiums that may accrue to such corporation" shall be usurious. *Selden v. Reliable Sav. & B. Asso.* 81* Pa. 336, was a *scire facias* on a building association mortgage. It was held to be no defense to say that the borrower had only received a certain sum, for the difference between that and the face of the mortgage is presumptively the premium.

In *Walbach v. Lehigh Bldg. Asso.*, 84 Pa. 211, it was held that the Act of 1859 taking premiums, fines, etc., out of the Usury Laws did not apply to loans to persons not members, or not *sui juris*, and that a married woman was not liable for more than the sum borrowed with legal interest.

In *Tanner's App.*, 95 Pa. 118, this ruling was held not to be applicable to the case of a husband who

was bound jointly with his wife, and who received the benefit of the loan.

The courts of most of the states have treated these associations as ordinary money-lending institutions.

But in *White v. Mechanic's Bldg. F. Asso.*, 23 Gratt. 24, the court thought that the difference between the sums realized on their shares by the advanced and unadvanced stockholders was not a premium but was produced by the payment of interest authorized by the eighth section of the statute and therefore not usurious. It was held that the redemption by the association of a share of stock was a purchase and not a loan.

In *Burns v. Metropolitan Bldg. Asso.*, 3 Mackey, 833, the contract was held not to be for a loan and not usurious. The court refused to disturb the impression gathered from *obiter dicta* in *Pabet v. Economical Bldg. Asso.*, 1 MacArth. 335, and in *Mulloy v. Fifth Ward Bldg. Asso.*, 3 MacArth. 594.

In *Franklin Bldg. Asso. v. Marsh*, 29 N. J. L. 225, it was held that though the borrower had to pay more than the legal rate of interest the contract was legal within the Act (Nix. Dig. 75) authorizing the formation of building associations, and providing that no premium given for the priority of a loan should be deemed usurious.

In *Clarksville Bldg. & Loan Asso. v. Stephens*, 26 N. J. Eq. 354, the defendant contended that the clause in the constitution providing for fines was an infraction of the Usury Laws. It was held not; since the mortgage was given to secure, not the payment of a loan of money, but the performance of his contract with his fellow stockholders.

In *Hoboken Bldg. Asso. v. Martin*, 13 N. J. Eq. 427, *Chancellor Green* said: "The money was not advanced by way of loan, but in redemption of the

Interest cannot be charged on the premium. *Parker v. United States Bldg. & Loan Assn.* 19 W. Va. 776; *Mutual Bldg. & Loan Assn. v. Tascott* (Ill.) Oct. 31, 1891; *Forrest City U. Land & Bldg. Assn. v. Gallagher*, 25 Ohio St. 215; *Baltimore P. Bldg. & L. Soc. v. Taylor*, 41 Md. 418; *Mechanics & W. Mut. Sav. Bank & Bldg. Assn. v. Wilcox*, 24 Conn. 147.

Premiums or interest charged to exceed the legal rate of interest have not been sustained except where expressly authorized by statute.

With the exception of Massachusetts and New Hampshire where alone the partnership theory seems to have been consistently carried through, the right independently of statutory sanction, of any association, incorporated or unincorporated, to deal with its members on partnership basis, has never been expressly recognized, but frequently denied.

Endlich, Building Associations, § 335.

In sections 331 and 337 Mr. Endlich shows there is nothing in the partnership theory, except where authorized by statute.

See also *Pfeister v. Wheeling Bldg. Assn.* 19 W. Va. 697; *Jackson v. Cassidy*, 68 Tex. 232; *Columbia Bldg. & Loan Assn. v. Bollinger*, 12 Rich. Eq. 124, 78 Am. Dec. 463.

An agreement to pay ten per cent per annum on \$1,000 when only \$900 was loaned, is usurious.

Burlington Mut. Loan Assn. v. Heider, 55 Iowa, 424; *Hawkeye Ben. & L. Assn. v. Blackburn*, 48 Iowa, 385. See also *Mills v. Salisbury Bldg. & Loan Assn.* 75 N. C. 292.

A loan to members at legal rates with reasonable dues for maintenance of organization

is good, but a loan for illegal interest divests it of its benevolent character and converts into an organization under form of law to fill its treasury by imposing oppressive burdens on its members who have been solicited to become the objects of its benevolence.

Henderson Bldg. & Loan Assn. v. Johnson, 8 L. R. A. 289, 10 Ky. L. Rep. 830; *Lincoln Bldg. & Sav. Assn. v. Graham*, 7 Neb. 173; *Lincoln Bldg. & Sav. Assn. v. Benjamin*, 7 Neb. 181.

There can be no question where the bid is more than legal interest, it is usury, as both parties intended more than legal interest.

Pfeister v. Wheeling Bldg. Assn. 19 W. Va. 696.

Where a member becomes a borrower the consideration has become so much the nature of a loan that subsequent payments on stock are partial payments on the debt, and each payment *pro tanto* extinguishes the debt.

Overby v. Fayetteville Bldg. & Loan Assn. 81 N. C. 58.

It is preposterous to suppose that non-borrowers who own stock would be willing on business principles to permit their money or that of the institution to be loaned or advanced to other shareholders, which was never to be repaid, unless they reaped some advantage therefrom greater than loss of the principal.

Burlington Mut. L. Assn. v. Heider, 55 Iowa, 428.

Where upon a loan of money the lender contracts to receive, besides his principal, in lieu of interest, something which may be worth more than legal interest, though it may per-

defendant's share, a mode of investment provided for by the constitution of the association."

In *Patterson v. Workingmen's Bldg. & Loan Assn.*, 14 Lea, 677, the corporation was organized under the Act of 1875, the transaction was held not to be a loan, but a sale of the expected dividend, and not usurious.

Contract held usurious.

In some of the states the statutes authorizing the organization of such institutions do not exempt them from the Usury Law. In such cases the transaction is held to be a loan of money under a contract tainted with usury. *Lincoln Bldg. & Sav. Assn. v. Graham*, 7 Neb. 173; *Mills v. Salisbury Bldg. & Loan Assn.* 75 N. C. 292.

In *Latham v. Washington Bldg. & Loan Assn.*, 77 N. C. 145, the transaction was held usurious but recovery was refused on the ground that the plaintiff was *in pari delicto*.

In *Mechanics & W. Mut. Sav. Bank & Bldg. Assn. v. Wilcox*, 24 Conn. 153, it was said that though one portion of the sum to be paid for the use of the money borrowed was called interest and another portion a bonus, yet, in fact, it was nothing else than a contract to pay fifteen per cent for such use; and this contract was held usurious under the Act of 1859 authorizing the establishment of building associations.

The facts in *Mechanics & W. Mut. Sav. Bank & Bldg. Assn. v. Meriden Agency Co.*, 24 Conn. 163, were substantially the same as in the preceding case, and the ruling of that case was followed. See *Mechanics & W. Mut. Sav. Bank & Bldg. Assn. v. Allen*, *infra*.

Under the statute in Iowa the fines or premiums in addition to the interest cannot exceed 10 per cent per annum. In the light of this provision, the contract in *Hawkeye Bldg. & Loan Assn. v. Blackburn* 18 L. R. A.

48 Iowa, 390, was usurious. Followed in *Burlington Mut. L. Assn. v. Heider*, 55 Iowa, 424.

In the case *Columbia Bldg. & Loan Assn. v. Bollinger*, 12 Rich. Eq. 124, 78 Am. Dec. 463, the by-laws were not adopted as part of the charter. By the charter the corporation was authorized to make such by-laws as were not "repugnant to the laws of the land." It was held that the contract was an attempt to evade the Usury Law, and must fail. Followed in *Mechanics & F. Bldg. & Loan Assn. v. Dorsey*, 15 S. C. 422, where the borrower, for the use of \$1,000, agreed to pay annually \$60 as interest and \$37 as premium, when the legal rate was 7 per cent.

Where the constitution of a building and loan association provides that on the winding up of the association the rate of interest on any advance is not to exceed the legal rate, a contract for the loan of money by it will not be held void for usury, although it appears that more than the legal rate of interest is reserved thereon. *Thompson v. Gillison*, 23 S. C. 534.

In *Martin v. Nashville Bldg. Assn.*, 2 Coldw. 418, there was no provision in the Act of incorporation exempting the association from the Usury Law. It was held that the redemption of a share was a loan of money and the retention of the premium tainted the transaction with usury. See *Patterson v. Workingmen's Bldg. & Loan Assn.* 14 Lea. 677.

In *Robertson v. American H. Assn.*, 10 Md. 397, the only proof of the contract was in the mortgage. It was recited to be "a condition precedent to the money being loaned" that the mortgage should be executed. The consideration was stated to be \$400; but the mortgage contained no covenant for the payment of the sum. The mortgage was held to be in conformity with the Act of 1832, chap. 103, and free from usury. The court expressly adopted the views of the court in *Silver v. Barnes*, 6 Bing. N. C. 120; *Burbidge v. Cotton*, 8

hapse prove to be worthless, the contract is usurious.

Tyler, Usury, 289, 290.

Wherever the lender stipulates for chance or advantage beyond the legal rate of interest, the contract is usurious.

Thomas v. Murray, 34 Barb. 157.

Agreement to pay the lender profits in addition to principal and interest is usurious.

Sweet v. Spence, 35 Barb. 44.

If the parties contract for more than 10 per cent interest it is usury.

German Bank v. De Shon, 41 Ark. 339.

If the transaction is a mere loan, and not a transaction under the statute, it is usurious.

Patterson v. Workingmen's Bldg. & Loan Assn. 14 Lea, 677; *Pfeister v. Wheeling Bldg. Assn.* 19 W. Va. 698.

It is the contract which constitutes usury, and not the amount he might or might not pay.

Burlington Mut. L. Assn. v. Heider, 55 Iowa, 424.

The contract is usurious on its face, and the court cannot presume, when the association would not contract, that the payments would cease at such time as would relieve the contract of usury.

Even if the contract had made such a guaranty and a shorter time was reached in which the stock would reach par value, by the borrower paying usurious interest, than it would by payment of legal interest, it would still be usury.

Jackson v. Cassidy, 68 Tex. 282; *Columbia Bldg. & Loan Assn. v. Bolinger*, 12 Rich. Eq.

Eng. L. & Eq. 57; *Seagrave v. Pope*, 15 Eng. L. & Eq. 477.

In *Awalt v. Eutaw Bldg. Assn.*, 34 Md. 435, where the excess of interest had been paid with full knowledge and no compulsion had been used, recovery was refused.

In *Baltimore P. Bldg. & Loan Soc. v. Taylor*, 41 Md. 418, the society was incorporated under an Act of 1867, which permitted the mortgage to stipulate for the payment of weekly installments on the shares redeemed or sold, "together with interest on the sum so paid or advanced." The mortgagor received \$2,700, while the par value of his share was \$3,000, on which latter sum the mortgage stipulated that he should pay interest. The contract was held usurious.

In a mortgage made by a member of a building association, combinations of interest with other payments were held intended to evade the statute against usury. And a transaction in which the annual interest on the loan at the legal rate would be \$36, and the borrower was required to pay \$1 a week on his shares, was held usurious. *Waverly Land Assn. v. Burk*, 1 Cent. Rep. 493, 64 Md. 338.

The use in the mortgage of the phrase, "This payment is for interest, expenses," etc., was held to be a subterfuge. *Peter's Bldg. Assn. No. 5 v. Jaacksch*, 31 Md. 201.

In *Border State P. Bldg. Assn. v. Hayes*, 61 Md. 600, the appellee, owning eight shares, had, to reduce his indebtedness, executed a new mortgage for half the amount of the former one on which he had paid interest at 8 per cent. The Act of 1876 provided that usury should not be a cause of action in any case where the debt had been settled by any consideration "except that of a renewal in whole, or in part." This transaction was held to come within the exception, and the appellee to be 18 L. R. A.

124, 78 Am. Dec. 463; *Burlington Mut. L. Assn. v. Heider*, *supra*; *Endlich*, Building Associations, §§ 831, 835, 837, 855, 856, 878; *Pfeister v. Wheeling Bldg. Assn.* *supra*; *Lincoln Bldg. & Sav. Assn. v. Graham*, 7 Neb. 178; *Lincoln Bldg. & Sav. Assn. v. Benjamin*, 7 Neb. 181; *Oerby v. Fayetteville Bldg. & Loan Assn.* 81 N. C. 58. *Messrs. Blackwood & Williams*, for appellee:

The principal reason of the existence of building associations is to enable persons belonging to a class whose earnings are small, and with whom the slowness of accumulation discourages the effort, to become, by a process of gradual saving, either at the end of a certain period, or by anticipation of it, the owners of homesteads.

Patterson v. Workingmen's Bldg. & Loan Assn. 14 Lea, 677; *Endlich*, Building Associations, p. 386.

In *Patterson v. Workingmen's Bldg. & Loan Assn.*, *supra*, the court says if the transaction was a loan or a device to lend money at usury then the statute would not cure it, but being a sale of stock it is not within the Usury Laws and does not need the assistance of the statute.

In *Parker v. Fulton L. & Bldg. Assn.*, 46 Ga. 166, the court says: "We think this contract on its face to be a mere sale by the plaintiff of his right to a share in the ultimate division of the accumulation. That is clearly the form of the contract. The plaintiff was the owner of stock or shares; they paid nothing, and were to pay nothing until the accumulation amounted to a certain sum, when, as is the result of the provision for winding up, that sum was to be

entitled to a rebate of all the usurious interest paid on the original mortgage.

To the same effect was *Border State P. Bldg. Assn. v. Hilleary*, 68 Md. 52.

Effect of voluntary payment.

In *Parker v. Fulton Loan & Bldg. Assn.*, 46 Ga. 166, it was held that upon the settlement of the transaction which embraces an item or feature of usurious interest, when the attention of the party paying such interest is distinctly called to it, and it is then knowingly included in the final adjustment, a recovery cannot be subsequently had for such usurious interest.

Contract not usurious.

But in most of the states these associations are exempted from the operation of the Usury Laws.

St. Louis D. & Sav. Loan Assn. v. Augustin, 2 Mo. App. 123, was the case of an association which was authorized by its charter to make a usurious contract.

In *Hammerslough v. Kansas City Bldg. Loan & Sav. Assn.*, 79 Mo. 80, the member had never paid anything on his stock but had borrowed an amount equal to the face value of his shares, giving his note and agreeing to pay monthly the full legal interest, and \$1 per share. He never drew the full amount of the loan, but it was always ready for him. This was held not usurious.

In *Melville v. American B. Bldg. Assn.*, 33 Barb. 103,—the case of an unincorporated society—the borrowing contract was held to be tainted with usury; but it was expressly declared that this case was not affected by the Act of 1851, as all the transactions took place before the passage of that Act.

In *Citizens' Mut. L. & A. F. Assn. v. Webster*, 25 Barb. 263, the taking of a premium was held not to

divided between such of the shareholders as had not sold. Having such shares, the plaintiff sold them to the company, the company advancing him a certain sum of money and he binding himself to do certain other things. It is not a loaning of money at all, nor is it a forbearance for the use of money, but a sale of certain shares of stock in the company to the company.

See also *Holmes v. Smythe*, 100 Ill. 420; *Freeman v. Ottawa Bldg. & H. Sav. Assn.* 114 Ill. 182; *Winget v. Quincey Bldg. & H. Assn.* 128 Ill. 67, 25 Am. & Eng. Corp. Cas. 665; *Merrill v. McIntire*, 13 Grav. 157; *Delano v. Wild*, 6 Allen, 1, 83 Am. Dec. 605; *Bowker v. Mill River L. F. Assn.* 7 Allen, 100; *Shannon v. Dunn*, 48 N. H. 197; *Burns v. Metropolitan Bldg. Assn.* 2 Mackey, 7; *Citizens Mut. L. & A. F. Assn. v. Webster*, 25 Barb. 263; *City Bldg. & Loan Co. v. Fatty*, 1 Abb. App. Dec. 350; *Massey v. Citizens Bldg. & Sav. Assn.* 22 Kan. 624.

In *McLaughlin v. Citizens Bldg. L. & Sav. Assn.*, 62 Ind. 264, the court says: "In our opinion, the bonus, premium, or percentage bid for the loan offered by appellee, and which is included in the note in suit, is not, strictly speaking, 'interest on money.'"

See also *Robertson v. American Homestead Assn.* 10 Md. 397, 69 Am. Dec. 145; *Clarks-ville Bldg. & Loan Assn. v. Stephens*, 26 N. J. Eq. 351; *Pabel v. Economical Bldg. Assn.* 1 McArthur, 386; *Pattison v. Albany Bldg. & L. Assn.* 63 Ga. 373; *Hoboken Bldg. Assn. v. Martin*, 18 N. J. Eq. 427; *Mechanics Bldg. & L. Assn. of N. B. v. Conover*, 14 N. J. Eq. 219; *Endlich, Building Associations*, §§ 42, 326, 327, 371.

be usury, the Statutes of Usury having been repealed as to such cases. Section 37, Act 1851.

In *Concordia Sav. & A. Assn. v. Read*, 93 N. Y. 474, Read had borrowed a sum from the association for which he paid a premium deducted from the whole sum. The taking of a premium, being sanctioned by the Act of 1851, amended by chap. 564, Laws 1875, did not render the loan usurious.

In *Holmes v. Smythe*, 100 Ill. 422, it was said that *Smythe's* being compelled to pay the face of the note, as well as interest, etc., was the result of his failure to comply with his contract; and that the obligation might be regarded as in the nature of liquidated damages.

In *Freeman v. Ottawa Bldg. H. & Sav. Assn.*, 114 Ill. 182, this question was said to be no longer open for discussion in Illinois. As following these cases, see *Winget v. Quincey Bldg. & H. Assn.* 128 Ill. 67.

In *Montgomery Mut. Bldg. & Loan Assn. v. Robinson*, 69 Ala. 413, the transaction was sanctioned by the Act of incorporation and was not usurious. So also in *Security L. Assn. v. Lake*, 69 Ala. 456.

By W. Va. Code, chap. 54, § 27, it is provided that dues, fines, or premiums taken by the association in addition to the usual interest "shall not be construed to make the loan usurious."

In *Massey v. Citizens' Bldg. & Sav. Assn.*, 22 Kan. 624, under a similar statute the contract was held not to be usurious.

But in *Forrest City U. L. & Bldg. Assn. v. Gallagher*, 25 Ohio St. 208, the association was incorporated under an Act containing an exemption clause much like that of the West Virginia Act. The redemption was held to be a loan, and the agreement to take interest on the premium usurious. So in *State v. Greenville Bldg. & Sav. Assn.* 29 Ohio St. 92; *Jackson v. Cassidy*, 68 Tex. 232.

A transaction with a loan association whereby 18 L. R. A.

The decisions cited by appellant from Pennsylvania treated the transactions as mere loans and the monthly payments as partial payments on the principal sum borrowed. But the Supreme Court afterwards changed its rulings, and not on account of the Statute of 1859. But in the case of *North American Bldg. Assn. v. Sutton*, 35 Pa. 469, 78 Am. Dec. 849, decided in 1857 on a loan made in May, 1852, the court says: "The doctrine of those cases (*Kupfert v. Guttenburg Bldg. Assn.* 80 Pa. 465, and *Hughes' App.* Id. 471) was perhaps in advance of the general understanding," and decides that payments on stock are not *ipso facto* payment on the debt.

See also *Spring Garden Assn. v. Tradesmen's L. Assn.* 46 Pa. 495.

In *Becket v. Uniontown Bldg. & Loan Assn.*, 88 Pa. 216, *Judge Sharswood* says: "A building and loan association, organized under the Act of April 12, 1859, is a species of partnership for dealing in money. The borrower has often to pay very large interest, and if he fails so as not eventually to secure the advantages of his contract, it seems very hard, even cruel, to exact so heavy a forfeiture; yet he became a member of the association in view of the large profits expected to accrue from these heavy discounts to the common fund.

"The borrower at usury is himself also a lender at usury, and if he can, by economy and self denial, manage to make his payments, is sure to come out in the end a large gainer. It would be very unjust to those who thus make their payments regularly, if the court, from sympathy for those who have fallen behind-hand, should refuse to enforce the obligations."

for a loan of \$1,800 a note for \$2,000 with interest at 10 per cent payable monthly is given, is not relieved of the taint of usury by a subsequent agreement by which the usurious interest paid is returned, and only lawful interest is to be paid in future, when the note for \$2,000 remains in force, notwithstanding the rights of third parties have become affected upon new considerations. *El Paso Bldg. & Loan Assn. v. Lane*, 51 Tex. 399.

An agreement by a borrower from a loan association of \$1,440, for which a security of \$2,600, with interest at 6 per cent is given, is not usurious as providing for the payment of more than 12 per cent per annum, where a by-law forming part of the contract provides that to redeem his shares the borrower shall pay, in addition to the sum actually received, one eighth of premium for each year he has had the use of money. *International Bldg. & Loan Assn. v. Abbott* (Tex.) June 10, 1892.

Constitutionality of statutes.

And these statutes are generally held to be constitutional.

By Laws of 1889, chap. 41, § 3, Dak. Terr., building and loan corporations were declared to be benevolent institutions.

And in *Vermont L. & T. Co. v. Whitted*, 2 N. Dak. 82, *Bartholomew, J.*, in delivering the opinion, said that the "operation of these associations when confined to their own members differs so radically from ordinary loan transactions that legislation placing them in a separate class for the purpose of regulations regarding interest and usury was clearly warranted."

In *McLaughlin v. Citizens' Bldg. Loan & Sav. Assn.*, 62 Ind. 264, a provision in the statutes (1 Rev. Stat. 1876, p. 246) declaring that "no premiums, fines, or interests on such premiums" "shall be

The first case decided in England (and really the foundation of the decisions in the United States) was *Silver v. Barnes*, 6 Bing. N. C. 180. At this time no Act of Parliament had been passed regulating these building associations. The court says: "The question was whether the transaction was a loan of money, or a dealing with the partnership fund. If it was a loan it was usurious. We think it was a dealing with the partnership fund, in which the defendant had an interest in common with the other members of the society, and that it was not a loan."

The next cases,—*Seagrave v. Pope*, 15 Eng. L. & Eq. 477; *Burbridge v. Cotton*, 8 Eng. L. & Eq. 57; *Moseley v. Baker*, 81 Eng. Ch. 87, and *Mosley v. Baker*, 8 De G. M. & G. 1032,—were decided under the Statute 7 Wm. IV. chap. 32, but followed the same reasoning and placed their decision on the same grounds as *Silver v. Barnes*, *supra*, and were not dependent upon the statute.

The mere fact of many of the decisions in favor of appellee being under special statutes was a mere incident, and it does not follow that the same decisions would not have been under a general law like ours.

Patterson v. Workingmen's Bldg. & Loan Assn., 14 Lea, 677, says: "The Legislature cannot grant to a corporation or class of corporations the right to charge a higher rate of interest than the rate fixed by the general law."

When a member borrows he must keep his contract. He has no right to call for an account or settlement at any instant short of the times mentioned in his contract.

Endlich, *Building Associations*, § 480; *Patterson v. Albany Bldg. & Loan Assn.* 63 Ga. 378.

The profits are reserved to those members who continue to the end. For borrowing members who drop out by the way, there is nothing but disaster. The defendant dropped out by the way. There is nothing in the charter of the association, nor in his contract, to

entitle him at this stage to a share of the profits.

Watkins v. Workingmen's Bldg. & L. Assn. of Hyde Park, 97 Pa. 523; *Delano v. Wild*, 6 Allen, 1, 83 Am. Dec. 605; *Cason v. Seldner*, 77 Va. 238.

Counsel says Reeve was not a stockholder; that he signed the articles merely to get a loan. He could become a stockholder for the avowed purpose of getting a loan.

Freeman v. Ottawa Bldg. H. & Sav. Assn. 114 Ill. 182; *Parker v. Fulton L. & Bldg. Assn.* 46 Ga. 166; Endlich, *Building Associations*, §§ 69, 76; *Mechanics & W. Mut. Sav. Bank & Bldg. Assn. v. Wilcox*, 24 Conn. 147.

The contract in this case upon its face is not usurious. It only stipulates for 9 per cent interest per annum which is 1 per cent less than the maximum allowed under our law.

Moody v. Hawkins, 25 Ark. 195; *Jordan v. Mitchell*, 25 Ark. 260.

Hughes, J., delivered the opinion of the court:

This was a bill filed in Pulaaki chancery court by appellant against appellee to cancel two mortgages given by appellant, one on block 152, city of Little Rock, to secure payment of dues, etc., on \$1,200 of stock, and the other on lots 10, 11 and 12, block 65, city of Little Rock, given by appellant, to secure payment of dues, etc., on \$7,000 of stock in appellee's association, on the alleged ground that the transactions were usurious loans, and asking judgment over against said association for all sums paid in on said transactions. Are these contracts usurious? We do not deem it necessary to the determination of this question to decide whether these transactions were sales or redemptions of the shares of the appellant, or transactions in partnership funds, as they are held to be in many of the decisions of the courts of last resort. The evidence shows that in each of these transactions there were two sep-

deemed usurious," was held constitutional. Followed in *Shaffrey v. Workingmen's Sav. Loan & Bldg. Assn.* 64 Ind. 600.

Illinois Laws 1872, p. 173, providing that no premium, fines, or interest on premium that may accrue to a building association under the provisions of that Act shall be deemed usurious, is not in violation of Ill. Const., art. 4, § 22, which prohibits the passage of local or special laws regulating the rate of interest on money. *Winget v. Quincey Bldg. & H. Assn.* 128 Ill. 67.

In *Mechanics & W. Mut. Sav. Bank & Bldg. Assn. v. Allen*, 23 Conn. 97, the Statute of 1856, which provided that loans previously made upon monthly bonuses should not be usurious, was held not unconstitutional.

And so in *Welch v. Wadsworth*, 30 Conn. 158, 79 Am. Dec. 239.

And in Kentucky it has been held that a statute incorporating a building and loan association, providing that "the dues, premiums, interest, or fines that may accrue to the association in accordance with its charter shall not be deemed usurious," is an attempt to confer special privileges and violates the fundamental law. *Henderson Bldg. & Loan Assn. v. Johnson*, 3 L. R. A. 239, 10 Ky. L. Rep. 830.

In *Gordon v. Winchester Bldg. & A. F. Assn.*, 12 Bush, 110, 23 Am. Rep. 713, it was held that the charter giving the corporation power to charge a greater rate of interest than was allowed by the 18 L. R. A.

general law was unconstitutional; and, whether regarded as an exclusive privilege or partial legislation, was usurious.

In *Ribb County L. Assn. v. Richards*, 21 Ga. 532, a special Act of the Legislature had incorporated the association according to its Constitution and by-laws. The transaction of this case was held not usurious because the provision of the special charter had been followed.

Strict conformity with the statute is requisite,

It was held in *Pfeister v. Wheeling Bldg. Assn.*, 19 W. Va. 684, that the association was not exempted from the Usury Laws unless it saw to it that the loan was applied by the member for the purposes specified by the Act.

In *Bates v. People's Sav. & Loan Assn.*, 42 Ohio St. 655, the premium was not ascertained by competitive bidding as required by statute, and being in excess of the legal rate, calling it a premium did not make it any the less usurious.

A building association can claim exemption from the Usury Laws only on the ground that it is incorporated under the provisions of the Act of 1859, and its contracts must strictly conform to the requirements of that Act. *Stiles's App.* 95 Pa. 122.

The defense of usury is personal to the borrower and his heirs or representatives. *Stein v. Indianapolis, etc. Assn.* 18 Ind. 240.

A. P. W.

arate contracts: *First*. The taking of shares in the association by the appellant, and the contract to pay for the shares monthly, as stipulated. *Second*. The sale or transfer of the shares to the association, in consideration of the advance to the appellant of the value of his shares, in anticipation of their par value, at the time when all the shares of all the members should be at par, by reason of the accumulations of the association. When this may be is uncertain, as it must depend upon the prosperity of the association. Whenever these shares are at par the borrowing member ceases to make his monthly payments of dues and interest on the advance made to him. What rate of interest he must pay is uncertain, and cannot be known until the final calculation can be made. The amount he may pay the association may be far less, or it may be more, than the sum he receives, with interest thereon at the rate of 10 per cent per annum. There is, then, in the transaction an element of uncertainty and hazard that seems to exclude the idea of a loan of money at a usurious rate of interest. "Where the promise to pay a sum above legal interest depends upon a contingency, and not upon the happening of a certain event, the loan is not usurious." *Spain v. Brent*, 68 U. S. 1 Wall. 604, 17 L. ed. 619; *Tyler, Usury*, p. 98; *Lloyd v. Scott*, 29 U. S. 4 Pet. 205, 7 L. ed. 883. This principle is applied to contracts of insurance, of bottomry, to post-obits, and annuities. *Tyler, Usury*, p. 175 *et seq.*; *Delano v. Wild*, 6 Allen, 1, 83 Am. Dec. 605; *Bowler v. Mill River L. F. Assn.* 7 Allen, 100.

In *Parker v. Fulton Loan & Bldg. Assn.*, 46 Ga. 166, the court said: "Even on the idea that he was borrowing the money, and was merely selling his interest in the dividend, it was wholly a matter of contingency whether he paid seven per cent, or more, or less than that, for the money. This fact, this uncertainty or contingency, introduces into the transaction an element wholly foreign to an agreement to pay so much for the use of money." The association does not know what it will get back, or what the borrower will eventually pay, as that depends entirely on how long it will take to reach the point of final winding up. *Ibid.*; *Bidd County L. Assn. v. Richards*, 21 Ga. 592; *Shannon v. Dunn*, 48 N. H. 194; *Burns v. Metropolitan Bldg. Assn.* 2 Mackey, 7.

There are expenses and losses incident to the business of these associations which must be considered in estimating the value of the shares of the members before maturity. *Pattison v. Albany Bldg. & L. Assn.* 68 Ga. 878. The testimony in this case shows that if the appellant had kept his contract, the interest he would have paid on the moneys he received from the association would have been in one of the transactions $7\frac{1}{4}$ per cent per annum, and in the other $4\frac{1}{2}$ per cent. It is contended by the counsel for appellant that the statutory rule for computing interest where partial payments are made is applicable to these transactions, and that the payments of monthly dues should bear interest, or cause interest to cease upon the principal, from the time they are made to the extent that they reduce the principal. But the member nowhere reserves the right to charge the association interest on his stock payments. He has no claim as a member to such interest, and it cannot be assumed that by incurring the additional obligations towards the association involved in the grant of an advancement his previous rights in respect to it have become enlarged. He continues liable on his original undertaking. A borrower's claim to have these items taken into account, and to be given credit therefor at any intermediate stage, "has no foundation in law or equity." "It must be remembered that he is, in the first place, a member, and only in the second place a borrower. In the former capacity he has no right to an account of profits except upon the termination of the scheme." "As for interest upon his several stock payments, his contract with the building association, upon acceding to it, never contemplated such a thing. No such stipulation, expressed or implied, ever entered into the bargain. All he was entitled to, all he reserved to himself the right to claim, was a share of the profits of the building association's dealings with the whole fund of subscriptions." *Endlich, Building Associations*, 456. Where the contract, however, is for a mere loan of money upon which a rate of interest greater than that allowed by law is exacted, no device, shift or cloak, whatever its form, or how specious soever it may be, can protect it from the taint of usury.

The decree of the Pulaski Chancery Court is affirmed.

MICHIGAN SUPREME COURT.

Harry C. HALL, *Appt.*,

v.

NIAGARA FIRE INSURANCE CO.

(.....Mich.....)

1. The provision of an insurance policy that it shall become void unless con-

sent is indorsed thereon if the insured is not the sole and unconditional owner of the property, relates only to subsequent changes and does not apply to the state or condition of the property when the policy was issued.

2. The assignment of an insurance policy with the consent of the insurer creates a new contract between the latter and

NOTE.—Effect on assignee of insurance policy of acts of forfeiture by assignor.

The effect of an assignment of an insurance policy with consent of the insurer to create a new contract which shall be unaffected by acts of the assignor as declared by the main case is a question of very great importance and one on which there has been much confusion and disagreement among courts and text-writers. Some of the difficulty has been due to a failure to distinguish between an as-

signor as declared by the main case is a question of very great importance and one on which there has been much confusion and disagreement among courts and text-writers. Some of the difficulty has been due to a failure to distinguish between an as-

the assignee which is unaffected by any causes of forfeiture previously existing and unknown to either party.

- B. Proceedings to oust a tenant according to the provisions of a contract** under which he had become merely a tenant holding over without permission is not a litigation which will defeat an insurance policy which provides that it shall be void "if the title or possession be now or hereafter involved in litigation."

(October 4, 1892.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of defendant in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Reversed.*

The facts are stated in the opinion.

Messrs. Keena & Lightner, for appellant:

The sale of the property and the assignment of the policy in suit by Mr. Hough to plaintiff and the consent of the defendant company indorsed on the policy constituted a new contract of insurance between plaintiff and defendant, and plaintiff is not bound by any act of his assignor.

Wilson v. Hill, 3 Met. 69; 1 May, Ins. 8d ed. § 878A.

The unearned and retained premium is a good consideration for the new contract.

Flanagan v. Camden Mut. Ins. Co. 25 N. J. L. 506; *Cummings v. Cheshire County Mut. F. Ins. Co.* 55 N. H. 457; *Shearman v. Niagara F. Ins. Co.* 46 N. Y. 526; *Steen v. Niagara F. Ins. Co.* 89 N. Y. 326, 42 Am. Rep. 297; *Pratt*

v. New York Cent. Ins. Co. 64 Barb. 589, 14 Am. Rep. 804; *Ellis v. Council Bluffs Ins. Co.* 64 Iowa, 507; *Continental Ins. Co. v. Munns*, 5 L. R. A. 480, 120 Ind. 80; *Ellis v. Insurance Co. of North America*, 32 Fed. Rep. 646.

Plaintiff had a sufficient title to the property insured to satisfy the requirements of the policy.

With no inquiries made by the company and no statements given by plaintiff, the provisions in the policy in regard to the title of the insured are at most representations, a substantial compliance with which is sufficient. If the company deemed an accurate knowledge of insured's title to be material it should have inquired in regard to the title.

1 May, Ins. 8d ed. § 285; *Castner v. Farmers Mut. F. Ins. Co.* 46 Mich. 15; *Guest v. New Hampshire F. Ins. Co.* 66 Mich. 98; *Hoove v. Prescott Ins. Co. of Boston*, 11 L. R. A. 340, 84 Mich. 823, 7 Am. & Eng. Encyclop. Law, p. 1020, and notes; *Hooper v. Hudson River F. Ins. Co.* 17 N. Y. 424; *Short v. Home Ins. Co.* 90 N. Y. 16, 43 Am. Rep. 188; *Continental Ins. Co. v. Munns*, supra; *Vankirk v. Citizens Ins. Co. (Wis.)* May 5, 1891; *Washington Mills & E. Mfg. Co. v. Weymouth & B. Mut. F. Ins. Co.* 185 Mass. 505; *Pett v. Dakota F. & M. Ins. Co. (S. Dak.)* Jan. 5, 1891.

The meaning of "title or possession" in the clause relating to the title or possession becoming involved in litigation, is some interest in the property asserted in opposition to the title of, or derived from the insured. A possession of the premises under plaintiff is an "occupancy" and not legally a "possession."

assignment to an owner of the property and an assignment merely as security for a debt.

Prior acts.

The doctrine of the above case that prior acts of forfeiture by an assignor do not affect the rights of a purchaser of the property to whom the policy is assigned with consent of the insurer is accepted in most of the more recent cases, even where the insurer is ignorant at the time of such acts of forfeiture. *Ellis v. Insurance Co. of North America*, 32 Fed. Rep. 646; *City F. Ins. Co. v. Mark*, 45 Ill. 482; *Continental Ins. Co. v. Munns*, 5 L. R. A. 480, 120 Ind. 80.

The rule is still plainer and has been followed in other cases where the consent has been given by the insurer with knowledge of the prior acts of forfeiture. *Shearman v. Niagara F. Ins. Co.* 46 N. Y. 526; *Pratt v. New York Cent. Ins. Co.* 64 Barb. 589, 14 Am. Rep. 804; *Steen v. Niagara F. Ins. Co.* 89 N. Y. 319, 42 Am. Rep. 297.

In *Kreutz v. Niagara Dist. Mut. F. Ins. Co.*, 16 U. C. P. 181, the court says it does not mean to say whether notice to either party of the prior acts of forfeiture is material or not. In that case it appears that the insurer knew, but the assignee did not, of a prior cause of forfeiture by change of occupation of the premises, and it was held that this was waived by consent to an assignment of the policy. The court says this doctrine might not apply to some defenses such as those in respect to an original infirmity of title.

The doctrine is likewise applied to the case of a mortgagee who becomes a purchaser of property on foreclosure where the insurer consents that the policy originally payable to him as mortgagee shall continue in his favor. *Pratt v. New York Cent. Ins. Co.* 64 Barb. 589, 14 Am. Rep. 804.

And the same rule is adopted in respect to a purchaser.

chaser at sheriff's sale to whom an insurer with knowledge of a cause of forfeiture consents that the policy shall be assigned. *Steen v. Niagara F. Ins. Co.* 89 N. Y. 315, 42 Am. Rep. 297.

The retention of the unearned premium is a good consideration for a new contract with the assignee of a policy. *Shearman v. Niagara F. Ins. Co.* 46 N. Y. 526; *Pratt v. New York Cent. Ins. Co.* supra.

But in conflict with most of the above cases it is held in *Ellis v. State Ins. Co.*, 68 Iowa, 573, 56 Am. Rep. 865, that the consent of an insurer to the assignment of a policy which provides that it shall be void if the title is "transferred, incumbered or changed" does not waive a cause of forfeiture which is not known to the insurer arising out of an undisclosed incumbrance.

An exception from, rather than a contradiction of, the doctrine of the main case is made in *Insurance Co. of North America v. Garland*, 106 Ill. 220, in which it is held that consent to an assignment of a policy on a house which is then vacant made subject "to all the terms and conditions" of the policy, one of which makes it a cause of forfeiture if the building shall "become vacant and unoccupied and so remain," will not waive that provision altogether and the assignee cannot hold the company liable if he allows the building to continue vacant. In this case one judge dissented on the ground that as a new contract was made with the assignee at a time when the premises were vacant the condition was waived altogether.

Another exception is made in the case of *McCluskey v. Providence Wash. Ins. Co.*, 126 Mass. 306, in which a policy which was void when issued for lack of insurable interest was held not to become valid in the hands of an assignee to whom the property had been conveyed where the assignment was made by mere consent of the insurer without any new consideration or any new undertaking.

1 May, Ins. 8d ed. § 273 A, and notes; *Rumsey v. Phœnix Ins. Co.* 1 Fed. Rep. 896; *Alkan v. New Hampshire Ins. Co.* 58 Wis. 187; *Rumsey v. Phœnix Ins. Co.* 17 Blatchf. 527.

Stevens, on the forfeiture of his contract by notice from plaintiff in accordance with its terms before the fire, became a tenant at will of plaintiff.

Dwight v. Cutler, 8 Mich. 566, 64 Am. Dec. 105; *Rawson v. Babcock*, 40 Mich. 380.

The policy was valid when issued to Hough. *Dupreau v. Hibernia Ins. Co.* 76 Mich. 615, and cases cited.

And the contract to sell to Stevens and his possession taken thereunder did not avoid the policy.

1 May, Ins. 8d ed. § 267.

Possession taken by one holding under a land contract is not an avoidance of the contract.

Smith v. Phœnix Ins. Co. 13 L. R. A. 475, 91 Cal. 823.

The property being vacant at the time the policy was issued, the provisions contained therein as to vacancy and consequently as to change of possession do not apply.

Aurora F. & M. Ins. Co. v. Kranich, 36 Mich. 289; Conditions in Insurance Policies. 15 Am. Rev. p. 772; *Burson v. Philadelphia F. Assn.* 136 Pa. 267; *Hill v. Cumberland Valley Mut. Prot. Co.* 59 Pa. 474; *Grable v. Germania Ins. Co.* 32 Neb. 645; *Davidson v. Hawk-eye Ins. Co.* 71 Iowa, 582; 1 May, Ins. 8d ed. § 267, note 5.

Messrs. Hanchett, Stark & Hanchett, for appellee:

The sale by Hough to Stevens and placing

him in possession under the contract, not having been consented to by the company renders the policy void. It was a change in the title interest and possession of the property by sale.

Savage v. Howard Ins. Co. 52 N. Y. 502, 11 Am. Rep. 741; *Cottingham v. Firemans F. Ins. Co.* 20 Ins. L. J. 187; *Davidson v. Hawk-eye Ins. Co.* 71 Iowa, 582; *Insurance Co. v. Archibald*, 16 Ins. L. J. 153; *Western Mass. Ins. Co. v. Riker*, 10 Mich. 280; *Elliott v. Ashland Mut. F. Ins. Co.* 117 Pa. 548; *Imperial F. Ins. Co. v. Dunham*, 117 Pa. 460.

The policy having become void cannot be revived by any action of waiver or estoppel, unless done with a full knowledge of the facts.

Security Ins. Co. v. Fay, 22 Mich. 468, 7 Am. Rep. 670; *New York Cent. Ins. Co. v. Watson*, 23 Mich. 486; *Emery v. Mutual City & Village F. Ins. Co.* 51 Mich. 471, 47 Am. Rep. 590; *Allemania F. Ins. Co. v. Hurd*, 37 Mich. 18.

An assignment and consent is not regarded as yielding any rights of the company. The same defense can be made as if the action were brought by the assignor.

Bergson v. Builders Ins. Co. 38 Cal. 545; *Eastman v. Carrol County Mut. F. Ins. Co.* 45 Me. 307; *Merrill v. Farmers & M. Mut. F. Ins. Co.* 48 Me. 285; *Bowditch Mut. F. Ins. Co. v. Winslow*, 8 Gray, 43; *McCluskey v. Providence Wash. Ins. Co.* 126 Mass. 308; *Ellis v. State Ins. Co.* 68 Iowa, 578, 56 Am. Rep. 865; *Lycorning Ins. Co. v. Mitchell*, 48 Pa. 873; *Mitchell v. Lycorning Mut. Ins. Co.* 51 Pa. 410; *Elliott v. Ashland Mut. Ins. Co. supra*; in-

Substantially the same decision where there was no insurable interest originally is made in respect to a mutual policy in which the assignment is made subject to all liabilities, etc. *Eastman v. Carrol County Ins. Co.* 45 Me. 307.

But the fact that the insured had merely a partnership interest in goods insured [and not the entire title] does not defeat the right of an assignee to whom the policy has been assigned with the insurer's consent. *City F. Ins. Co. v. Mark*, 45 Ill. 482.

It does not appear in this case whether the insurer knew of the ground of forfeiture at the time of the assignment or not.

Where the assignee knows of the prior cause of forfeiture and the insurer does not, another important element is introduced. Actual knowledge of the prior forfeiture on the part of an agent of the assignee by whom the assignment is made is the knowledge of the assignee and if such cause of forfeiture is not known to the insurer it is not waived by consent to the assignment. *Philadelphia Fire Assn. v. Flournoy (Tex.)* May 17, 1892; *Northern Assur. Co. v. Flournoy*, May 17, 1892.

An insurer's consent to the assignment of a policy to the grantee of the property insured which was in fact but not so known to the company fraudulent as to the creditors of the insured, does not prevent it from avoiding the policy under a clause therein against fraud although the fraudulent grantee was the insurer's agent. *Phoenix Ins. Co. v. Willis*, 70 Tex. 12.

An assignee of a policy only and not of the property by an assignment made before loss where the policy does not restrict a transfer is subject to all defenses against the insured. *Bergson v. Builders Ins. Co.* 38 Cal. 545.

A mortgagee to whom a policy is assigned as collateral, but who does not give any new deposit 18 L. R. A.

note or other security as required by the by-laws of a mutual company which issued the policy, takes it subject to a prior cause of forfeiture by misrepresentation in the original application for the insurance. *Bowditch Mut. F. Ins. Co. v. Winslow*, 8 Gray, 43.

A mere assent by a mutual company to an indorsement by the insured directing payment "in case of loss" to another person "for value received" is not sufficient to show a new contract with the latter where a new deposit note is not given as required by the company's by-laws in case of assignment. *Fogg v. Middlesex Mut. F. Ins. Co.* 10 Cush. 387.

Subsequent acts.

Subsequent acts of forfeiture by the assignor do not affect the rights of a purchaser of insured property to whom the policy is assigned with the consent of the insurer. *Ellis v. Council Bluffs Ins. Co.* 64 Iowa, 507.

An assignor of an insurance policy cannot afterwards bind the assignee by an agreement as to the amount of the loss. *American Cent. Ins. Co. v. Sweetser*, 118 Ind. 370.

The rights of an assignee of a policy as security cannot be defeated by an adjustment made between the mortgagee and the insurer. *Hall v. Fire Assn. of Philadelphia*, 64 N. H. 406.

An arbitration between a mortgagee and an insurer without notice to the mortgagee to whom the loss is made payable does not affect the latter's rights. *Bergman v. Commercial Union Assur. Co.* 15 L. R. A. 270, 18 Ky. L. Rep. 720.

The same is true of an accord and satisfaction between the insurer and the mortgagee. *Hathaway v. Orient Ins. Co. (N. Y.)* 17 L. R. A. 514.

Some of the early cases which decided that an assignment made with the insurer's consent cre-

Insurance Co. of North America v. Garland, 108 Ill. 220.

In the case at bar we have the feature that it was not an assignment of a policy to the purchaser in a case of sale of the property, but the assignment of a policy to the assignee of a vendor's interest, a vendor who did not have the legal title and had contracted his equitable title to another. It is what might be termed the sale of an equitable mortgage merely with an assignment of a policy not issued on that interest but an interest as owner.

Even if the assignment of the policy and consent thereto in this case was a new contract of insurance, the condition of the title was such that plaintiff's interest was not sufficient to sustain the conditions of the policy.

Clay F. & M. Ins. Co. v. Huron Salt & L. Mfg. Co. 81 Mich. 346.

McGrath, Ch. J., delivered the opinion of the court:

This is an action upon a policy of insurance dated October 13, 1888, and running for three years, issued to J. C. Hough "on his two-story frame dwelling, . . . against all such immediate loss or damage sustained by the assured

as may occur by fire to the property above specified, but not exceeding the interest of the assured in the property." By the terms of the policy, the assured by its acceptance "warrants that any application, survey, plan, statement, or description, connected with procuring this insurance, or contained in or referred to in this policy, is true, and shall be a part of this policy; that the assured has not overvalued the property herein described, nor omitted to state to this company any information material to the risk." The policy also provided that "this policy shall become void, unless consent in writing is indorsed by the company hereon, in each of the following instances, viz.: If the insured is not the sole and unconditional owner of the property; or if any building intended to be insured stand on ground not owned in fee simple by the assured; or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, is not truly stated in this policy; or if any change take place in the title, interest, location, or possession of the property (except in case of succession by reason of the death of the assured), whether by sale, transfer, or conveyance in the whole or in part, or by

ated a new contract that could not be defeated by subsequent acts of forfeiture by the assignor applied the doctrine to assignments merely as security for debts where the assignee did not own the property insured. *Tillou v. Kingston Mut. Ins. Co.* 7 Barb. 570, affirmed 5 N. Y. 406; *Allen v. Hudson River Mut. Ins. Co.* 19 Barb. 442; *Traders Ins. Co. v. Robert*, 9 Wend. 404; *Pollard v. Somerset Mut. F. Ins. Co.* 42 Me. 221; *Foster v. Equitable Mut. F. Ins. Co.* 3 Gray, 218; *Charleston Ins. & T. Co. v. Neve*, 2 McMull. L. 239.

The same doctrine is applied in New England *F. & M. Ins. Co. v. Wetmore*, 32 Ill. 221, where the insurance was originally taken by a mortgagee and assigned with the mortgage.

But the case of *Foster v. Equitable Mut. F. Ins. Co.*, *supra*, is distinguishable from the others in that the mortgagee to whom the assignment was made gave his own written promise to pay future assessments on the policy which was in a mutual company.

Later cases have repudiated the doctrine and have established the rule that a mortgagee or other creditor to whom a policy is assigned merely as security for a debt takes the policy subject to subsequent acts of forfeiture by his assignor if no new agreement is expressly made with the assignee or any new consideration received from him. *Buffalo Steam Engine Works v. Sun Mut. Ins. Co.* 17 N. Y. 401 (overruling the New York Cases above cited to the contrary); *Grosvener v. Atlantic F. Ins. Co.* 17 N. Y. 391 (although in this case there was no assignment but merely a clause held equivalent thereto by which the policy was made payable to the mortgagee); *Swenson v. Sun Fire Office*, 68 Tex. 461; *Illinois Mut. F. Ins. Co. v. Fir*, 53 Ill. 151, 5 Am. Rep. 88; *State Mut. F. Ins. Co. v. Robert*, 81 Pa. 438; *Home Mut. F. Ins. Co. v. Houslein*, 60 Ill. 521 (this also was a case of loss payable to a mortgagee); *Hoxsie v. Providence Mut. F. Ins. Co.* 6 R. I. 517; *Burton v. Gore Dist. Ins. Co.* 12 Grant, Ch. 156; *Edes v. Hamilton Mut. Ins. Co.* 3 Allen, 362; *Lawrence v. Holyoke Ins. Co.* 11 Allen, 387; (in these Massachusetts cases the policies were in mutual companies and there was no new deposit note or other security given by the assignee as required by the by-laws in case of assignments.)

But after an assignment with the insurer's con-

sent to a mortgagee who signs premium notes with the assignor, the assignor's acts cannot defeat the rights of the assignee. *Boynton v. Clinton & E. Mut. Ins. Co.* 16 Barb. 254; *Foster v. Equitable Mut. F. Ins. Co.* *supra*.

In *Reed v. Windsor County Mut. Ins. Co.*, 54 Vt. 413, it is held that concealment or misrepresentation as to incumbrances in an application will defeat the right of an assignee although the insurer has consented to the assignment; that it is a case of mere substitution and any defense against the assignor is good against the assignee. It seems that this assignment was made as security for a mortgage although this is not definitely stated in the report.

In *Pupke v. Resolute F. Ins. Co.*, 17 Wis. 373, 54 Am. Dec. 754, it is held that subsequent acts of an assignor such as fraud in respect to proofs of loss defeat the rights of the assignee equally with those of the assignor; but it does not appear in this case whether the assignment which was made, as is usual in such cases, subject to all terms and conditions of the policy, was made to the owner of the goods insured or merely as security.

An assignment of his interest in a policy by a mortgagee to whom the loss was made payable, made with the insurer's consent, is not an assignment of the policy, and the assignee's rights are defeated by the mortgagor's subsequent acts of forfeiture. *Hale v. Mechanics Mut. F. Ins. Co.* 6 Gray, 169, 66 Am. Dec. 410.

Assignment after loss.

An assignment of an insurance policy after a loss is merely an assignment of a chose in action and the assignee's rights are purely derivative which can therefore be no greater than those of his assignor. *East Texas F. Ins. Co. v. Coffee*, 61 Tex. 287; *Archer v. Merchants & M. Ins. Co.* 43 Mo. 434; *Bonenfant v. American F. Ins. Co.* 76 Mich. 653; *Wilson v. Hakes*, 36 Ill. App. 539.

But an adjustment of a policy between the insurer and the insured who has assigned it after the loss occurred will not defeat the rights of the assignee if he is not given opportunity to participate on his request therefor. *London Fire Asso. v. Blum*, 63 Tex. 238.

R. A. R.

legal process or judicial decree; or the title or possession be now or hereafter become involved in litigation; or if this policy be assigned or transferred before a loss." No written application for the policy was requested or made. The insurance was solicited by the company's agent, "who saw the building permit in the paper, and came to the office, [Hough's] and wanted to write a policy on the house." No statement as to the condition of the title or as to the nature of Hough's ownership was asked for or given. Hough, in November, 1887, had bought 10 acres of land for \$18,000, a large portion of which had been paid, and had subdivided the land; the house in question being, at the time the insurance was effected, in process of construction on one of the lots known as "Lot 7." He held the whole under a contract of purchase, October 13, 1888, the policy was issued May 14, 1889. Hough contracted, in writing, to sell to one Stevens this lot 7 for \$3,500, which was to be paid as follows: \$25 on July 1, 1889, and the further sum of \$25 in monthly payments thereafter, until the entire sum, with interest, should be paid. Stevens contracted to pay all taxes and assessments upon the property, and to pay the expenses of keeping the buildings insured against loss or damage by fire. Hough agreed, on performance of all of the covenants upon Stevens' part, to execute a good and sufficient deed to Stevens. It was further agreed that "the said party of the second part shall have possession of said premises on and after the date hereof, while he shall not be in default on his part in carrying out the terms hereof; and if said party of the second part shall fail to perform his agreements on this contract, or any part of the same, the said party of the first part shall, immediately after such failure, have a right to declare the same void, and may retain whatever may have been paid hereon, and all improvements that may have been made on said premises, to the extent of his just interest therein, and treat the party of the second part as his tenant holding over without permission." Stevens went into possession at once, and occupied the premises at the date of the fire, although he only made three monthly payments. On July 1, 1890, he was given notice to quit the premises, and that the contract had been declared void. In March, 1889, Hough assigned all his interest in the original contract held by him to plaintiff. At the time of that assignment, Hough assigned the policy to Hall and Hough and Hall went together to the office of defendant's agent. Hall told the agent that Hough had "assigned his interest in the property" to him (Hall), and that he "wanted the policy to read payable to him in case it should burn," and thereupon the consent of the company was indorsed upon the policy. Upon these facts the court directed a verdict for defendant, and plaintiff appeals.

The record presents two questions: (a) Was this contract valid at its inception? (b) Conceding that the policy was vitiated by the Stevens contract as to Hough, what was the effect of the company's consent to the assignment to plaintiff? It must be conceded that Hough, at the inception of the policy, had an insurable interest in the property. It is well settled in this state, at least, that an applicant for insur-

ance is not required to show the exact condition of his title, unless requested so to do, (*Castner v. Farmers Mut. F. Ins. Co.* 46 Mich. 15; *Guest v. New Hampshire F. Ins. Co.* 66 Mich. 98;) that the failure to mention incumbrances, if not inquired about, the application being oral, and no deceit being practiced, is immaterial, (*O'Brien v. Ohio Ins. Co.* 52 Mich. 131; *Tiefenthal v. Citizens Mut. F. Ins. Co.* 53 Mich. 306;) and that an equitable ownership will support a recital of ownership. *Farmers Mut. F. Ins. Co. v. Fogelman*, 35 Mich. 481; *Guest v. New Hampshire F. Ins. Co. supra*. See 1 May, Ins. 285-287, and 7 Am. & Eng. Encyclop. Law. 1020.

In the present case, neither Hough nor Hall were asked to state the nature of their interest in the property or the condition of the title; neither made any misrepresentation or was guilty of any fraud or concealment; and Hough at the inception of the policy, and plaintiff, at the time of the consent of the company to the assignment to him, had such an interest in the property insured as would support the recitation in the policy that it covered "his two-story frame dwelling." Hough's contract with Stevens was not executed until after the policy had been issued, and when Hall took Stevens was in default, but, in any event, Hall had at that time an equitable interest. The provisions of the policy in the present case, respecting the sole and unconditional ownership of the property, the truthfulness of the statement as to the interest of the assured in the property, and as to any change in the title, interest, location, or possession of the property by sale or transfer, are precisely the same as were passed upon in *Hosae v. Prescott Ins. Co.*, 84 Mich. 309, and the court there held that all the provisions of the contract must be taken together; that if the insurer desired to know the interest it was insuring, it should have defined that interest in the policy; that it was the intention of the parties to make a binding contract of insurance when accepted by the insured; that the claim as to sole and unconditional ownership could only be held to relate to changes arising after the execution and acceptance of the policy, and did not apply to an existing state or condition of the property at the time that the policy was issued. That case, therefore, disposes of the first question.

The other question is the more serious one, and one upon which the authorities are by no means uniform. In *Continental Ins. Co. v. Munns*, 120 Ind. 80, 5 L. R. A. 430, the insured had mortgaged the property, and afterwards sold it to Munns, and assigned the policy, to which assignment the company, without knowledge or notice of the mortgage, consented. The court held that a contract of insurance is a purely personal engagement, and does not run with the property insured, citing *Nordyke & Marmon Co. v. Gery*, 112 Ind. 535, and *Cummings v. Cheshire County Mut. F. Ins. Co.* 55 N. H. 457. "That the policy expires with the transfer of the estate, so far as it relates to the original holder, but the assignment and assent of the company constitute an independent contract with the assignee, the same, in effect, as if the policy had been reissued to him upon terms and conditions therein expressed. . . . The contract of insurance,

thus consummated, arises directly between the purchaser and the insurance company, to all intents and purposes the same as if a new policy had been issued embracing the terms of the old. In such a case, no defense predicated on supposed violations of the conditions of the policy by the assignor will be available against the assignee. Until the latter himself does some act or permits a condition of things to exist in violation of the terms of the policy, he is not in default." That, being a new and independent contract, both parties are subject to the same rules which govern the making of the original contract. A large number of authorities are cited in support of the conclusions reached. In *Steen v. Niagara F. Ins. Co.* 89 N. Y. 315, 42 Am. Rep. 297, the court held that the consent to the assignment created a new contract between the company and the assignee, unaffected by the forfeiture, if, in any event, it could have been insisted upon. In *Shearman v. Niagara F. Ins. Co.*, 46 N. Y. 526, 7 Am. Rep. 880, the property was conveyed to plaintiff March 14th. The policy was renewed in the name of the grantor, March 21, and was assigned to plaintiff April 15, and on the same day the company consented to the assignment. The company insisted that at the time of its consent it had no knowledge of any fact except that at that time it was notified that the property had been conveyed to plaintiff, but the time of the transfer had not been given, nor the fact that the policy was issued after the transfer. The court held that "the renewal revived the original policy, and continued it with all the virtue which it would have had for any purpose, if it had not expired; that the consent to the assignment was equivalent to an agreement to be liable to the assignee upon the policy as a subsisting operative contract, for which agreement the retention of the premium received on renewal was a good consideration." In *Hooper v. Hudson River F. Ins. Co.*, 17 N. Y. 424, the insurance was upon a stock of goods which had been sold on execution, and the purchaser obtained the consent of the company to an assignment to him, and the court held that the policy became a new contract of insurance between the underwriters and the assignee. "An assignment, therefore, being of no avail, except in case of an interest in the assignee in the subject insured, the request made to the defendant to consent to an assignment to plaintiff was of itself notice to them that he had acquired or was about to acquire an interest in the insured property. If, therefore, it was important to the defendants to know what the nature of the interest was which the plaintiff had acquired, they should have asked for information in respect to it. If they were content to give their consent without such inquiry, it was their own fault." In *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507, it was held that, although "assured may have made statements in his application which by the terms of the policy would defeat a recovery thereon by him, yet, where the insured property is sold and the policy assigned to another, and the company assents to such assignment, a new contract arises, which is not affected by the fraud of the party originally insured." In *Ellis v. State Ins. Co.*, 68 Iowa, 578, 56 Am. Rep. 865, a majority of the court held that the provision in

the policy that, if the title of the property is incumbered, the policy should be void, was imported into the new contract, and that the existence of the mortgage invalidated that contract. The court divided upon the construction of this provision, a minority of the court holding that it was not against prior or existing incumbrances, but against those which should fall on the property subsequent to the execution and delivery of the new contract. Upon this question the dissenting opinion is in accord with the case of *Hoose v. Thescott Ins. Co. supra*. In *Ellis v. Insurance Co. of North America*, 32 Fed. Rep. 646, there is a very able discussion of the question by Brewer, J., who says: "That where an assignment goes with an absolute sale of the property there is the creation of a new contract. If it is a new contract for one purpose, it is a new contract for all purposes. The assignment is expressed to be subject to the terms and conditions of the policy. It is equivalent to saying that the assignee takes the contract as of present writing, containing the same terms and stipulations, binding him to the same duties, and subjecting him to the same liabilities that were imposed by the contract in the first instance upon the assignor. In no other way can it fairly be said that a new contract was made. Tested by that rule, the assignee, as the assignor, had agreed, in the first instance, that he would place no incumbrance upon the property, and that, if he did, the policy should fail. There is no pretense that he has violated that stipulation thus construed. It may well be doubted whether the use of the technical terms 'assignment,' 'assignor,' and 'assignee' are apt to describe the actual transaction. When the insured sells the property, that moment the policy falls. He has no insurable interest. The policy ceases to have legal force as a policy. Can it be said he is assigning that which is nothing, and that the insurance company contemplates and assents to the transfer of that which has no legal existence? This is a practical question, and we must look at these matters in a practical light. When the purchaser buys the property, naturally the thought in his mind is insurance. It being his, and the old policy being dead, he looks for insurance. He finds a policy which had been in force, dead because of his purchase and cessation of the insurable interest in the assignor, yet which the insurance company is willing to have transferred to him. Would it not be an injustice to him if, after the insurance company had consented to that transfer, it could turn back to acts done by the person from whom he obtained the policy, and claim that those acts vitiated the whole thing, and rendered it not liable to the assignee? But it is said there is really no consideration for this contract on the part of the company; the assignment of this policy is an assertion, practically, by the assignor of a right to an unearned premium, and the claim of such unearned premium, presented to the assignee, is assented to by the company when it consents to the assignment. It matters not that there may have been no actual right to such unearned premium, for the recognition and compromise of a claim is consideration. Further than that there would be the injury to the assignee as well as the benefit to the insurer

to be considered. Again, it is said that there can be no waiver without knowledge; that the insurance company was ignorant of the fact of this incumbrance; and therefore it should not be held to have waived its rights. There may be estoppel without knowledge. This consent to the assignment, dealing with things in a practical way, must be construed as a statement by the insurance company that it recognized that policy as a valid instrument. Surely it would be unjust to think that the insurance company put itself into the position of assenting to the transfer of a policy, which had no validity, going through the form of consenting to that which had no legal existence, and was worthless. These considerations, although we concede that the question is one of not perfect transparency, leads us to the conclusion that this assignment must be taken, in the language of the text-books and the authorities, to create a new contract between the assignee and the insurance company,—a new contract embracing, as of present writing, the same terms and stipulations as were embraced in the contract originally written between the assignor and insured." 2 May, Ins. 878; Wood, Ins. 110, 366; Fland. Ins. 494; *Cummings v. Cheshire County Mut. F. Ins. Co.* 55 N. H. 457; *Wilson v. Hill*, 3 Met. 66; *Pratt v. New York Cent. Ins. Co.* 64 Barb. 589, 14 Am. Rep. 804.

An insurance policy is a personal contract of indemnity. It is nonassignable, except with the assent of the insurer; nevertheless the assignment of policies of insurance is an incident of nearly every transfer of personal property or improved real estate. Unexpired policies, before loss, have, as a rule, in the hands of the person to whom issued or his assignee, a certain face value, which is the unearned premium or indemnity to the assignee for the unexpired term. They are either transferred as a part of the consideration for the purchase money, or the value of the unearned premium is agreed to be paid in consideration of the assignment. The assignee acquires the right to the unearned premium, or the right to the indemnity for the unexpired term for value. The right to the unearned premium may be subject to the conditions of the contract, for he takes that right subject to the consent of the company. But suppose that the unearned premium is paid over to the assignee of the policy, or credited upon the premium for a new policy, could it be contended that the company would have the right to recover back the sum so paid or credited from the assignee? The company, in such case, recognizes the validity of the policy, and the assignee is simply reimbursed for what he has paid to the assignor. The ordinary railroad mileage ticket is not transferable, and attached is a condition that its use by any other person will operate as a forfeiture. Suppose that A. holds such a ticket, which he desires to transfer to B., and they go together to the office of the railroad company, and A. transfers the ticket to B., and the company indorses its consent, B. paying the value represented by the unused strip for the transfer. Could the railroad company be afterwards heard to say, as against B., that A. had, before the transfer, forfeited the contract, even though it had no knowledge of the breach, and therefore the contract was void as to B.? Certainly not. By consent, a new contract between the company and B. is

created. The company has agreed with B. that the unused coupons are good in his hands. The company cannot be said to have waived that which they had no knowledge of, but they have waived the right as against B. to insist upon A's infirmities, whatever they may have been. The contract which, prior to the transfer, was personal with A., has ceased, and has become personal with B. B. does not agree that A. has not violated its provision, but only that he will not. Insurance contracts are peculiar, and hence rules applicable to other contracts are applicable to them only so far as the provisions are analogous.

When a party to a non-assignable instrument, representing upon its face an unearned value, consents to its transfer without reservation, and the assignee in good faith pays value for such transfer, the party consenting cannot be heard to set up mental reservations or prior breaches which were unknown to either party. The rule applicable to the transfer of an assignable contract has no application to such contracts. The consent to the assignment imported validity. The right to withhold or grant it is for the benefit of the insurer. It has its burdens as well as its advantages. The application for consent is, in effect, one for a contract of indemnity to the assignee. It affords an opportunity to the company to examine the risk, or to inquire as to the title or interest to be insured, or as to whether there had been any other change in risk or title. Had it done so, and refused its consent, plaintiff would have been in a position to retain or recover the consideration paid, and to seek indemnity elsewhere. It is too late now, after the loss, to set up the changed conditions. It may be said, too, that at the time of the application for the consent of the company to the assignment, plaintiff informed the company that Hough had assigned his interest in the property to him. That was sufficient, of itself, to put the company upon inquiry.

Defendant insists, further, that, inasmuch as plaintiff had commenced proceedings against Stevens before a circuit court commissioner, to recover possession of the premises, the policy was invalidated thereby. The policy contained a provision that, "if the title or possession be now or hereafter involved in litigation," the policy should become void. Stevens was clearly in default, having occupied the premises for twelve months, and paid but \$75, whereas he had agreed to pay \$25 per month. Plaintiff had declared the contract under which Stevens occupied void, as he had the right to do under the contract. From that moment Stevens became and was a tenant holding over without permission. The proceeding to recover possession was predicated upon these provisions of the contract. It cannot be contended that the provision of the policy referred to contemplated that, in the event that proceedings were instituted to oust a tenant, the policy should become void. This provision, taken in connection with the other provisions of the policy, clearly relates to a litigation over the title or possession of the insured.

The judgment must be reversed, and a new trial had, with costs of this court to the plaintiff.

The other Justices concurred.

Rehearing denied.

DISTRICT OF COLUMBIA SUPREME COURT.

Henry KRAAK

v.

Eva FRIES.

(.....D. C.....)

1. A note given as a forfeit in case of the non-performance of a parol contract for the sale of land void under the Statute of Frauds is itself void.
2. A purchaser of land who does not offer to perform the contract on his part until several days after the time set for performance cannot enforce a forfeiture for non-performance on the part of the vendor.

(October 24, 1882.)

A PPEAL by plaintiff from a judgment of the Special Term in favor of defendant in an action brought to recover the amount alleged to be due upon a promissory note. *Affirmed.*

The facts are stated in the opinion.

Mr. Calderon Carlisle for appellant.

Mr. B. F. Leighton for appellee.

Hagner, J., delivered the opinion of the court:

This is a suit at law by the plaintiff against the defendant, upon her note dated March 12, 1887, for \$100, payable on demand to the order of Henry Kraak, at the National Bank of Washington, with interest until paid.

The declaration is in the usual form.

The defendant pleaded general issue, and also a plea in set-off, which alleged the plaintiff was indebted to her in a like sum of \$100, which, in the particulars of defense, is described as a check made by the defendant to the order of the plaintiff contemporaneously with the note, for that amount.

At the trial the plaintiff proved the note and rested. Thereupon the defendant testified

that on the 12th day of March, 1887, the day the note was given, the plaintiff came to her and asked her to sell him her house and lot, and offered her therefor the sum of \$4,000; that she agreed to accept the offer; and it was then agreed between them that the sale should be consummated on or before the 20th day of March, 1887, and further that the plaintiff and defendant should each deposit with Charles A. James, the cashier of the National Bank of Washington, the sum of \$100, to be forfeited by either party who should fail to perform his part of the contract to the party able and willing to perform it on his or her part; that upon this agreement the defendant executed the note sued on, and the plaintiff executed his check for the sum of \$100, and both were then delivered to James, the cashier, to hold in escrow upon the conditions above mentioned; that the contract for the sale of the land was entirely in parol, the only papers signed being the note and the check, neither of which contained any reference to the contract.

The defendant further testified that the plaintiff did not perform his said oral agreement on the 20th day of March, 1887, but made default therein; but that afterwards, about the 29th day of March, the plaintiff offered to perform his contract by taking the real estate and paying the sum of \$4,000.

There the defendant rested.

The plaintiff then gave evidence tending to show that there was no time fixed for the performance of the contract except such as was necessary for an examination of the title; that on the 12th of March the plaintiff and defendant went to the Real Estate Title Company's office, and the plaintiff ordered an abstract of title, which the company agreed to furnish by the 20th of March; that the company did not furnish it until the 27th of March, and thereupon the plaintiff offered to comply with the terms of the agreement by offering on that day to pay for the property,

NOTE.—*Validity of promissory note given as a forfeit or as collateral to an invalid oral agreement which is within the Statute of Frauds.*

The question presented in the above case has rarely arisen notwithstanding the very numerous decisions in relation to the Statute of Frauds.

The case of *Rice v. Peet*, 15 Johns. 502, which is cited in the opinion, is very nearly a direct precedent. There an action was brought for money had and received on a note which had been given as a pledge to be forfeited in case of failure to complete an oral agreement for the exchange of farms; and the note was held to be without consideration and the action for money had and received was upheld.

In *Goodrich v. Nickols*, 2 Root, 498, the question was one of evidence, and it was held that parol evidence was not admissible of an agreement to convey land or in default thereof to forfeit a certain sum of money.

To substantially the same effect it is decided in *Patterson v. Cunningham*, 12 Me. 506, that an oral agreement in the alternative to convey land or to pay a certain sum of money was not valid.

But parol evidence has been held admissible to prove that a note was delivered in escrow to be valid if an oral agreement for lands should be executed.

Cut. Couch v. Meeker, 2 Conn. 302, 7 Am. Rep. 274.

So a note for the purchase price of land bought by oral agreement is valid when the contract is executed. *Edelin v. Clarkson*, 3 B. Mon. 31, 38 Am. Dec. 177.

And an oral agreement to surrender a note on the removal of certain buildings was held valid as a good satisfaction of the note when the agreement was executed by removal of the buildings. *Thayer v. McEwen*, 14 Ill. App. 416.

And a note given for the purchase price of lands can be enforced by the vendor although the sale of the land was not in writing if the vendor chooses to execute the contract. It is no defense to the maker that he has failed to bind the vendor. *Crutchfield v. Donathon*, 49 Tex. 691, 30 Am. Rep. 112; *McGowen v. West*, 7 Mo. 569, 38 Am. Dec. 468; *Rhodes v. Storr*, 7 Ala. 347; *Gillespie v. Battle*, 15 Ala. 276.

Somewhat analogous to the above cases are those deciding that money deposited with a third person to be paid as a forfeit for failure to fulfill an oral contract of sale which is within the Statute of Frauds is not earnest money which will make the sale valid. *Howe v. Hayward*, 108 Mass. 54, 11 Am. Rep. 306; *Noakes v. Morey*, 30 Ind. 108. B. A. R.

but that the defendant refused to convey the land.

The only other evidence was that of Mr. James, who testified that when the papers were left with him, he heard nothing said with reference to the limitation to the 20th day of March as the date when the contract should be consummated.

Thereupon, upon application of the defendant, the court below directed the jury to find a verdict for the defendant.

The ground of the defense was that the note having been given only as a forfeit for the non-performance of a parol contract respecting the sale of land was, therefore, without consideration and incapable of sustaining a recovery.

The question has been very well argued by counsel on both sides, and being an interesting one, we have given it full attention.

As a matter of course, the verbal contract between the plaintiff and the defendant was distinctly within the 4th paragraph of section 4 of the Statute of Frauds; and therefore was totally void and incapable of being enforced or taken cognizance of by any court except by decree for a specific performance upon such proof of part payment as is recognized as sufficient by a court of equity. The note of the defendant was, therefore, given to secure the execution of a void agreement—in other words of no agreement at all; and hence was equally void, as without consideration.

We think this position is clear from a proper consideration of the authorities, notwithstanding its apparent conflict with some of those quoted by counsel for the plaintiff.

In *Browne on the Statute of Frauds*, § 134, in illustrating the results of the invalidity of parol contracts for the sale of land, the author says: "This case, *Carrington v. Roots*, 2 Mees. & W. 248, affords a very clear exemplification of the general rule which may be here reasserted, that no action can be brought to charge the defendant in any way upon a verbal agreement not put in writing according to the statute. And it may be briefly illustrated further. If land be sold at auction or otherwise, and no memorandum made, and the purchaser refuses to take it, no action will lie against him to recover the loss sustained upon a second sale to another party; this could be done, manifestly, only upon the ground that he was originally legally liable to take and pay for the land himself. Nor will a discharge from performing a verbal contract within the statute be a sufficient consideration to support another engagement. No action whatever could have been maintained against the defendant for any breach of that contract. A discharge from it, therefore, is of no use to him. And upon exactly the same principle an engagement to forfeit a certain sum of money, in case of failing to perform another engagement which, within the Statute of Frauds, could not itself be enforced, is not enforceable by the party to whom it is made."

"So where the defendant agreed to take up certain notes and receive a conveyance of land which a third party had verbally engaged to

give, the defendant's promise was held void for want of consideration."

This is the principle decided in the case of *Goodrich v. Nickols*, 2 Root, 498, which seems to be directly applicable to the case under consideration.

To the same effect is the case of *Rice v. Peet*, 15 Johns. 502. There two parties agreed verbally to exchange their farms, and one of them delivered to the other a note which had been given to him by a third person to be forfeited in case he should not comply with the contract. He failed to comply; whereupon the other party went to the drawer of the note and collected the money. The plaintiff in the case thereupon brought suit for the money thus collected and it was held that he could recover the money. The court after examining other points said:

"There is another ground on which the plaintiff had good right to recover the money received by the defendant on that note. It was received by the defendant without consideration; the contract for the exchange of farms was void by the Statute of Frauds, being by parol only."

The case of *Lemy v. Brush*, 45 N. Y. 589, is a very instructive one. Two parties agreed that one of them should attend an auction and purchase a piece of land which was to be there offered for sale. The person who was to bid it off was to pay for it, and then it was to be held jointly for the two, and the second party was to reimburse the purchaser one half the money so paid. At the auction he did buy the land, but signed no note of the purchase, and the auctioneer failed to make any memorandum of the transaction, so that the contract of sale was entirely verbal and void under the Statute of Frauds. The purchaser who had thus possessed himself of the land under this agreement refused to make good his contract with the other party, who filed a bill to compel him to receive one half of the money and convey one half of the land. The relief was refused upon the ground that the contract of sale of the land at the auction, in the absence of an agreement or memorandum or note thereof, was totally void under the Statute of Frauds and therefore the collateral agreement, so called, to divide the land when bought, was also void and could not be enforced. The court said (p. 594): "If no valid contract for purchase had been made, the plaintiff would have had no remedy against the defendant, although the failure to make such contract was wholly from the default of the defendant. In other words, an action will not lie by one party against another for the breach of a verbal agreement to unite with him in the purchase of a designated piece of land, the title to be taken by them in common. No purchase having been made, such an agreement would come within the statute," etc.

Again, the court, replying to an argument advanced by counsel for the plaintiff, that the statute cannot be invoked as a shield to protect a party in the perpetration of a fraud, says:

"But no case can be found where a contract has been taken out of the statute in favor of

a party who had no existing interest in the property, who had done no act of part performance, who had parted with nothing under the contract, simply upon the ground that the other party was guilty of a fraud in refusing to perform his verbal agreement. That is all there is of this case, except the offer of performance by the plaintiff. To hold that to be sufficient to take the case out of the statute, would repeal it. Care must be taken that this is not done, under an idea that as the statute was enacted to prevent fraud, it cannot be applied to cases where it appears that, in a moral sense, a party is attempting to perpetrate a fraud. A party, in no legal sense, commits a fraud by refusing to perform a contract void by its provisions. He has not, in that sense, made a contract, and has a perfect right, both at law and in equity, to refuse performance."

'This case is cited with approbation by the Supreme Court in the case of *Howland v. Blake*, 97 U. S. 628, 24 L. ed. 1029.

The authorities cited by the plaintiff do not impugn this principle. It is true, a parol agreement collateral to a written contract concerning the sale of interests in lands, and not interfering with its terms, is not void under the statute. Such was the case of *Morgan v. Griffith*, L. R. 6 Exch. 70, where a landlord who had given a written lease afterwards agreed with the tenant that he would keep down the rabbits that were overrunning the crops. Upon failure to do so, the tenant brought suit upon the collateral agreement,

and it was held it might be established by parol.

This and a similar case, *Brakine v. Adoane*, L. R. 8 Ch. App. 756, and many others to the same effect, were relied on in the case of *Raub v. Barber*, 6 Mackey, 245, where it was decided that a lessee under a written lease which gave him power to assign his term, might be held answerable under a contemporaneous verbal promise to divide with the lessor whatever profits he might make by the assignment. But such recognized collateral verbal agreements presuppose the existence of valid existing contracts, to which they are supplementary. If the principal agreement is void and not capable of being enforced, it is not easy to see how a penalty can lawfully be enforced for its non-performance. If there are any cases apparently to the contrary, they must have been governed by some other principle.

An additional reason why the plaintiff could not recover is that the contract was conditional. Payment was to be made and deed given on the 20th of March, on which day the defendant was ready to comply with the terms of the contract; but the plaintiff failed to do so. The excuse that he offered to comply on the 27th or 29th of March, was no more a legal performance by him of his part of the agreement than an offer to do so on the 29th of April would have been.

We think the judgment below correct, and it is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

James R. ALTON, *Appt.*,

FIRST NATIONAL BANK OF WEBSTER.

(.....Mass.....)

Payment of the amount due on an instrument by one who indorsed it, which is made and accepted in the mistaken belief of both parties that such indorsee was legally liable, where the matter was equally open for the inquiry and judgment of both parties, cannot be recovered back whether the mistake is to be considered one of fact or of law.

(October 22, 1892.)

APPEAL by plaintiff from a judgment of the Superior Court for Worcester County in favor of defendant in an action brought to recover back certain payments which plaintiff had made to defendant under the mistaken belief that he was liable for them as surety upon certain instruments in writing. *Affirmed.*

The case was submitted to the Superior Court upon an agreed statement of facts of which the following is a copy:

NOTE.—For notes on mistake as to legal rights, see *Page v. Higgins* (Mass.) 5 L. R. A. 152; *German Ins. Co. v. Gueck* (Ill.) 6 L. R. A. 835. See also *Morgan v. Bell*, 16 L. R. A. 614, 3 Wash. 554.

18 L. R. A.

In the spring of 1889, and for some time previously, one William Walker carried to the defendant bank, a national banking association located at Webster, Mass., a number of instruments in writing, indorsed in blank by this plaintiff and himself, a copy of one of which is as follows:

"\$150. So. Woodstock, Ct., March 4, 1889.

"Received of W. H. Walker, this day, one bay horse, — Vinton horse, — one express wagon, for which I promise to pay said Walker or order one hundred and fifty dollars, five months from date, at First Nat. Bank, Webster, with interest at — per cent; said property to be and remain the entire and absolute property of said Walker until paid in full by me; and I hereby agree not to sell or dispose of and to keep said property in good order and condition, as the same now is; and, should said horse die before said sum is fully paid, I hereby agree to pay all sums due thereon; and should said property be returned to or taken back by said Walker I agree that all payments made thereon may be retained by said Walker for the use of said property.

"Charles H. Moore.

"Witness: I. L. Edmunds.

"Indorsement: W. H. Walker.

J. R. Alton."

The amount of such paper was about \$4,400. Walker then supposed the instruments to be negotiable promissory notes, and the de-

fendant, understanding and believing said instruments to be negotiable promissory notes, discounted them for said Walker, and credited the proceeds thereof to his account upon their books. The defendant discounted said paper, relying largely upon the strength of the plaintiff's indorsement. There was no want of certainty on the part of either Walker, the defendant, or the plaintiff as to the actual contents of the several papers. The plaintiff, living at New Boston, in Thompson, Conn., about four miles from Webster, had indorsed said instruments at said Walker's request, and solely for his accommodation, supposing them to be promissory notes. He received no consideration for said indorsement. Plaintiff believed at the time of his indorsement that if he had to pay the paper he could hold the property described in it as collateral security for the payment. The plaintiff indorsed these instruments understanding that it was Walker's purpose to raise money by obtaining their discount, and that it was to aid him in this that the indorsements were requested. He did not at first know where the discounts were to be obtained, but prior to January 1, 1889, he was informed by one of the directors that the defendant bank was discounting for Walker's notes with the plaintiff's indorsement, and was asked by him for a statement as to his financial condition, and the amount of his indorsements for Walker. The plaintiff, in reply, stated his financial condition, and that he thought that he was the indorser for Walker to the amount of \$2,200 or \$2,300. He also stated that he understood that he was liable to pay in case Walker did not. In June, 1889, Walker fled, making no provision for the payment of his indebtedness to the defendant. The defendant bank, understanding said instruments to be promissory notes, caused the same, as they became due, to be protested, of which the plaintiff had notice. After Walker's departure, the plaintiff deposited with the defendant bank \$1,300, directing that it be applied to the payment of the notes upon which he was indorser, as they should mature. \$1,061 of the money so deposited was applied as directed. The plaintiff, desiring to obtain possession of certain of these instruments before they were due, went to the defendant bank, and got three of his own notes discounted, and paid the proceeds thereof and a certain small sum besides, amounting to \$710.20, to the defendant for an equal amount of these instruments not yet due, and the same were thereupon delivered to him by the defendant. At the time the plaintiff deposited said \$1,300, with directions as aforesaid, and at the time he paid the \$710.20 for the instruments not yet due, he still supposed them to be negotiable promissory notes, and that he was liable on them as indorser. Afterwards he was advised otherwise, and refused to pay any more of said instruments, whereupon the bank brought suit against him on one of these instruments in Connecticut, which was decided in his favor, being the case of *First Nat. Bank of Webster v. Alton*, 60 Conn. 402. This action is brought to recover back the money so received by the bank, viz., the sums of \$1,061 and \$710.20, making in all the sum of \$1,771.20; and it is agreed that the declaration may be taken as if

it specified these two sums, and the aggregate of them.

Messrs. W. S. B. Hopkins and Frank Bulkeley Smith for plaintiff.

Mr. Frank P. Goulding for defendant.

Holmes, J., delivered the opinion of the court:

Lord Westbury sometimes is supposed to have taken a distinction as to the effect of a mistake of law, according to whether the mistaken principle is general or special. *Cooper v. Phibbs*, L. R. 2 H. L. 149, 170. But in the often-quoted passage of his judgment he only meant that certain words, such as "ownership," "marriage," "settlement," etc., import both a conclusion of law and facts justifying it, so that, when asserted without explanation of what the facts relied on are, they assert the existence of facts sufficient to justify the conclusion, and a mistake induced by such an assertion is a mistake of fact. In the case before him the mistake was one concerning the ownership of a fishery, and was induced by a general statement of a certain person that he owned it. *Id.* 164; *Windram v. French*, 151 Mass. 547, 551, 8 L. R. A. 750.

We will assume, merely for the purposes of this case, without expressing any opinion upon it either way, that a mistake of law of any kind, when the mistaken notion is made the avowed basis of a transaction, may be a ground of relief under some circumstances. We take it that the money sought to be recovered was understood by the plaintiff and defendant to be paid and received under the belief that the plaintiff was bound to pay it by his indorsement of the instrument set out in the agreed facts, and we also will assume that this belief was erroneous, as has been decided in Connecticut. *First Nat. Bank of Webster v. Alton*, 60 Conn. 402. See *Sloan v. McCarty*, 184 Mass. 245.

But the plaintiff meant to bind himself in the way in which he supposed he had done, and must be taken to have known that the defendant meant to have the security of his obligation before advancing, as it did, on the strength of it. If the case stopped there, the plaintiff hardly would have the boldness to contend that he could recover back what he had paid, and what he had meant to be understood and had been understood to promise, simply because, if he had found out the law soon enough, he might have backed out of his undertaking and honorary obligation. The plaintiff says that the case does not stop there, because, if the parties had been right in their view of the law, the plaintiff would have had the benefit of the security mentioned in the instrument, whereas now he has not.

If it be true that the plaintiff was not subrogated to the security upon payment, we are of opinion that it makes no difference as between the plaintiff and the defendant. The right of a surety to subrogation, like his right to contribution, is a collateral matter, and no part of his principal contract by which he makes himself surety. The existence of that right is not the implied foundation of the principal contract. The defendant was not concerned or bound to inquire what the expectations of the plaintiff might be as against a

third person. It was for the plaintiff to obtain or preserve his rights as best he might. *Aiken v. Short*, 1 Hurlst. & N. 210, 215.

So far as this case is concerned, it does not matter whether the mistake was a mistake of fact or law; for even a common mistake as to a fact, but for the supposed existence of which the plaintiff would not have come into the transaction, as the defendant knew, would not warrant a recovery, when, as here, the fact was a matter equally open for the inquiry and judgment of both parties, and the defendant had a right to assume that the plaintiff relied wholly on his own means of information. *Hecht v. Batcheller*, 147 Mass. 335; *Carter v. Boehm*, 3 Burr. 1905, 1910; *Smith v. Hughes*, L. R. 6 Q. B. 597.

There is no ground, however, for the suggestion that this was a mistake of fact in such

a sense as to help the plaintiff. The plaintiff's indorsement was in the hands of the accommodated party until delivered in Massachusetts, and the payment was made in Massachusetts, so that the transaction was a Massachusetts transaction throughout. The plaintiff's obligation to know the Massachusetts law, whatever the measure of that obligation may be, was not affected by the accident of his being personally out of the jurisdiction. See *Hill v. Chase*, 143 Mass. 129. Probably the measure of the plaintiff's obligation would be the same in the case of a contract made in Connecticut, if on any ground its validity or effect depended on the law of Massachusetts. *Cambios v. Mafet*, 2 Wash. C. C. 98, 104; *Merchants Bank v. Spalding*, 9 N. Y. 53, 62; *Graves v. Johnson* (Mass.) 15 L. R. A. 834.

Judgment for defendant affirmed.

NEBRASKA SUPREME COURT.

August MEYER *et al.*

v.

Robert GRAHAM *et al.*, *Appts.*

(.....Neb.....)

"When a person has been in the actual, visible, exclusive, and uninterrupted

***Headnote by NORVAL, J.**

possession of a portion of a street in a city under a claim of right for ten years the title thereto vests absolutely in such occupant.

(December 18, 1891.)

APPEAL by defendants from a decree of the District Court for Lancaster County enjoining them from proceeding to cut down complainants' trees and otherwise interfere

NOTE.—Rights acquired as against the public by adverse possession of highway or city street.

All of the early cases in this country assume that in England no title to a portion of a highway could be acquired by adverse possession because of the operation of the maxim, *nullum tempus occurrit regi*. This may have been the law but if it was all of the subjects must have acquiesced in it without question, for the judges certainly had few if any occasions to apply it in cases in which title to highways on land were concerned. An examination of all available sources of authority for the preparation of this note has failed to reveal a single English case in which the question was raised and decided.

From the reasoning in *Searby v. Tottenham R. Co.*, L. R. 5 Eq. 409, it would seem that under the present English statutes there was a possibility of acquiring adverse possession to a part of the highway.

In this country the rules laid down by the different courts are exceedingly diverse and unsatisfactory, so much so that it would be very difficult to determine in some states what rule was applicable to a particular state of facts until the court of last resort had applied it. Upon one extreme we find decisions that a prescriptive right may be acquired in a highway. *Knight v. Heaton*, 22 Vt. 480.

Title to land of a highway may be acquired by adverse possession. *Webber v. Chapman*, 42 N. H. 383, 80 Am. Dec. 111.

In *Jersey City v. Morris Canal & Bkg. Co.*, 12 N. J. Eq. 561, the court, after adverting to the fact that there had been some departure from the old common-law doctrine that the land of a highway could not be acquired by adverse possession, and citing some of the cases holding the new doctrine, refused to yield assent to them, criticising the doctrine as an application of the doctrine of adverse possession uncalled for and eminently disastrous to the public interests.

18 L. R. A.

In accordance with that decision it is held that the public right to a highway cannot be lost by nonuser. *Smith v. State*, 23 N. J. L. 712.

In *Philadelphia v. Philadelphia & R. R. Co.*, 53 Pa. 263, it is said that buildings erected on highways acquire no right on account of time.

No private occupancy for whatever time, either adverse or permissive, vests title inconsistent with the public use. *Stevenson's App.* (Pa.) May 3, 1893.

Presumption of abandonment.

There is a numerous class of cases which while refusing to subscribe to the idea that an individual could acquire by prescription or adverse possession any title against the public to a portion of a highway arrive at practically the same conclusion so far as the owner of the fee is concerned by presuming an abandonment. Thus it has been held that nonuser of a highway will forfeit the public right. *Georgetown Street Comrs. v. Taylor*, 2 Bay, 282.

A highway may be perpetually discontinued by nonuser. *Gregory v. Knight*, 60 Mich. 61.

It stands as against long user no better than other property. *Coleman v. Flint & P. M. R. Co.* 64 Mich. 163.

Nonuser of a highway may raise the presumption of abandonment so as to vest the right to possession in the owner of the fee. *State v. Culver*, 63 Mo. 607, 27 Am. Rep. 295.

When a city has permitted a party under a claim of right to occupy for thirty years land granted to it for a street it will be presumed to have abandoned its right thereto. *Simplot v. Dubuque*, 49 Iowa, 630.

Where land upon which a highway had been laid out has been in the open and exclusive possession of an individual for twenty years and there has been a complete nonuser of the easement by the public during that time an extinguishment will be presumed. *Peoria v. Johnston*, 56 Ill. 44.

with their property for the alleged purpose of opening a street. *Affirmed.*

The facts are stated in the opinion.

Mr. E. P. Holmes, for appellants:

No right to obstruct a street can be acquired by adverse possession to the public.

People v. Pope, 53 Cal. 437; *San Francisco v. Sullivan*, 50 Cal. 608; *Jersey City v. State*, 80 N. J. L. 521; *Cross v. Morristown*, 18 N. J. Eq. 305.

Encroachments upon a public street are public nuisances.

Wetmore v. Tracy, 14 Wend. 250, 28 Am. Dec. 525; *Robbins v. Chicago*, 71 U. S. 4 Wall. 637, 18 L. ed. 427; *Neavin v. Peoria*, 41 Ill. 503, 89 Am. Dec. 892; *El Dorado County v. Davidson*, 80 Cal. 520.

No length of time will legalize a public nuisance.

Folkes v. Chad, 8 Dougl. 340; *Stoughton v. Baker*, 4 Mass. 522, 3 Am. Dec. 286; *Com. v. Upton*, 6 Gray, 476; *Burbank v. Fay*, 65 N. Y. 57; *New Orleans v. United States*, 85 U. S. 10 Pet. 734, 9 L. ed. 601; *Henshaw v. Hunting*, 1 Gray, 203; *Com. v. Boston*, 16 Pick. 442; *Wright v. Tukey*, 8 Cush. 290; *Fox v. Hart*, 11 Ohio, 414.

A prescriptive right is merely a conclusive presumption of an actual grant. As public authorities cannot grant away title to streets no prescriptive right can grow up, because there can be no presumption of an actual grant; the presumed grant being *ultra vires*.

Quincy v. Jones, 76 Ill. 281, 20 Am. Rep.

243; *Sims v. Chattanooga*, 2 Lea, 694; *Sheen v. Stothart*, 29 La. Ann. 630.

Messrs. Billingsley & Woodward and J. E. Philpott, for appellees:

Corporations are subject to the operation of the Statutes of Limitation in the same manner and to the same extent as natural persons; and notorious, actual, and adverse possession for more than ten years by a private individual under a claim of ownership of land dedicated to a city or town for a street or public square will bar the claim of the city or town to its use.

Cincinnati v. First Presby. Church, 8 Ohio, 298; *Cincinnati v. Evans*, 5 Ohio St. 594; *Armstrong v. Dalton*, 15 N. C. 588; *Dudley v. Frankfort*, 12 B. Mon. 610; Ang. Limitations, § 88.

Title to property can be acquired by actual, adverse, open, and notorious possession, through a period fixed by the Statute of Limitations, although it was owned by a municipal corporation.

1 Am. & Eng. Encyclop. Law, p. 800, § 54, note 1; Buswell, Adverse Possession, § 99.

There is a distinction between public highways belonging to the sovereign state and to a municipal corporation.

Wheeling v. Campbell, 12 W. Va. 86; *Pella v. Scholte*, 24 Iowa, 293, 95 Am. Dec. 729; *Cincinnati v. First Presby. Church* and *Cincinnati v. Evans*, *supra*; *Rowan v. Portland*, 8 B. Mon. 250; *North Hempstead v. Hempstead*, 2 Wend. 109; *Denton v. Jackson*, 2 Johns.

Nonuser of a highway for many years is prima facie evidence of a release of the public right. *Beardslee v. French*, 7 Conn. 125.

A public way may be shown to have been discontinued by proof that it has been shut up and the land enclosed by permanent fences and occupied and improved for purposes inconsistent with its use as a public highway for forty years. *Holt v. Sargent*, 15 Gray, 97.

It seems that twenty years' nonuser will work an abandonment. *Amsbey v. Hinds*, 46 Barb. 623.

A presumption of abandonment may be indulged to save an abutting landowner from criminal prosecution where the public has long acquiesced in the line which it is seeking to repudiate by proceedings to remove obstructions. *Hamilton v. State*, 106 Ind. 361.

Estoppel.

Some courts have resorted to the doctrine of estoppel to prevent the public from reclaiming land formerly part of a highway which has for a long time been in the adverse possession of an individual. See *Chicago & N. W. R. Co. v. People*, 91 Ill. 251; *Chicago, R. L. & P. R. Co. v. Joliet*, 79 Ill. 40.

Entire nonuser of a portion of a highway during the limitation period accompanied by adverse possession by one claiming an adverse title will estop the public from claiming any right in such portion. *Orr v. O'Brien*, 77 Iowa, 263; *Smith v. Gorell*, 81 Iowa, 218.

Where there has been an entire nonuser of the highway for a period of thirty years and one half of the same in width has been enclosed, and in open, notorious, and adverse possession for more than ten years, the public will be estopped to claim any right in the property thus enclosed. *Davies v. Huebner*, 45 Iowa, 574.

But merely permitting one to fence in a portion of the street will not estop the city from claiming the street when it needs it. *Solberg v. Decorah*, 41 Iowa, 501.

13 L. R. A.

Rule in case of city streets.

In many jurisdictions a distinction is drawn between highways and city streets upon reasoning well shown in *Fort Smith v. McKibbin*, 41 Ark. 45, 48 Am. Rep. 19, where the court says municipal corporations are not really the state nor are their functions and powers conferred principally for the benefit of the whole people of the state. It may well be doubted whether the reason of the maxim [*nullum tempus occurrit regi*] may not be strained too far in applying it to these bodies. That the time and attention of the sovereign was occupied by the cares of government might well have excused a king from asserting his rights but affords no reason why the officers of a corporation should not be reasonably diligent in the discharge of the duties they were selected to execute. Nor does it afford a reason why citizens daily sensible of an encroachment on their common rights should be allowed to lie dormant for many years and then assert them to the detriment of others. The more wholesome rule for the citizen, individually and collectively, is that the laws favor the vigilant only; and the court then makes a distinction between an attempted claim to a prescriptive right which implies an original grant and a defense under the Statute of Limitations where no grant or even a lawful entry is necessary, holding that a defense under the statute may be valid while impliedly denying the validity of a claim by prescription.

In *Cincinnati v. First Presby. Church*, 8 Ohio, 298, 82 Am. Dec. 718, which is a case frequently cited in support of the doctrine that the statute will run against a municipality, the controversy was over some town lots and the court said none of the reasons for exempting the sovereign from the operation of the Statute of Limitations applied with much force to municipal corporations. The law imposed upon them the duty of defending the interests which they are created to uphold and has

Ch. 820, 1 L. ed. 394. See also *Forsyth v. Wheeling*, 19 W. Va. 818; *Gaines v. Hot Spring County*, 39 Ark. 262; *Kennebunkport v. Smith*, 22 Me. 445; *Alton v. Illinois Transp. Co.* 12 Ill. 88; *St. Charles Twp. School Directors v. Goerges*, 50 Mo. 194; *Gibson v. Chouteau*, 80 U. S. 13 Wall. 92, 20 L. ed. 534; *Cooper v. Detroit*, 43 Mich. 584; *Lancaster County v. Brinthal*, 29 Pa. 38; *Vicksburg v. Marshall*, 59 Miss. 568; *Sims v. Frankfort*, 79 Ind. 446.

Norval, J., delivered the opinion of the court:

This action was brought by August Meyer to enjoin the defendant, the mayor, councilmen, and street commissioner of the city of Lincoln, from opening an alleged public road or street in said city by cutting down and removing numerous fruit and shade trees owned by the plaintiff, which are claimed by the defendants to be within the limits of said highway or street, and to obstruct the travel thereon. It also appears that Adam Bax, Emma A. Beach, and Margaret Roath each brought a similar action against the defendants herein, which for convenience, by agreement of parties, were tried with this in the district court; it being stipulated that all the causes should abide the decision in the suit of Meyer against Graham and others. The trial court found the issues in favor of the plaintiff Meyer, and rendered a decree perpetually enjoining the defendants from entering upon plaintiff's premises, or from injuring or destroying the

trees thereon, or otherwise interfering with the plaintiff's possession and enjoyment of the same. The defendants appeal.

In 1865 the territorial Legislature of Nebraska passed an Act entitled "An Act to Locate a Territorial Road from Forest City in Sarpy County to the South Line of Lancaster County." Charles H. Walker, John P. Loden, and Richard Wallingsford were named in the law as commissioners to locate the road. By the Act the commissioners were required to view and locate the road, and make return thereof to the county clerks of the several counties through which the road should pass, on or before the 1st day of August, 1865. Laws 1865, p. 144. The commissioners commenced their work in Lancaster county on August 1, 1865, but did not complete the same and make return to the county clerk of the county until the 5th day of September of the same year. A portion of this territorial road was located on the section line between sections 85 and 86 in township 10, range 6 E., and is now known as a portion of Fourteenth street in said city. At the date of the location of this road the title to the N. E. $\frac{1}{4}$ of said section 85 was in the United States. Subsequently, on the 15th day of January, 1870, the E. $\frac{1}{4}$ of said N. E. $\frac{1}{4}$ of section 85 was laid out and platted by the owner as "Dawson's Addition to South Lincoln." The plat represents a street on the east side of the tract thus platted, and also the east tier of blocks as being the same in size as all other blocks in the addition. The legend recites

conferred every power necessary to that end. The rights of such corporations seem well enough protected without evading the letter of the statute.

A municipal corporation has no more right than a natural person to claim the benefit and advantage of the maxim, *nullum tempus occurrit regi*. *Dudley v. Frankfort*, 12 B. Mon. 614; *Rowan v. Portland*, 8 B. Mon. 289.

In *Wheeling v. Campbell*, 12 W. Va. 46, the court makes a very full review of the authorities and concludes that the maxim does not apply in favor of a municipal corporation.

But the above doctrine can by no means be said to be the generally accepted one. In many jurisdictions the title to city streets is said to be held in trust for the public without power of alienation, and from this premise the conclusion is drawn that property not susceptible of alienation cannot be acquired by prescription. *New Orleans v. Magnon*, 4 Mart. O. S. 2.

In a case where title by adverse possession was claimed to land which had been dedicated to a city by the United States for street purposes the court held that in keeping possession of the land the city was representing a public right of the nature of sovereignty and that the Statute of Limitations would not run against it. *Simplot v. Chicago*, M. & St. P. R. Co. 16 Fed. Rep. 861.

No one can acquire by adverse possession as against the public the right to obstruct a street dedicated to public use and thus prevent the use of it as a public highway. *People v. Pope*, 58 Cal. 437.

The streets of an incorporated town are held by the corporation in trust for the public and an adverse possession thereof by an abutting owner cannot bar the right of the corporation to open it for public use. *Vicksburg v. Marshall*, 59 Miss. 571.

The title of the municipality to the soil of its streets for uses which conduce to the public enjoyment or convenience is permanent and exclu-

sive and no private occupancy for whatever time and whether adverse or by permission can vest a title inconsistent with it. *Barter v. Com.* 3 Penn. & W. 259.

In *Cross v. Morristown*, 18 N. J. Eq. 312, where the title to a portion of a city street was in controversy, the court makes no distinction between such streets and highways but after quoting the common law with reference to adverse possession of highways, it cites from *Domat*, p. 492, to the effect that one cannot acquire by prescription the things which nature or the law of nations destined to a common and public use; and then says the absence of the doctrine that prescription will not run against the public from any legal system would be attended with much inconvenience for it is almost impossible to imagine a scheme of supervision over public interests which would be adequate for their protection against the constant and yet almost imperceptible aggressions of individuals.

In numerical strength the cases denying the power to acquire a portion of a street by adverse possession preponderate, the following cases recognizing the power: *Cornwall v. Louisville & N. R. Co.* 87 Ky. 78; *Boesworth v. Mt. Sterling*, 13 Ky. L. Rep. 157; *Big Rapids v. Comstock*, 65 Mich. 78; *Wayzata v. Great Northern R. Co.* (Minn.) July 12, 1892; *Schock v. Falls City*, 31 Neb. 599; *Cincinnati v. Evans*, 5 Ohio St. 603; *Galveston v. Menard*, 23 Tex. 409; *Ostrom v. San Antonio*, 77 Tex. 347; *Taylor v. Philippi*, 35 W. Va. 556; *Forsyth v. Wheeling*, 19 Va. 322; while the following refuse to do so: *Orena v. Santa Barbara*, 91 Cal. 631; *Vialia v. Jacob*, 65 Cal. 484, 52 Am. Rep. 303; *Grogan v. Hayward*, 4 Fed. Rep. 161; *Lee v. Mound Station*, 118 Ill. 804; *Sims v. Frankfort*, 79 Ind. 451; *Cheek v. Aurora*, 92 Ind. 107; *Waterloo v. Union Mill Co.* 78 Iowa, 439; *Louisiana Ice Mfg. Co. v. New Orleans*, 43 La. Ann. 217; *Sheen v. Stothart*, 29 La. Ann. 630; *Thibodeaux v. Maggiolo*, 4 La. Ann. 78; *Jersey City v. State*, 30 N. J. L. 521; *St. Vincent's F. Orphan*

that all lots are 142 feet deep by 50 feet wide. The plaintiff Meyer is the owner of lot 12 in block 44 of said addition, which lot lies on the east side of the addition, and next to the highway or street in controversy. Counting the lot 50 feet in width, the east side thereof is from 6 to 8 feet west of the section line between said sections 85 and 86. The plaintiff's improvements, which were sought to be removed by the defendant Byers as street commissioner, are on the strip which it is claimed was set apart for said street or road. The defendants contend that the street was 100 feet wide, the same as the other streets in the addition. If such is the case, the eastern tier of lots are much less than half the width called for in the legend attached to the plat of the addition. In argument the plaintiff insists that the territorial road already referred to was never legally located, nor was it ever ordered opened as a public highway, and that the land in dispute is a part of plaintiff's lot, and not within the limits of any street of the city of Lincoln. As we view the case, it will not be necessary for us to consider or decide the questions thus presented, but for the purpose of the case we will assume that the ground in controversy is within the limits of a legal public street of the city of Lincoln. The plaintiff alleges in his petition, and there is ample testimony in the record tending to show, that for more than ten years immediately prior to the bringing of the action the plaintiff and his grantor have been in the open, actual, ad-

verse, peaceable, and continued possession of said premises, and held the same under claim of title. The evidence shows that a house with a cellar under it, a well, barn, smoke-house, fruit and shade trees, and a fence have been upon the lot since 1878 or the spring of 1879. The house is about twenty feet west of the section line, and within the strip claimed to be a part of the road or street known as "Fourteenth street." The trees were east of the house. The plaintiff and his grantor have paid, from year to year, the taxes levied upon said lot since 1870. Upon the trial there was no attempt to show that the land in controversy had been used or traveled upon by the public as a street for more than ten years, but, on the contrary, it is clear enough from the evidence that the traveled road was east of the section line. Most of the improvements were made by the plaintiff's grantor, Christian Bohman, who lived upon the premises for seven or eight years prior to 1885, when he sold the lot to the plaintiff, who immediately took possession and has resided thereon ever since. The possession of the plaintiff and his grantor was not in any manner disputed by any, nor did the city authorities make any claim to the land until about the 24th day of July, 1889, when the street commissioners commenced removing the fence and cutting down the trees, whereupon this action was instituted to restrain the city authorities from proceeding to open a street through the premises. By numerous decisions of this court it has been held that

Asylum v. Troy, 76 N. Y. 114; *Com. v. Moorehead*, 118 Pa. 344; *Kopf v. Utter*, 101 Pa. 27; *Memphis v. Lenore*, 6 Coldw. 412; *Sims v. Chattanooga*, 2 Lea, 604.

But it will be observed that in some jurisdictions where the power is denied the doctrine of abandonment or estoppel is recognized.

Enclosure of part of the width of the way.

Besides the conflict in fundamental principles as shown above there is also much conflict in minor applications of principles. Thus it is held that enclosure of part of the width of a highway the remainder of which was traveled is a public nuisance and cannot be the legal commencement of an adverse claim, hence no title by adverse possession can be based upon it. *Simmons v. Cornell*, 1 R. I. 623.

Mere fencing in a strip off from the side of the street with notice of the true line, the public continuing to use the remainder of the street, cannot ripen into adverse possession. *Childs v. Nelson*, 69 Wis. 135.

Mere fencing will not give title to a part of a city street. *Brooks v. Riding*, 46 Ind. 15; *Lane v. Kennedy*, 13 Ohio St. 42; *Fox v. Hart*, 11 Ohio, 414.

Merely enclosing a portion of a highway by a fence does not constitute such adverse possession as against the public as will confer title by mere lapse of time. *McClelland v. Miller*, 28 Ohio St. 502.

The occupation of a portion of a highway by an individual is a mere obstruction and nuisance for which no lapse of time will enable him to prescribe and no acquiescence by the highway officials of the town will deprive the public of the right to use the whole highway. *Driggs v. Phillips*, 103 N. Y. 77.

But it had been previously held that under the New York statute if a fence encroaches on the highway in such a way as not to amount to a nuisance by obstructing travel, and remains there for twenty years, the land within the fence ceases to be a highway. *Peckham v. Henderson*, 27 Barb. 212. And see cases cited *supra*.

Neglect to open.

In *Walker v. Caywood*, 31 N. Y. 51, in which the commissioners had failed to open a highway to its full width for more than thirty years, the court held there was no Statute of Limitations which would apply to extinguish the rights of the public to the portions not opened and worked.

Where adverse possession was claimed to land over which a street had been laid out but never opened the court said the very nature of the rights vested in the town by the laying out of the street rendered it impossible that there should be as against it any adverse possession until an official order or adjudication was made that the street should be improved or until some acts were done which were equivalent thereto. *Henshaw v. Hunting*, 1 Gray, 218.

Until the time arrives when the land is actually needed for street purposes no mere nonuser, however long continued, will operate as an abandonment of it. *Reilly v. Racine*, 51 Wis. 522; *Derby v. Alling*, 40 Conn. 410.

Nor will the additional fact that during the time of nonuser the city treats the land as that of the owner of the fee have that effect. *State v. Leaver*, 62 Wis. 387.

Restraint of summary proceedings to remove obstructions.

There may be circumstances under which a city will not be permitted to proceed summarily to remove buildings alleged to be encroaching on its streets. *Manko v. Chambersburgh*, 25 N. J. Eq. 183.

After an adverse possession of a street for twenty-five years under a claim of right the city will not be permitted without due process of law to enter upon the land and pull down buildings, etc., under

adverse possession of real estate as owner for ten years gives a perfect title to the occupant. *Horbach v. Miller*, 4 Neb. 47; *Gatling v. Lane*, 17 Neb. 79; *Haywood v. Thomas*, 17 Neb. 240; *Taz v. Pfug*, 24 Neb. 669; *Levy v. Yerga*, 25 Neb. 764; *Obernally v. Edgar*, 28 Neb. 70; *Crawford v. Galloway*, 29 Neb. 261; *Petersen v. Townsend*, 80 Neb. 376; *Alexander v. Wilcox*, 80 Neb. 795, 9 L. R. A. 735.

Appellants contend that no one can acquire title to a street by adverse occupation,—in other words, that the doctrine of adverse possession does not apply to municipal corporations. In our investigation of the subject we find the authorities conflicting. The decisions of the highest courts of some of the states, notably California, Pennsylvania, New York, New Jersey, Rhode Island, and Louisiana, sustain the doctrine for which the appellants contend, while the courts of most of the other states have held that the doctrine of adverse possession applies to municipal corporations the same as individuals. The weight of the adjudications are certainly that way. *Cincinnati v. First Presby. Church*, 8 Ohio, 298; *Cincinnati v. Keane*, 5 Ohio St. 594; *Armstrong v. Dalton*, 15 N. C. 568; *Rowan v. Portland*, 8 B. Mon. 232; *Dudley v. Frankfort*, 12 B. Mon. 610; *Galveston v. Menard*, 23 Tex. 849; *St. Charles County v. Powell*, 22 Mo. 525; *Peoria v. Johnston*, 56 Ill. 45; *Richmond v. Poe*, 24 Gratt. 149; *Pella v. Scholte*, 24 Iowa, 283, 95 Am. Dec. 729; *Fort Smith v. McKibbin*, 41 Ark. 45; *Cornwall v. Louisville & N. R. Co.* 87 Ky. 78; *Clements v. Anderson*, 46 Miss. 581; *Wheeling v. Campbell*, 12 W. Va. 36; *Webber v. Chapman*, 42 N. H. 326; *Schock v. Falls City*, 81 Neb. 599.

Dudley v. Frankfort, *supra*, was an action to restrain the marshal from removing plaintiff's inclosure off of the street as an obstruction. The plaintiff claimed the right to part of the street by adverse occupancy. The court in the opinion, says: "If the private citizen at any time encroach with his buildings and

inclosures upon the public streets, the municipal authorities should, in the exercise of proper vigilance and of their undoubted authority, interfere, by the legal means provided in their charter, to prevent such encroachment in due time, and thus preserve for the public use the squares, streets, and alleys of the town in their original dimensions; but if a private individual or citizen has been permitted to remain in the continual, adverse, actual possession of public ground, or of a public street, or of a part of a street, as embraced within his inclosure, or covered by his dwelling or other buildings, for a period of twenty years or more, without interruption, such citizen will be vested thereby with the complete title to the ground so actually occupied by him; and the title thus perfected by time will be just as available against a municipal corporation as it would be against an individual, whose elder title and right of entry may be barred by a continued adverse possession for twenty years of his land." In *Wheeling v. Campbell*, *supra*, that court, after a complete and critical review of the conflicting authorities, in the opinion says: "We see no reason why a municipal corporation should not be held to the same degree of diligence in guarding their streets and squares from encroachments as natural persons are in protecting their property from the adverse possession of others. We do see great reason why no time should bar the sovereign power, because the officers of the sovereign, whether king or state, have such various and onerous duties to perform that the rights of the sovereign may be neglected; and all the people of the kingdom or state are interested in having the rights of the sovereign preserved intact, and not subject to be impaired or lost by the neglect of officers. But the same reason does not apply to a municipal corporation. A city or town is a compact community, with its city or town council, its committee on streets and alleys, and its street commissioners, whose special duty it is

its right to regulate highways. *Varick v. New York*, 4 Johns. Ch. 53, 1 L. ed. 761.

Equity will protect one in possession of part of a highway of which he has had adverse possession for a long period of time until the adverse claim is decided. *Devaux v. Detroit*, Harr. Ch. 98.

Right to lateral support.

No right to lateral support can be claimed by prescription because it is impossible that it could have been obtained by grant. *Quincy v. Jones*, 76 Ill. 245, 20 Am. Rep. 243; *Mitchell v. Rome*, 49 Ga. 19.

Miscellaneous decisions.

No adverse user of a highway by a wrongdoer for any period less than ten years can alter its legal status or the rights of the public. *Brown v. Kansas City, St. J. & C. B. R. Co.* 20 Mo. App. 427.

The prescription must be under color of title. *Coleman v. Thurmond*, 56 Tex. 520.

The use of a part of a street by a railroad company "as and for a right of way" cannot ripen into absolute title. *Indianapolis, P. & C. B. Co. v. Ross*, 47 Ind. 25.

To perfect a title by adverse possession against a city the appropriation and use must be under claim of title hostile to the city with the assertion of exclusive proprietary rights in the land claimed. *Briel v. Natchez*, 48 Miss. 439.

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The right of a county cannot be barred. *Coleman v. Thurmond*, 56 Tex. 520.

Statutory provisions.

In some states there is an express statutory provision that the Statute of Limitations shall not apply to lands belonging to the public. *State v. Culver*, 65 Mo. 607, 27 Am. Rep. 295; *Ostrom v. San Antonio*, 77 Tex. 347.

In some states the Statute of Limitations is expressly made to apply to the state. *Wheeling v. Campbell*, 12 W. Va. 46.

In Massachusetts the statute provides that where buildings or fences have been erected fronting on a highway and continued for more than twenty years and the true boundaries are not known or cannot be made certain, the buildings or fences shall be taken to be the true boundaries. See *Morton v. Moore*, 15 Gray, 575.

The charter of Pittsburg expressly precluded time from legalizing encroachments on a street and from being a bar to public prosecutions for such encroachments. *Com. v. McDonald*, 16 Serg. & R. 401.

Land covered by a highway is within the terms of the Connecticut statute limiting the time for commencing actions to quiet title to real estate. *Litchfield v. Wilmot*, 2 Root, 288.

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to see that the streets, squares, and alleys are kept in proper order, and free from obstructions or encroachments. And if with all this machinery and power, confined to so narrow a compass, and the interest of the corporation to exercise it, the city authorities permit an individual to encroach upon the streets, alleys, or squares of the city, and hold, enjoy, and occupy the same, claiming them as his own under his title, without interruption or disturbance in that right, for the period prescribed in the Statute of Limitations, the city not only does, but, we think, according to reason as well as authority, ought to, lose all right thereto." Upon a careful consideration of the

question we are satisfied, upon principle as well as authority, that adverse possession by an abutting lotowner of a portion of a street in a city for the statutory period of limitation will give a complete title thereto to the occupant. To have that effect the possession must be actual, visible, exclusive, and uninterrupted for the full period of ten years under a claim of right. Under the facts proven the city is barred from now asserting any right or claim to the property held by the plaintiff for ten years.

The judgment is affirmed.

The other Judges concur.

MINNESOTA SUPREME COURT.

Jennie SNIDER, *Appl.*,
v.
City of ST. PAUL, *Respnt.*

(.....Minn.....)

"The duty of providing and maintaining a city hall for the use of the city officers is a public and governmental use, for the negligence of its agents or servants in the discharge of which the city of St. Paul is not liable in a private action.

(December 2, 1892.)

A PPEAL by plaintiff from an order of the District Court for Ramsey County overruling a demurrer to the answer in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. B. H. Schriber, for appellant:

So far as municipal corporations exercise powers conferred on them for purposes essentially public—purposes pertaining to the administration of the general laws, made to enforce the general laws of the state, *e. g.*, police powers,—they should be deemed agencies of the state, and not subject to be sued for any act or admission occurring while in the exercise of such power.

15 Am. & Eng. Encyclop. Law, p. 1141.

But for wrongful acts done in what is termed their private or corporate character, and from which the municipality derives some special or immediate advantage; the corporation is liable and the rule of *respondent superior* applies.

Dill. Mun. Corp. 4th ed. p. 1180.

A municipal corporation in its private character as the owner, lessee, or controller of lands and houses, is to be regarded in the same light as an individual and dealt with accordingly.

*Headnote by MITCHELL, J.

NOTE.—For notes on the general subject of the liability of a municipal corporation for negligence, see *Neff v. Wellesley* (Mass.) 3 L. R. A. 500; *Anderson v. East* (Ind.) 2 L. R. A. 712; *Chope v. Eureka* (Cal.) 4 L. R. A. 326; *Culver v. Streater* (Ill.) 6 L. R. A. 270; *Bulger v. Eden* (Me.) 9 L. R. A. 206; *Howard v. Worcester* (Mass.) 12 L. R. A. 160.

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15 Am. & Eng. Encyclop. Law, p. 1155; *Bailey v. New York*, 8 Hill, 581; *Rez v. Gardner*, 1 Cowp. 79; *Thursfield v. Jones*, T. Jones, 187; *Lyme Regis v. Henley*, 1 Bing. N. C. 223; *Lynn v. Turner*, 1 Cowp. 86.

Persons or corporations that voluntarily assume and undertake the performance of a work, even though it be quasi public in its character, ought to be held to impliedly contract that they will exercise due care in its performance and for a neglect in this respect should be liable for the resulting damage.

Galveston v. Posnainsky, 62 Tex. 118, 13 Am. & Eng. Corp. Cas. 484, 50 Am. Rep. 517, cited in 15 Am. & Eng. Encyclop. Law, p. 1141, note 3.

A political corporation is not exempt from any of the responsibilities of a private corporation or an individual except while engaged strictly in exercising the powers of sovereignty. *Bailey v. New York*, 8 Hill, 581.

The following duties have been held to be public.

The management of corrections and charities. *Maximilian v. New York*, 63 N. Y. 168, 20 Am. Rep. 468.

The appointment of a board of health and the acts performed by such board.

Bryant v. St. Paul, 33 Minn. 289, 53 Am. Rep. 81.

The establishment of a fire department.

Grube v. St. Paul, 34 Minn. 402.

The following duties have been held to be private or ministerial in their nature and character, and the municipality held liable for misfeasance in the discharge thereof.

The care and maintenance of public streets.

Cleveland v. St. Paul, 18 Minn. 279; *Lindholm v. St. Paul*, 19 Minn. 245; *Kobs v. Minneapolis*, 22 Minn. 159; *O'Brien v. St. Paul*, 25 Minn. 331, 33 Am. Rep. 470; *Estelle v. Lake Crystal*, 27 Minn. 243; *Dyer v. St. Paul*, 27 Minn. 457; *Treiss v. St. Paul*, 36 Minn. 527; *Hewitson v. New Haven*, 37 Conn. 475; *Requa v. Rochester*, 45 N. Y. 129, 6 Am. Rep. 52.

The construction of a public sewer.

For notes on the liability of such a corporation for a nuisance, see *Chapman v. Rochester* (N. Y.) 1 L. R. A. 236; *Seymour v. Cummins* (Ind.) 5 L. R. A. 126; *Bates v. Westborough* (Mass.) 7 L. R. A. 156. See also *Miles v. Worcester* (Mass.) 13 L. R. A. 841.

Rochester White Lead Co. v. Rochester, 8 N. Y. 468, 58 Am. Dec. 316; *O'Brien v. St. Paul*, 18 Minn. 176; *Simmer v. St. Paul*, 23 Minn. 408; *Pye v. Mankato*, 86 Minn. 875; *McClure v. Red Wing*, 28 Minn. 186; *Lloyd v. New York*, 5 N. Y. 869, 55 Am. Dec. 347.

The construction and maintenance of sidewalks.

St. Paul v. Ruby, 8 Minn. 154; *Davenport v. Ruckman*, 87 N. Y. 568.

The building of an aqueduct for the purpose of furnishing a pure supply of water.

Bailey v. New York, 8 Hill, 531; *Wilkins v. Rutland*, 61 Vt. 836, 25 Am. & Eng. Corp. Cas. 49.

The building of a bridge.

People v. Kelly, 76 N. Y. 475.

The keeping of a public dock in a safe condition.

Kennedy v. New York, 78 N. Y. 865.

The deepening of a canal.

Chicago v. Joney, 60 Ill. 883.

The construction and maintenance of a city hall building.

Chicago v. Dermody, 61 Ill. 431; *McCaughy v. Tripp*, 12 R. I. 449.

The providing of light for corporate conveniences.

San Francisco Gas Co. v. San Francisco, 9 Cal. 458.

The maintaining of a public park.

People v. Detroit, 28 Mich. 228.

In ascertaining the measure of corporate liability this distinction between "public" or "sovereign" and "private," "ministerial" or "proprietary" duties was clearly noted by Nelson, Ch. J., in *Bailey v. New York*, 8 Hill, 531, and that distinction has been recognized and approved in—

Cooley, Torts, p. 619 *et seq.*; 2 Dill. Mun. Corp. §§ 974, 980, 985; 15 Am. & Eng. Encyclop. Law, p. 1141; *People v. Detroit*, *supra*; *Bryant v. St. Paul*, 33 Minn. 289, 53 Am. Rep. 81; *Western Saving Fund Soc. v. Philadelphia*, 81 Pa. 185; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Carrington v. St. Louis*, 39 Mo. 208, 58 Am. Rep. 108; *Rowland v. Kalamazoo County Supra. of Poor*, 49 Mich. 558; *Hill v. Boston*, 123 Mass. 844, 28 Am. Rep. 832.

The establishment of gas works, of water-works, the construction of sewers, and the like, are matters which pertain to the municipality as distinguished from the state at large.

1 Dill. Mun. Corp. § 58; *Britton v. Steber*, 62 Mo. 870; *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 108.

A public duty is a political duty which the municipality owes to the state, the sovereignty which created it.

1 Dill. Mun. Corp. § 66; *Regents of the University v. Williams*, 9 Gill & J. 365, 31 Am. Dec. 72; *Regents of University v. McConnell*, 5 Neb. 427; *School Trustees v. Tatman*, 13 Ill. 27; *Cranston v. Augusta*, 61 Ga. 572.

The legislative grant by its own force imposes upon the municipality the obligation to perform that duty, and the state may exercise compulsory authority.

People v. Hurlbut and *People v. Detroit*, *supra*.

The performance of a private duty cannot be 18 L. R. A.

imposed upon the municipality without its assent.

1 Dill. Mun. Corp. § 72; *People v. Detroit*, *supra*; *Oliver v. Worcester*, 102 Mass. 489.

The construction and maintenance of the court-house and city-hall building was not undertaken by the city of St. Paul in its sovereign capacity, but in its private corporate capacity as owner, as its streets, sewers, sidewalks, and bridges are controlled in its proprietary capacity.

Lindholm v. St. Paul, 19 Minn. 245; *Chicago v. Dermody*, 61 Ill. 431.

Messrs. Daniel W. Lawler, J. C. Michael and Davis, Kellogg & Severance, for respondents:

Where a city or county is performing an act in the exercise of government functions, solely for public and governmental purposes, as distinguished from municipal duties or quasi municipal duties, then the city is not liable.

Jones, Negligence, Mun. Corp. chap. 4, § 30; *Curran v. Boston*, 8 L. R. A. 243, 151 Mass. 505; *Hill v. Boston*, 123 Mass. 844, 23 Am. Rep. 832; *LaClef v. Concordia*, 41 Kan. 323, 18 Am. St. Rep. 285; *Wixon v. Newport*, 13 R. I. 454, 43 Am. Rep. 85; *Oliver v. Worcester*, 102 Mass. 499; *Mazmilian v. New York*, 63 N. Y. 164, 20 Am. Rep. 468; *Davis v. Knoxville*, 90 Tenn. 599; *Brown v. Guyandotte*, 11 L. R. A. 121, 84 W. Va. 299; *Western Saving Fund Soc. of Philadelphia v. Philadelphia*, 81 Pa. 189; *Moffit v. Asheville*, 108 N. C. 237; *Lindley v. Pope County (Iowa)* Jan. 25, 1892; *Steele v. Boston*, 128 Mass. 583; *Eastman v. Meredith*, 36 N. H. 296, 72 Am. Dec. 302; *Bryant v. St. Paul*, 33 Minn. 289, 53 Am. Rep. 81; *Grube v. St. Paul*, 34 Minn. 402.

In *LaClef v. Concordia*, *supra*, the city was sued for damages by a person confined in the city prison by reason of the negligent condition in which the prison had been maintained. The court says: "For the purposes of this case it will be presumed that the plaintiff has sustained the injuries complained of, and that his petition is in all respects sufficient to entitle him to recover, if the city is liable for this class of injuries. It has already been held in this state that counties are not liable for injuries of this kind."

Pfefferle v. Lyon County Comrs. 39 Kan. 432.

This seems to be the doctrine universally held elsewhere.

Wehn v. Gage County Comrs. 5 Neb. 494, 25 Am. Rep. 497; *Crowell v. Sonoma County*, 25 Cal. 813; *Miller v. Iron County*, 29 Mo. 122; *Waltham v. Kemper*, 55 Ill. 346, 8 Am. Rep. 652; *Brabham v. Hinds County Supra.* 54 Miss. 363, 28 Am. Rep. 852; *Wimbler v. Los Angeles*, 45 Cal. 36.

One of the earliest cases upon this subject is *Bailey v. New York*, 8 Hill, 531, in which the court clearly distinguishes between powers conferred for public purposes exclusively, and those belonging to the corporation in its municipal character.

See also *Hayes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760; *Richmond v. Long*, 17 Gratt. 875; *Ogg v. Lansing*, 35 Iowa, 495, 14 Am. Rep. 499; *Welsh v. Rutland*, 56 Vt. 223, 43 Am. Rep. 762; *Tindley v. Salem*, 137 Mass.

171. 50 Am. Rep. 289; *Condict v. Jersey City*, 46 N. J. L. 157, 19 Cent. L. J. 218, and cases cited; *Smith v. Rochester*, 76 N. Y. 506.

A county is not liable for negligently failing to keep its court-house in repair.

Dowdell v. Olmsted County, 80 Minn. 96, 44 Am. Rep. 185.

Mitchell, J., delivered the opinion of the court:

The complaint alleges that the city of St. Paul and the county of Ramsey owned and possessed, as tenants in common, a building known as the "Court-house and City Hall," that they negligently constructed the entrance to one of the elevator shafts in an unsafe manner; also that their servant in charge of the elevator handled it negligently, whereby the plaintiff was injured. As one of its defenses, the city pleaded the various statutes regulating the construction, custody, and use of the building, particularly Special Laws 1881, chap. 876, and Special Laws 1889, chap. 64. Briefly stated, the Act of 1881 created a special court-house commission, consisting of the mayor of the city of St. Paul (who was *ex officio* a member) and five other persons, to be appointed by the judges of the district court of Ramsey county. This commission was to prepare plans for a building for the use of the city and county "for a city hall and county court-house, and for offices for the city and county officers, and such other public uses as may be deemed expedient," and submit the same, together with an estimate of the cost, to the board of county commissioners and the common council of the city for their approval. Upon their approval of the plans the commission was to proceed and construct the building, which was to be paid for out of the proceeds of a fund called "the court-house and city-hall building fund," which was to be raised by the issue and sale of bonds of the city and of the county. The Act further provided that the city and county "shall hold the land occupied and needed for said building, together with the building which may be erected thereon, in common, and for the public uses aforesaid." The Act of 1889 provided that when completed the building should be placed in charge of a committee of seven, to be appointed as follows: Three annually by the president of the common council, and three annually by the chairman of the board of county commissioners; and that the mayor of the city should be *ex officio* a member and the chairman of the committee. This committee was to have entire charge of the building, with power to appoint such janitor, custodian, and other employees as they should deem necessary for the proper care and management of the building. The answer also alleges that the city has never had any control over either the construction or custody of the building, which have been entirely under the direction and control of the court-house commission and committee referred to. The court overruled a demurrer to this defense, placing its decision on two general grounds: *First*, that the special court-house commission which constructed the building, and the committee which has charge of it, were independent bodies, and not the agents or servants of the city, and hence that the city

was not liable for their negligence; *second*, that even if the city had controlled the construction and custody of the building, it would, in so doing, have been performing merely a governmental duty for the benefit of the public, for any negligence in the performance of which no private action would lie. The decision might perhaps be sustained on either ground, but, as we are clearly of opinion that the second is well taken, it is unnecessary to consider the first.

The common-law rule is that no private action can be maintained against a municipal corporation for the neglect of a public duty imposed upon it by law for the benefit of the public, and from the performance of which the corporation receives no pecuniary profit. As respects what are sometimes called "quasi municipal corporations," such as counties, townships, and school districts, this is the rule everywhere, without exception. But as respects what are called "municipal corporations proper," such as cities and incorporated villages, the general current of the authorities is to the effect that, even in the absence of an express statute, they may be impliedly liable for acts of misfeasance or neglect of duty on the part of its officers and agents, while for the same or a similar wrong there is no such liability resting on quasi municipal corporations. The most noted and familiar instance of this is the different rule applied to towns and counties as respects liability for negligence in not keeping highways in repair, and that applied to incorporated cities for negligence in failing to keep streets in repair. But respecting the principle upon which to rest this distinction, or as to the nature of the duties to which it extends, the courts seem to be much perplexed, and their decisions, often in conflict with each other, leave the subject in some confusion. The ground for the distinction is not to be found in the mere fact that one is created by special charter, while the other is not, for both are alike subdivisions of the state, created for public, although local, governmental purposes. Nor is it to be found in the fact that the one is given greater powers than the other, unless the power is, not for public governmental purposes, but to engage in some enterprise of a quasi private nature, from which the municipality will derive a pecuniary benefit in its corporate or proprietary capacity; as, for example, power to build gasworks or waterworks, to furnish gas or water to be sold to consumers, or to build a toll bridge, from each of which the city would derive a revenue. In this class of cases it is generally held that corporations are liable for wrongful or negligent acts, because done in what is termed their "private" or "corporate" character, and not in their public capacity as governing agencies, in the discharge of duties imposed for the public or general benefit. But it is also generally held that they are not liable for negligence in the performance of a public, governmental duty imposed upon them for public benefit, and from which the municipality in its corporate or proprietary capacity derives no pecuniary profit. The liability of cities for negligence in not keeping streets in repair would seem to be an exception to this general rule, which we think the courts would do better to rest either

upon certain special considerations of public policy or upon the doctrine of *stare decisis* than to attempt to find some strictly legal principle to justify the distinction. And, as already suggested, as to what are public and governmental duties and what are private or corporate duties the courts are not in entire harmony, and their decisions do not furnish a definite line of cleavage between the two. Nor shall we attempt to fix any such line of universal application. For a quite full discussion of the subject, see Dillon on Municipal Corporations, chap. 23; and for an exhaustive review of the authorities, see *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332. In *Doddall v. Olmsted County*, 80 Minn. 96, 44 Am. Rep. 185, we held that a county is not liable for the negligence of its board of county commissioners in failing to repair a court-house, the duty of maintaining a court-house being a public one, and for a wholly public purpose. In *Bryant v. St. Paul*, 83 Minn. 289, 58 Am. Rep. 31, we held that the city was not liable for the negligence of the board of health in the discharge of its duties, the same being public and governmental, and not corporate, in their charac-

ter. And, for a like reason, in *Grube v. St. Paul*, 84 Minn. 402, we held that the city was not liable for the negligent acts of members of its fire department. We fail to discover any distinction in the character in this respect of the duty performed by the city in maintaining a board of health, a fire department, or a police department, and that performed in providing and maintaining a city hall for the use of the public officers of the city. The city, in its private or corporate capacity, derives no more pecuniary benefit from the one than it does from the others, and in each case alike the purpose is a public and governmental one. The duty which a city performs in providing a city hall for the use of the public officers of the city is exactly the same in its nature as that performed by a county in providing a court-house for the use of the county officers. The inconsistency of holding that the county of Ramsey is not liable (as must be, under the *Doddall Case*), but that the city is, would be forcibly illustrated by the special facts of this case. Our conclusion is that the city is not liable.

Order affirmed.

MICHIGAN SUPREME COURT.

Henry L. SELICK

v.

LAKE SHORE & MICHIGAN SOUTHERN R. CO., *Appt.*

(.....Mich.....)

1. The obstruction of a railroad crossing by a freight train for a time longer than the statute allows may be a **concurrent cause** with smoke, steam, and noise of another train in frightening a team which is waiting to cross and render the railroad company liable for the damages thus occasioned where the team would not have been frightened by the other train if it had not been concealed from view by the freight train which obstructed the crossing.
2. Whether a freight train obstructing a highway crossing did or did not give to the noise, steam, and smoke of another passing train a character which they

would not possess in the absence of the obstruction so as to make a concurrent cause of the frightening of a team, is a question for the jury where there is evidence that the team was accustomed to trains.

3. The question whether or not the result could have been anticipated is not the test of liability for an act which is negligence *per se*, but the person guilty of it is equally liable for its consequences whether he could have foreseen them or not.

(November 4, 1892.)

ERROR to the Circuit Court for Branch E County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. George C. Greene and O. G. Getzen-Danner, with Mr. C. E. Weaver, for appellant.

NOTE.—*Liability of a railroad company for obstructing a highway crossing.*

A railroad company is subject to indictment for unreasonably obstructing a highway crossing. *State v. Chicago, M. & St. P. R. Co.* 4 L. R. A. 298, 77 Iowa, 442; *Com. v. New York, N. H. & H. R. Co.* 112 Mass. 412; *State v. Morris & E. B. Co.* 23 N. J. L. 360; *State v. Louisville & N. R. Co.* (Tenn.) April 28, 1892; *Louisville & N. R. Co. v. State*, 3 Head, 523, 75 Am. Dec. 778; *State v. Western N. C. R. Co.* 95 N. C. 602; *Palatka & I. River R. Co. v. State*, 23 Fla. 546.

In some states the statutes have fixed five minutes as the limit of time for which obstruction shall be allowed by cars. *Com. v. New York, N. H. & H. R. Co. supra*; *Young v. Detroit, G. H. & M. R. Co.* 56 Mich. 430.

A rule of the company against obstructing a highway more than five minutes is no defense to an indictment of the company if its employees violate the rule by obstructing it for an unreasonable 18 L. R. A.

time (in this case from twenty to thirty minutes). *State v. Louisville & N. R. Co. supra*.

Nor is it any defense to an indictment for obstructing the highway longer than the statute permits that the occupation was accidental and unavoidable and that due diligence was used to remove the obstruction. *Com. v. New York, N. H. & H. R. Co. supra*.

Nor is it any defense to an indictment for such obstruction to a highway that it was necessary for carrying on the railroad company's business and that such obstruction was only occasional. The necessity or convenience of such obstruction by a railroad company cannot be considered. *State v. Chicago, M. & St. P. R. Co. supra*.

A railroad company is liable for the injuries caused to an individual by such wrongful obstruction. *Young v. Detroit, G. H. & M. R. Co. supra*.

Damages are recoverable by a person for detention by cars allowed to stand across a highway for

Messrs. Campbell & Johnson, with Mr. Jno. B. Shipman, for appellee:

The cause of the fright was a proper question for the jury to whom it was submitted by the trial court, and who found it was not the steam and smoke of the passenger train but the freight cars which frightened the team. We are not able to believe that this court as a matter of law will decide that fact "in opposition to the finding of twelve men of vaster and more varied experience and with greater opportunities of knowledge than the court possesses."

Smith v. Sherwood Twp. 62 Mich. 159.

If these freight cars, while unlawfully obstructing the highway, were the cause of the horses becoming frightened, the plaintiff would be entitled to recover.

Patterson v. Detroit, L. & N. R. Co. 58 Mich. 172; *Young v. Detroit, G. H. & M. R. Co.* 56 Mich. 480; *Geveke v. Grand Rapids & I. R. Co.* 57 Mich. 589; *Peterson v. Chicago & W. M. R. Co.* 64 Mich. 621.

It is not necessary that the particular injury be foreseen to hold a person liable for it.

1 Suth. Damages, 47, 48; Whart. Neg. §§ 16, 17, 21, 76; 1 Sedgw. Damages, 7th ed. 180.

If the act be wrong it is not necessary that any injury be foreseen.

Brown v. Chicago, M. & St. P. R. Co. 54 Wis. 342, 41 Am. Rep. 41; *Ehrgott v. New York*, 96 N. Y. 264, 48 Am. Rep. 622; 1 Shearm. & Redf. Neg. § 28.

Plaintiff had a right to drive over the road, and the defendant could not deprive him of that right by obstructing it or making it dangerous for him to do so.

Malby v. Chicago & W. M. R. Co. 52 Mich. 108.

The fact of an intervening innocent cause producing the mischief does not settle the question of whether the original wrong was the proximate cause or not.

Some authorities hold that an intermediate responsible cause relieves the first actor from responsibility, but how this circumstance can break the chain of causation is not made clear. However, the majority of the cases is the other way.

Thomp. Neg. 1085, and cases in *note 2*.

The intervening cause in this case was set in

motion by the original wrongdoer, and the defendant was directly in fault for the plaintiff's exposure to it.

What frightened the horses is a question of fact and not of law.

Stark v. Lancaster, 57 N. H. 88; *Olemens v. Hannibal & St. J. R. Co.* 53 Mo. 866, 14 Am. Rep. 460; *Toledo, P. & W. R. Co. v. Pindar*, 58 Ill. 447, 5 Am. Rep. 57; *Patten v. Chicago & N. W. R. Co.* 32 Wis. 524; *Sarton v. Bacon*, 81 Vt. 540; *Lake v. Millikin*, 62 Me. 240, 16 Am. Rep. 456; *Willey v. Belfast*, 61 Me. 569; *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 342, 41 Am. Rep. 41; *Ehrgott v. New York*, *supra*.

If there was under the facts shown a chance for different conclusions to be drawn by ordinarily candid and intelligent men, it is a question to be determined by the jury and not by the court.

Adams v. Iron Cliffs Co. 78 Mich. 271, and cases there cited; *Smith v. Sherwood Twp.* 62 Mich. 159.

If the original act was wrongful and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause passing by those which were innocent.

Cooley, Torts, 70; 1 Shearm. & Redf. Neg. § 38.

Whoever does an illegal act is answerable for all the consequences he immediately and directly brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrongdoer, or, provided their acts causing the damage were the necessary or legal and natural consequences of the original wrongful act.

1 Addison, Torts, Wood's ed. § 18. See also 2 Thomp. Neg. 1084-1087.

It is always sufficient to establish his liability if the defendant be directly in fault for the exposure of the injured party to the intervening cause of the injury.

1 Suth. Damages, 48, 64; 1 Shearm. & Redf. Neg. § 38; *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354; *Burrows v. March Gas Co.* L. R. 5 Exch. 67; *Ricker v. Freeman*,

more than the legal time, and such damages may include the extra expense incurred by him on account of his consequent inability to reach and take passage on a train. *Patterson v. Detroit, L. & N. R. Co.* 56 Mich. 172.

The killing of a horse by a train in a cut into which he is turned by cars wrongfully obstructing a crossing renders the railroad company liable. *Murray v. South Carolina R. Co.* 10 Rich. L. 227, 70 Am. Dec. 219.

The diminution in rental value of adjoining premises by reason of the obstruction of a street by cars so as to prevent access to and from his premises may be recovered from the railroad company by the abutting owner. *Kiel v. Jackson*, 6 L. R. A. 254, 13 Colo. 373.

In *Rauch v. Lloyd*, 31 Pa. 358, 72 Am. Dec. 747, a highway was obstructed for about half an hour by a train of cars which ran for part of the trip by gravitation and was drawn by horses the rest of the way. The railroad belonged to the state and the regulations made the conductor the represent-

ative of the owners of the train for the trip. During the conductor's absence a teamster started the cars and injured a boy who was attempting to cross under the cars and the owner of the train was held liable.

In case of a dispute as to facts the question whether a crossing is obstructed or not is for the jury. *Young v. Detroit, G. H. & M. R. Co.* 66 Mich. 430; *Peterson v. Chicago & W. M. R. Co.* 64 Mich. 621.

The same is true as to the contributory negligence of a person injured at such crossing. *Ibid.*

If a wagon could not go in the usual track without the whistle-tree or whistle hitting the bumper of a car there is an obstruction. *Peterson v. Chicago & W. M. R. Co.* *supra*.

The fact that there is an opening 16 feet wide is not, as matter of law, sufficient to show that there was no obstruction if the track crossed the highway at an angle less than 45 degrees. *Young v. Detroit, G. H. & M. R. Co.* *supra*. B. A. R.

50 N. H. 420, 9 Am. Rep. 267; *Lane v. Atlantic Works*, 111 Mass. 140; *Binford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508; *McDonald v. Snellig*, 14 Allen, 290, 92 Am. Dec. 768; *Eaton v. Boston & L. R. Co.* 11 Allen, 800, 87 Am. Dec. 780; *Powell v. Deveney*, 8 Cush. 300, 50 Am. Dec. 758; *Haney v. Dennis*, 93 Ind. 452, 47 Am. Rep. 879; *Dixon v. Bell*, 5 Maule & S. 198; *Lynch v. Nurdin*, 1 Q. B. 29; *Ilidge v. Goodman*, 5 Car. & P. 190; *Weick v. Lander*, 75 Ill. 93; *Woodward v. Abom*, 35 Me. 271; *Billman v. Indianapolis, C. & L. R. Co.* 76 Ind. 166, 40 Am. Rep. 280; *Hill v. Winsor*, 118 Mass. 251; *Baltimore & P. R. Co. v. Reaney*, 43 Md. 117.

It is always sufficient to hold the original wrongdoer responsible if the intervening cause was one likely to occur.

1 Shearm. & Redf. Neg. § 82.

McGrath, Ch. J., delivered the opinion of the court:

This is a case for negligence. Plaintiff, a bus driver, was *en route* for the depot with two passengers. Three railway tracks crossed the street near the depot. A freight train occupied one of these tracks, and obstructed the street for over twenty minutes. The conductor of the freight had gone to dinner. Plaintiff halted his team some three or four rods south of the tracks, and waited from ten to fifteen minutes for the freight to get out of the way, or to make a cut so that he might pass. While waiting, a passenger train came along on one of the tracks north of the track occupied by the freight train, enveloping the freight train at the crossing in smoke and steam. Plaintiff's horses became frightened, backed away, overturned the bus and ran away, throwing plaintiff out and injuring him. The horses were ordinarily gentle, and were used to running trains as well as to standing cars, and had not before that time taken fright at either. This is the second appearance of the case in this court. On the former appeal, this court held (*Selleck v. Lake Shore & M. S. R. Co.* 58 Mich. 195) that, while the declaration alleged that the horses were frightened, and the injury occasioned by carelessly and negligently causing the passenger engine to exhaust great quantities of steam and noise, the plaintiff had failed to give any evidence in support of the allegation of wrong to which he had by his declaration attributed the injury. Plaintiff amended his declaration, and now alleges that "defendant did then and there, by their said cars and train, obstruct the said public highway for more than five minutes at one time, to wit, at said time; that is to say, they negligently and unlawfully obstructed it for more than five minutes immediately preceding the time when the plaintiff reached the spot as aforesaid, with their said cars and train, and at a time when the west-bound passenger train run by the defendants over said road would arrive and depart from said depot, passing over the track on the north side of said freight train, and the engine drawing the same would exhaust great quantities of steam, and thereby, with its whistle and bell, make a great noise, and, the wind blowing fresh from the north, the smoke and steam from the passing engine would be driven south over the said freight

train, carelessly and negligently and wantonly neglecting to cut the train and open a passage along said highway across said track at any time during said period of over twenty minutes, but wrongfully left the cars and train standing on the track across the said highway during all that time, totally blockading and preventing travel thereon during all of said period, well knowing people would need to use the street at said time in going to the depot, with and without teams and wagons, to meet the west-bound passenger train over said railroad; and also knowing that the blockage of said highway, as aforesaid, under the circumstances as aforesaid, made it an unsafe and dangerous place for teams to be caught in." It is insisted by defendant that the present case is ruled by the decision upon the former hearing, and stress is laid upon that part of the opinion in which the court says: "The plaintiff has not, by his declaration, attributed his injury to the illegal detention, and, if he had, it would have been idle, for the particular injury of which he complained, namely, the fright and running away of his horses, could not have flowed from that detention as a proximate cause." The court had already disposed of the first allegation of wrong, viz., that the defendant had negligently obstructed the street, and had eliminated that allegation from their consideration; but the trial court had instructed the jury that, if the plaintiff had been unavoidably detained, and by reason of that detention, and while waiting, the team became frightened by surroundings, in consequence of which plaintiff was injured, the defendant was liable. It was with reference to this instruction that this court used the language upon which stress is laid by defendant. It is not alleged or claimed that the fright and runaway were occasioned by the illegal detention as the proximate cause, but by the obstruction which caused the detention. That opinion was written by Mr. Justice Cooley, and filed at the June term, 1885; but in the case of *Young v. Detroit, G. H. & M. R. Co.*, 56 Mich. 430, 438, in an opinion filed at the April term of the same year, and concurred in by Mr. Justice Cooley, speaking for the court, Mr. Justice Champlin says: "If it be conceded that teams could be driven through the opening left by defendant between its cars and across the plank crossing without coming in contact with the rail of the main track, yet, if the freight car obstructed the traveled track, and by reason of such obstruction caused the plaintiff's horse to sheer off so as to throw one runner of the cutter against the rail of the main track, the horse being one of ordinary gentleness, such conceded facts would present a proper question for the jury to determine,—whether the injury resulted from leaving the freight car in that position, and whether plaintiff's husband was in the exercise of ordinary care while driving the horse. No railroad company has the right to obstruct a public highway with its cars an unreasonable length of time, and, as before stated, the Legislature has enacted that this shall not in any one instance exceed five minutes. The liability arises from the duty of the company to leave the traveled part of the highway unobstructed after the expiration of the rea-

reasonable time limited by law. A violation of this duty is negligence, and, if a party is injured by reason thereof, being free from fault on his part, wrong and injury concur, and the liability attaches. . . . We can only apply the law to those facts. The shying of the horse was the result of the act of the defendant in obstructing the highway. If the car was lawfully there, and defendant had not violated any duty at the time, no liability would have attached, for the reason that, although injury might have arisen from the shying of the horse, the defendant had been guilty of no wrongful or negligent act which concurred in producing the injury." In the present case there was no intervening cause. The obstruction of the highway was a continuous breach of duty. It was a cause operating at the time of the injury. The smoke and steam were concurrent, rather than intervening, causes. They were contemporaneous. They enveloped and environed the freight train and produced a condition of the cars. It was for the jury to say whether the fright of the horses was caused by the appearance of the freight cars, surrounded as they were. Again, if the team was frightened by the noise and steam and smoke under the circumstances, it was for the jury to say, under testimony clearly tending to show that the team was used to passing trains and their attendant incidents, whether it was not the presence of the freight train across the highway, obscuring the origin of the steam and smoke and noise, that was the cause of the fright and injury. The wrongful act had not ceased to operate.

In the recent case of *Southwestern Teleg. & Teleph. Co. v. Robinson*, 50 Fed. Rep. 810, 2 U. S. App. 205, the company had permitted one of its wires to remain suspended across a public highway, a few feet from the ground, and plaintiff came in contact with it during an electrical storm, and was injured by a discharge of electricity, which had been attracted from the atmosphere. The court held that, since the electricity would have been harmless except for the wire, the defendant was liable. "If," it is said, "the electric fluid with which the wire of the telephone company was charged at the time was an element, or the main element, in the production of the injuries to the plaintiff, still it is clear that the displaced wire furnished the means of the communication of the dangerous force which resulted in the injury. . . . To say that the agency of the telephone wire in the production of the injury was inferior to that of the electric current, which was the main cause, is not satisfactory. It is, in fact, to admit that the company's displaced wire furnished the means by which the dangerous force was communicated to and injured the defendant in error. True, it was a new force of power which intervened, with the production of which the telephone company had nothing to do; but upon this point, in *Louisiana Msh. Ins. Co. v. Tweed*, 74 U. S. 7 Wall. 52, 19 L. ed. 67, the court says: 'If a new force or power has intervened, of itself sufficient to stand as the cause of misfortune, the other must be considered as too remote.' The new force or power here would have been harmless but for the displaced wire, and the fact that the wire took on a new force, with

the creation of which the company was not responsible, yet it contributed no less directly to the injury on that account." There the wire furnished the means of communication. Here it was a question for the jury to determine whether the cars did not give to the noise and steam and smoke a character which, as to this team, they did not possess in the absence of the obstruction. It was for the jury to say whether the new forces would or would not have been harmless except for the presence of the obstruction. In the case of *Grimes v. Louisville, N. A. & O. R. Co.*, 3 Ind. App. 573, recently determined, the rule is laid down that, "when two causes combine to produce an injury, both of which are proximate in their character,—the one being the result of culpable negligence, and the other an occurrence as to which neither party is at fault,—the negligent party is liable, provided the injury would not have been sustained but for such negligence." A large number of authorities are cited which support the doctrine. The rule is followed in *North Manchester Tri-County Agr. Assn. v. Wilcox* (Ind. App.) 80 N. E. Rep. 202.

In *Campbell v. Stillwater*, 32 Minn. 308, 50 Am. Rep. 567, it is said that, "when several concurring acts or conditions of things—one of them the wrongful act of defendant—produce the injury, and it would not have been produced but for such wrongful act or omission, such act or omission is the proximate cause of the injury." In *Shearman & Redfield on Negligence* (sec. 39) the authors say: "It is universally agreed that, if the damage is caused by the concurring force of the defendant's negligence and some other cause, for which he is not responsible, including the 'act of God,' or superior human force directly intervening, the defendant is nevertheless responsible if his negligence is one of the proximate causes of the damages, within the definition already given. It is also agreed that, if the negligence of the defendant concurs with the other cause of the injury in point of time and place, or otherwise so directly contributes to the plaintiff's damage that it is reasonably certain that the other cause alone would not have sufficed to produce it, the defendant is liable, notwithstanding he may not have anticipated, or been bound to anticipate, the interference of the superior force which, concurring with his own negligence, produced the damage." But if the superior force would have produced the same damage, whether the defendant had been negligent or not, his negligence is not deemed the cause of the injury." In *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117, Alvey, J., says: "The efficient and predominating cause in producing a given event or effect, though there may be subordinate and dependent causes in operation, must be looked into in determining the rights and liabilities of the parties concerned."

The rule laid down by Mr. Cooley in his work on Torts (page 76) is that, "if the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred

to the wrongful cause, passing by those which were innocent." In the note to page 78 the same author says: "It is equally true that no wrongdoer ought to be allowed to apportion or qualify his own wrong; and that, as a loss has actually happened while his own wrongful act was in force and operation, he ought to be permitted to set up as a defense that there was a more immediate cause of the loss, if that cause was put in operation by his own wrongful act. To entitle such party to exemption, he must show, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done,"—citing *Davis v. Garrett*, 6 Bing. 716.

In the present case, while the passenger train was not put in operation by the act of obstruction, both trains were operated by defendant, and it was for the jury to determine whether the presence of the obstruction did not give a different color and character to the other operations, and convert otherwise harmless incidents into fear-exciting agencies, and whether the presence of the obstructing cars did not produce the effect which caused the fright, the runaway, and the injury.

In 2 Thompson, Negligence, 1084, it is said

that "whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary and natural course of events, though such consequences be immediately and directly brought about by intervening causes, if such intervening causes were set in motion by the original wrongdoer." It is insisted that the result was not one that could have been anticipated, but that is not the test of liability in cases like the present. The question what a reasonable man might foresee is of importance in determining the question of negligence, but when the act complained of is negligence *per se*, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not. *Smith v. London & S. W. R. Co. supra*; *Grimes v. Louisville, N. A. & O. R. Co. L. R. 6 C. P. 21*; *Shearm. & Redf. Neg. supra*.

The trial court properly submitted the question of the proximate cause to the jury, and we find no error in his instructions. It is unnecessary to discuss the other questions raised. Upon an examination of them, we do not discover any prejudicial error.

The judgment is affirmed, with costs to plaintiff.

The other Justices concurred.

MARYLAND COURT OF APPEALS.

Frank GOSNELL, Trustee for James W. Flack, *Appt.*,

v.

David Hudson FLACK *et al.*, Adms., etc., of Thomas J. Flack, Deceased.

(.....Md.)

As against a trustee in insolvency as well as the insolvent a debt of the latter to a decedent's estate incurred while administrator thereof may be set off against his distributive share therein.

(December 2, 1892.)

A PPEAL from an order of the Orphans' Court of Baltimore City directing the amount due to James W. Flack as a distributee of the estate of Thomas J. Flack, deceased, to be set off against indebtedness which he had contracted to the estate while acting as administrator thereof. *Affirmed*.

The facts are stated in the opinion.

Argued before Alvey, Ch. J., and Bryan, Roberts, Fowler, Briscoe, and McSherry, JJ. *Messrs. Thomas M. Lanahan and Frank Gosnell* for appellant.

Messrs. S. T. Wallis and William E. Hoffman, for appellees:

The indebtedness of a legatee or distributee constitutes assets of the estate, which it is the executor's or administrator's duty to collect for the benefit of the creditors, legatees, and dis-

tributees. Hence such indebtedness may be deducted from any legacy or distributive share of the debtor.

2 Woerner, Administrators, § 564.

The right to deduct or set off the debt of a distributee against his share of the estate has been settled in this state.

Smith v. Donnell, 9 Gill. 84; *Manning v. Thruston*, 59 Md. 218; *Stieff v. Collins*, 65 Md. 69; *State v. Smith*, 64 Md. 108; *Mullikin v. Mullikin*, 1 Bland, Ch. 538; *Devries v. Hiss*, 72 Md. 562. See also, to the same effect, Williams, Executors, 7th Eng. ed. *1803; *Courteney v. Williams*, 3 Hare, 539; *Irby v. Irby*, 25 Beav. 632; *Re Brown*, L. R. 32 Ch. Div. 597; *Re Milnes*, 53 L. T. N. S. 534; *Doering v. Doering*, L. R. 42 Ch. Div. 203; *Keim v. Muhlenberg*, 7 Watts, 79; *Cresswell, Exrs. & Adms.* § 488; 2 Woerner, Administrators, § 564; *Brokaw v. Hudson*, 27 N. J. Eq. 135; *Strong v. Bass*, 35 Pa. 333; 7 Am. & Eng. Encyclop. of Law, p. 816, *note*.

The appellant contended below that James W. Flack had a legal estate in his distributive share of the estate, and his debt could not, therefore, be set off. This contention, however, is not supported by law.

The administrator of an estate holds the legal title to the estate and is a trustee for the creditors, distributees, and all parties interested therein.

Schouler, Exrs. & Adms. 2d ed. §§ 239-243; 7 Am. & Eng. Encyclop. of Law, pp. 232, 233; *Cott v. Cott*, 111 U. S. 566, 28 L. ed. 520; *Griffith v. Frazier*, 12 U. S. 8 Cranch. 24, 3 L. ed. 476; *Kane v. Paul*, 39 U. S. 14 Pet. 40, 10 L. ed. 845.

A legatee, distributee, or creditor, takes his rights through the administrator.

NOTE.—As to distribution of estate where distributees are indebted to it, see *Koons v. Mellett*, 7 L. R. A. 231, and *note*, 121 Ind. 585; *Fiscus v. Moore*, 7 L. R. A. 235, 121 Ind. 585.
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Hagthorp v. Hook, 1 Gill & J. 270; *State v. Greenwell*, 4 Gill & J. 414.

McSherry, J., delivered the opinion of the court:

In 1874, Thomas J. Flack died intestate, leaving a widow, several children, and some grandchildren surviving him. Administration upon his estate was granted to James W. Flack, his eldest son. Henry H. Flack and David Hudson Flack, two of his other sons, were indebted to their father in large amounts. These debts remaining unpaid, and Henry H. and David Hudson Flack becoming indebted also unto their brother, James W. conveyed to him, in 1877, by a deed absolute upon its face, certain valuable real estate owned by them, and know as the "Canton Property" or the "Distillery Property." At the same time there was also executed and acknowledged by the grantors and the grantee, in the deed referred to, an agreement in writing, setting forth the purposes for which the deed had been executed, and providing for the application to be made of the purchase money arising from a sale of the Canton property, when a sale thereof should be made by James W. Flack. The deed was at once placed upon record, but the agreement never was. James W. Flack, as administrator, stated several accounts in the orphans' court between the date of his appointment and the middle of October, 1883. During all that time, and until 1890, he collected rents belonging to the estate of his father, and expended thereof upwards of \$12,000 upon the Canton property for taxes, repairs, and other purposes. In 1890, having become heavily involved and insolvent, he executed a deed of trust for the benefit of his creditors to Frank Gosnell, Esq.; and on the 9th of November, in the same year, his letters of administration were revoked by the orphans' court, and David Hudson Flack and William E. Hoffman, Esq., were appointed administrators in his stead. Mr. Gosnell claimed that the Canton property passed to him under the deed of trust; but the administrators of Thomas J. Flack disputed this, and filed a bill in the circuit court for Baltimore county against Mr. Gosnell and sundry creditors of James W. Flack, alleging that, under the limitations and provisions contained in the unrecorded agreement, James W. Flack held the title to the Canton property in trust to secure the indebtedness due by Henry H. Flack and David Hudson Flack to the estate of their father, Thomas J. Flack, and praying that the trustees of James W. Flack be restrained by injunction from making sale of the property. In that case this court decided—*Hoffman v. Gosnell* (Md.) 24 Atl. Rep. 28, (not yet officially reported)—that the unrecorded declaration of trust could not operate to the prejudice of James W. Flack's creditors, who became such in good faith, and in ignorance of its existence, and that the administrators were not at liberty to set up any secret equity to the exclusion of those creditors, but that they (the administrators) were entitled "to share *pari passu* with the other creditors in the distribution of the proceeds of the property."

In March, 1892, James W. Flack, in obedience to the order passed when his letters were revoked, propounded his seventh account in the orphans' court, and in that account he charged the estate of his father with the sum of \$13,494.06 for expenses on the Canton property and for excess of interest. This charge was excepted to by one of the distributees of Thomas J. Flack. A hearing was had before the orphans' court, and in April, 1892, the exception was sustained, and the register of wills was directed to state another account, omitting that charge altogether. This was done in June following. The new seventh account was sworn to by James W. Flack, and he was shown to stand indebted to the estate in the sum of \$13,425.84. The new administrators had in the mean time stated an account, distributing the proceeds of a sale made by them of certain leasehold property belonging to the estate of Thomas J. Flack, but retained in their hands the sum of \$2,851.79, the amount distributable to James W. Flack. Subsequently they filed a petition, and the orphans' court passed an order thereon fixing a day for making distribution of this sum, and ordered notice to be given. On the day appointed some of the distributees filed a petition, praying that the above-named sum should be distributed to them, and insisting that no part of it should be paid over to James W. Flack, or to any person claiming under him. Mr. Gosnell appeared and answered, and claimed that the share of James W. Flack in his father's estate, and amounting, as above stated, to \$2,851.79, was payable to him, the trustee, under the deed of trust, and was not liable to be applied in reducing the alleged indebtedness of the former administrator to the estate. Evidence was adduced, and, after a hearing, the orphans' court of Baltimore city passed an order dated July 19, 1892, directing the administrators, to credit upon James W. Flack's indebtedness of \$13,425.84, due to his father's estate, the sum of \$2,851.79, which would otherwise have been payable to him or his trustee, and to distribute the latter sum among the other distributees. From this order Mr. Gosnell, the trustee of James W. Flack, has appealed.

It will be seen from this outline of the previous and the pending litigation between these parties that the question now involved, and upon which we are required to pass, is whether, under the circumstances stated, the distributive share of James W. Flack in his father's estate, and now in the hands of the new administrators of that estate, is liable to be set out by them against the alleged debt due by him to his father's estate; or whether Mr. Gosnell, as his trustee, is entitled to receive that share. The right of an administrator to retain from the share of a distributee the amount due by the latter to the intestate out of whose estate he is entitled to a share is undeniably clear. *Smith v. Donnell*, 9 Gill, 84; *Manning v. Thruston*, 59 Md. 218. And we think it equally clear that this right exists where the debt has been incurred to the estate itself by the distributee as administrator after the decedent's death. 2 Woerner, Administrators, § 564. The first proposition

has been the settled law of Maryland for many years, and the second may be said to be a necessary consequence of the other. There is nothing in the recent cases of *Devries v. Hiss*, 72 Md. 560, and *Flack v. Gosnell* (Md.) 24 Atl. Rep. 414, (not yet officially reported,) at all in conflict with these conclusions. Indeed, the principle which underlies those cases has no application to this. They hold that a legal estate owned or acquired by a trustee is not liable to be intercepted by a court of equity to make good trust funds misappropriated by the trustee. But it does not follow from this doctrine that a distributee who is himself a debtor to the estate can claim and receive his distributive share, and at the same time escape the payment of the debt he owes. If this were permissible he would, as stated in *Devries v. Hiss*, receive not only his full share, but that share augmented by the amount of his indebtedness. It would be contrary to the plainest principles of justice to allow an administrator who is also a distributee, and who is indebted to the decedent, or who by reason of a subsequent defalcation becomes indebted to the estate, to escape the payment of his indebtedness if he happened to be insolvent, and besides that to receive his full, unabated, distributive share. In such a case there is no question of impounding or intercepting a legal estate to satisfy in equity a delinquent trustee's malversations. It is merely an application of the doctrine of set-off. A court of equity could not, and much more certainly could not the orphans' court limited as its powers are, seize of a debtor's legal estate, not under its control and not subject to its jurisdiction, and impound that legal estate to satisfy a debt due to the trust estate being administered by either tribunal. That principle is widely different from the one which must be applied here. Here no legal estate had vested in the distributee in the first instance so indefeasibly as to exclude the administrator's right of set-off. The right to a distributive share is subordinate from the beginning to the distributee's indebtedness to the estate. If he is charged with the indebtedness, as he should be, he can only receive in the way of a distributive share what remains after deducting that indebtedness. In other words, his right to claim any portion of the estate is limited to that portion, if any, which is in excess of what he owes to that estate. This view is fully supported by the adjudged cases to which we have referred. Mr. Gos-

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nell, the trustee of James W. Flack, stands in the latter's place, and is entitled to no greater or other rights than his grantor could himself have asserted had the deed of trust not been made.

The only remaining inquiry is, Was James W. Flack indebted to his father's estate in an amount equal to his distributive share? This can be briefly answered. When the administrator's seventh account was excepted to, one of the objections was that he had improperly charged the estate with \$13,494.06, for expenses on the Canton property and for excess of interest. This exception was sustained, and the charge was disallowed by an order of the orphans' court dated April 7, 1892, whereby James W. Flack was brought in debt to the estate to that amount, and a new seventh account was directed to be stated upon this basis. No appeal was taken from that order, and on the 7th of June following the new seventh account was stated and sworn to by James W. Flack, whereby he showed his indebtedness to the estate to be \$13,425.84. No appeal, as has just been stated, was ever taken from the order of April 7th, and the adjudication thus made, after a full hearing, has never been reversed.

But, beyond this, it appears with clearness that the title to the Canton property stood in the name of James W. Flack after the conveyance to him in 1877. He was the ostensible owner, and, so far as the records disclosed, the actual and sole owner, of the property. Upon the faith of that apparent ownership, he obtained credit, and his creditors have, under our former decision, a right to be paid their claims out of the proceeds of its sale. Its present value depends in a large measure upon the fact that the property was kept in repair, and it was kept in repair by the expenditure upon it of the money of Thomas J. Flack's estate. Those expenditures were made chiefly by James W. Flack, the then administrator. He thus improved his own property by expending thereon part of the assets of his father's estate. He is therefore obviously bound to refund to that estate the amount thus applied. In the face of these facts, and with the decision of the orphans' court on the same subject unappealed from and unreversed, it is difficult to escape the conclusion that he is a debtor to his father's estate. Entertaining these views, we must affirm the order appealed from.

Order affirmed, with costs.

WASHINGTON SUPREME COURT.

Jennie McHugh BROWN, *Respt.*,

v.

City of SEATTLE *et al.*, *Appts.*

(..... Wash.)

1. A change of grade of a street which will make the property of an abutting owner less valuable to sell or rent although to make it conform to that established by ordinance before such owner acquired the property and although a portion of the property does not abut directly on the street but on an alley opening into it, is within a constitutional provision that no private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner.
2. An injunction against the change of grade of a street without making compensation for the damage required by a Constitution which prohibits private property to be taken or damaged for public or private use without just compensation having been first made or paid into court, may be granted in favor of an abutting owner where the change will seriously reduce both the rental and selling value of his property.

(October 11, 1892.)

APPEAL by defendants from a judgment of the Superior Court for King county in favor of plaintiff in an action brought to enjoin the grading of a certain street until the damages which would be thereby caused to plaintiff by injury to her property had been paid. *Affirmed.*

The facts are stated in the opinion.

Messrs. S. H. Piles, Charles F. Munday, George Donworth, and James B. Howe, for appellants:

The article of our Constitution in question does not rescue from the category of *damnum absque injuria* mere consequential injuries to the owner resulting from discomfort, inconvenience, loss of business and the like.

McMahon v. St. Louis, A. & T. R. Co. 41 La. Ann. 827; *Loris v. North Chicago City R. Co.* 32 Fed. Rep. 270; 3 *Suth. Damages*, pp. 453, 454, note 2, 455, 458; *Rude v. St. Louis*, 12 West. Rep. 238, 93 Mo. 403.

At common law and independent of the constitutional provisions plaintiff would not be entitled to recover for any damages to her property by reason of the improvement contemplated.

Lewis, Em. Dom. §§ 93-97; *Smith v. Washington*, 61 U. S. 20 How. 185, 15 L. ed. 858; *Northern Transp. Co. of Ohio v. Chicago*, 99 U. S. 635, 25 L. ed. 336; 2 *Dill. Mun. Corp.* 3d ed. § 685, 4th ed. §§ 989, 990.

The abutting owner, as against the city, has no right to lateral support of the soil of the street, and can acquire none through prescription or lapse of time.

2 *Dill. Mun. Corp.* 4th ed. § 991, and *notes*; *Lewis, Em. Dom.* § 101; *Loris v. North Chicago City R. Co.* *supra*.

Had Jefferson street been condemned instead of dedicated the following rule laid down in the case of *Dearborn v. Boston, C. & M. R. Co.* 24 N. H. 179, and referred to in *Lewis on Eminent Domain*, § 565, would have been of controlling force, viz.: "The damages awarded by the commissioners must be regarded as a full compensation for all the injury which the landowner may sustain, then or at any future time, from any cause which the commissioners were bound, or had a right, to consider; so that it can never afterwards be made a question whether, in fact, the commissioners have or have not considered any particular cause of damage legitimate for their consideration."

The city would acquire the same rights with reference to the street when the street is dedicated as when it is condemned.

That changes might be required must be presumed to have been contemplated when the land was taken and devoted to the purpose of a street, as incident to the enjoyment of the easement which was then acquired.

Henderson v. Minneapolis, 32 Minn. 819.

The dedicator must be presumed to have known that at some time it would become necessary to establish a grade on Jefferson street and to open said street for travel and in so doing to cut below or fill above the natural surface of the ground.

He was willing to dedicate the street to the public and suffer the inconvenience of a cut or fill and to receive as compensation therefor the increased benefit to his remaining property by having the convenience of a public highway.

Fellows v. New Haven, 44 Conn. 240, 26 Am. Rep. 447; *Montgomery v. Townsend*, 80 Ala. 489, 60 Am. Rep. 116.

Changes in the natural surface of the ground,—excavations and embankments necessary to render the street safe and convenient,—are the natural and probable consequences of the uses and purposes for which the land was originally taken, and the compensation then awarded, or in case of dedication for which the owner received compensation in the resultant advantages.

Montgomery v. Townsend, *supra*; *Denver v. Bayer*, 7 Colo. 118, 2 Am. & Eng. Corp. Cas. 465; *Lancashire & Y. R. Co. v. Evans*, 15 Beav. 322; *Laurence v. Great Northern R. Co.* 16 Q. B. 648; 2 *Dill. Mun. Corp.* 4th ed. § 995a.

Benefits arising from the grading of a street are to be offset against any damages, consequential or otherwise, accruing to the abutting property owner, regardless of its assessment to pay for the improvement.

Pacific Coast R. Co. v. Porter, 74 Cal. 261; *Tehama Land v. Briam*, 68 Cal. 57; *Somers v. Metropolitan Elev. R. Co.* 14 L. R. A. 344, 129 N. Y. 576; *Genet v. Brooklyn*, 99 N. Y. 296.

Messrs. Burke, Shepard & Woods, with *Mr. Thomas R. Shepard*, for appellee:

The earlier constitutions of the several states of the Union contain, with one or two exceptions, a provision that "private property shall

NOTE.—For note on injury to abutter's easements of light, air and access by vacating street, changing grade, etc., see *Selden v. Jacksonville (Fla.)* 14 L. R. A. 370.

not be taken for public use without just compensation."

It became the fixed judicial construction of these constitutional provisions that they would apply only to cases where there was an actual taking or physical invasion of the tangible subject of the property—the thing itself.

Sedgwick Stat. & Const. L. 2d ed. pp. 456–458, 462, 463; *Cushman v. Smith*, 84 Me. 247; *Selden v. Jacksonville*, 14 L. R. A. 370, and note, 28 Fla. 558.

This was the mischief for which a further remedy was to be sought. In 1870 the state of Illinois, in its revised Constitution then adopted, led off in a movement to provide a new remedy for the old mischief still remaining. Its Constitution of 1870, art. 2, § 13, provided that "private property shall not be taken or damaged for public use without just compensation."

Other states adopted the same provision.

Where a constitutional or statutory enactment has been borrowed by one of our states from another after it had received judicial interpretation in that other, it should be treated in the state adopting it as bearing the meaning which that interpretation elsewhere had applied to it.

Endlich, *Interpretation of Statutes*, § 530; *Atty. Gen. v. Brunst*, 8 Wis. 787; *Com. v. Hartnett*, 8 Gray, 450; *Poertner v. Russell*, 33 Wis. 193.

The courts in the other states adopting this later form of the constitutional guaranty have uniformly viewed the new words "or damaged" (or their equivalent) as broadening the right of compensation so as to include other cases than that of an actual taking or physical invasion of the subject of the property; and while the courts have not in terms formulated and generalized the new rule, there has been a growing tendency to hold, in effect, that it subjects the public and the agencies of the public to the same rule of liability as would rest upon a private individual for damage done to another's property when not acting under statutory authority.

The public are bound to compensate for impairment of the access to abutting property, or of the use of the street in connection with abutting property, by a change of grade in a street or by other change made in the street or in the use thereof.

Pekin v. Brereton, 67 Ill. 477, 16 Am. Rep. 629; *Elgin v. Eaton*, 83 Ill. 535, 25 Am. Rep. 412; *Rigney v. Chicago*, 102 Ill. 64; *Lehigh Valley Coal Co. v. Chicago*, 26 Fed. Rep. 415; *Chicago v. Taylor*, 125 U. S. 161, 31 L. ed. 638; *New Brighton v. United Presby. Church*, 96 Pa. 331; *Pusey v. Allegheny*, 98 Pa. 522; *Chambers v. South Chester*, 140 Pa. 510, 4 Am. R. R. & Corp. Rep. 273; *Montgomery v. Maddox*, 89 Ala. 181, overruling *Montgomery v. Townsend*, 80 Ala. 489; *McElroy v. Kansas City*, 21 Fed. Rep. 257; *Werth v. Springfield*, 78 Mo. 107; *Householder v. Kansas City*, 88 Mo. 488; *Rear-don v. San Francisco*, 66 Cal. 492, 56 Am. Rep. 109; *Lewis, Em. Dom.* §§ 221–227; 25 Am. L. Rev. 924.

The modern and progressive view adopted in these judicial interpretations of the later form of the constitutional mandate has affected the course of judicial decision to some extent 18 L. R. A.

even in a state where a provision requiring compensation only in case of a taking still remains unaltered.

Story v. New York Elev. R. Co. 90 N. Y. 122, 43 Am. Rep. 146; *Lahr v. Metropolitan Elev. R. Co.* 6 Cent. Rep. 371, 104 N. Y. 268; *Abend-roth v. Manhattan R. Co.* 11 L. R. A. 634, 122 N. Y. 1, 19 Am. St. Rep. 461; *Kane v. New York Elev. R. Co.* 11 L. R. A. 640, 125 N. Y. 164.

All these decisions both those in the states that have revised their constitutions and in the state of New York, hold that the owner of land abutting on a public way has certain rights in the enjoyment of that way in connection with his property which are incidental to his land and thus are specially his own, distinct from the general right of the public to the enjoyment of the use of the public way. The right of access to and from the street is the chief, and indeed the basis, of the peculiar rights incidental to the private estate.

Cincinnati v. White, 31 U. S. 6 Pet. 438, 8 L. ed. 456; *Theobald v. Louisville, N. O. & T. R. Co.* 66 Miss. 279, 14 Am. St. Rep. 564; *Elliott, Roads & Streets*, 519, 526, and cases cited; *Rigney v. Chicago*, 102 Ill. 64; *Chicago v. Taylor*, 125 U. S. 161, 31 L. ed. 638. See *Chicago & W. I. R. Co. v. Ayres*, 106 Ill. 511; *McCarthy v. Metropolitan Board of Works*, L. R. 7 C. P. 508; *Caledonian Ry. Co. v. Walker's Trustees*, L. R. 7 App. Cas. 259.

Stiles, J., delivered the opinion of the court:

This was an action to enjoin to city of Seattle from grading down that part of Jefferson street, in that city, lying between Eighth street and the alley, between and parallel with Seventh and Eighth streets, until just compensation to the plaintiff for the injury to result from such grading to her abutting real property should have been first ascertained and made or paid into court for her benefit. E. T. Smart, with whom the city had made a contract to do the grading in question, was joined as a defendant. The court below, after trial, found in respondent's favor, and granted the injunction sought. The respondent's property consists of three lots, each 80×120 feet in size, Nos. 2, 3, 4, block 59. Terry's first addition to Seattle. Lots 2 and 3 fronted on Eighth street, and lot 2 fronts on Jefferson street. Lot 4 fronts on Seventh street, 60 feet from Jefferson. Each of the lots has the alley in its rear. The streets named are each 66 feet in width, and the alley is 16 feet in width. In 1869 the plat of the addition was filed for record, and the streets and alleys were thereby dedicated to the public use. The respondent derives title to her lots from the maker of the plat, from whom she bought them in 1874, while they were unimproved, with the exception that there was a small house on lot 4. In 1863 the city, by ordinance No. 484, established the grade elevation of Jefferson street at heights above the city datum line as follows: At the intersection with Sixth street, 175½ feet; at Seventh street, 261 feet; at Eighth street, 304 feet. For the cross streets the ordinance required that there should be a uniform and continuous rate of grade between each two adjacent street intersections, provided that no

grade line was established between Sixth and Seventh streets. In 1887 the grade line at Seventh street was changed to 265 feet. In 1888 and 1889 respondent erected, on her lots 2 and 3, three cottages fronting on Eighth street, to which there is access from Eighth street at their front, and from Jefferson street, by way of the alley, at their rear. She also erected a double house fronting on Jefferson street, between Eighth street and the alley, its front standing within 6 feet of Jefferson street, and its west side within 4 feet of the alley; and also a house facing on the alley, occupying a part of the rear end of lot 8. For these houses she had been receiving a total rental of \$287 per month. Seventh street was graded down in 1887-88, so that the access to the house located on lot 4 is by an ascent of thirty-two steps. The alley has heretofore been used as the most convenient means of access to all the property for delivering heavy supplies. On April 14, 1890, the common council, acting under section 8 of the city charter of 1886, (Stat. 1885-86, p. 241,) without petition from property owners, ordered that Jefferson street be graded from Third street to Broadway, (which is beyond Eighth street,) by unanimous vote. The natural level of Jefferson street at Seventh street is 267 6-10 feet; at the alley, 292 6-100 feet; and at Eighth street, 312 38-100 feet. The grade proposed would leave a street with an ascending grade from Seventh to Eighth street of about 15 25-100 per cent, which is not greatly different from the general ascent of the natural surface; but, owing to the elevations at which Seventh and Eighth streets have been fixed, it will become necessary, in order to make the new grade continuous and uniform between the two streets, to excavate the width of the street to a depth which at Eighth street would be, according to the established grade, 8 38-100 feet, and at the alley something like 17 feet. This arrangement would, of course, leave the respondent's lots just that much above the street when the improvement is completed, and the alley would be no longer available for any of its natural purposes until further improvements had been made upon it. The city, however, claims that under its modified proposition the cut at Eighth street will be reduced to 2 38-100 feet, and at the alley to something over 14 feet. Terrace street, on the opposite side of the block from Jefferson street, has already been graded down, so that the alley at that end terminated in a drop of 5 or 6 feet. From Third street to Seventh street, the change in elevation is just 200 feet, being within a fraction of 20 per cent. A large proportion of this elevation, however, occurs between Sixth and Seventh streets, where the difference in elevation is 85 5-10 feet, or more than 33 per cent. It is conceded that this fact makes it impracticable to use Jefferson street between Sixth and Seventh for any ordinary street purposes excepting foot passage. It is also conceded that between Seventh and Eighth streets Jefferson street was impassable in its natural condition for teams, excepting a portion of the distance westward from Eighth street. It also appears that the proposed grade between Seventh and Eighth streets will be no steeper than that of

several other streets which are traveled by teams in the city of Seattle.

Evidence was taken by both parties upon the question whether or not the plaintiff's property would be injured by the proposed cutting down of the street. The result of that evidence, we think, shows a preponderance that she will be injured beyond any benefits which she will receive by the grading of the street, and that her property will be less valuable when the grade is completed than when it is begun. But the main question is, admitting the fact of injury, would the respondent be entitled to compensation from the city? Previous to the adoption of the Constitution, she would have been without remedy excepting for such injury as might have occurred to her land alone, arising from the withdrawal of support, and its consequent actual falling in, or from the negligence of the city in doing the work. *Parke v. Seattle* (Wash.) 81 Pac. Rep. 310; *Gilmore v. Driscoll*, 123 Mass. 199, 23 Am. Rep. 812; *Smith v. Washington*, 61 U. S. 20 How. 185, 15 L. ed. 858. But the Constitution of this state (art. 1, § 16) provides that no private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner, and it is upon this prohibition that the respondent bases her right to an injunction. The earlier constitutions of the several states in the Union contained, with but few exceptions, a provision that private property should not be taken for public use without just compensation. The Constitution of the United States contains substantially the same provision which was applicable to the territory. Under these provisions, however, owing to the interpretation put upon the word "taken" by the courts of the several states, with the exception of the courts of Ohio, great and manifest injury was constantly done by the states, counties, and cities to the private citizen without any legal means of reimbursement. The theory was that wherever the state, through its legislative Acts, authorized any of its agents to make public improvements, so long as these agents carried on their work within the scope of their authority, and without negligence, they were liable to no one, whatever damage might accrue. A citizen was thus left without protection in all that large class of cases where, through some act done for the public benefit, or for a use, public or quasi public, although no part of his tangible property was physically taken, the use or value of his property was palpably impaired, or was stripped of incidents comprised within the conception of complete property rights which brought to those rights quite as much value as the mere possession of the property.

In 1870 the state of Illinois, in revising its Constitution, inserted therein the provisions which we have quoted from our own. Its action in that matter has since been followed by West Virginia, Alabama, Missouri, Nebraska, Arkansas, Texas, Georgia, California, Colorado, Kentucky, Montana, and the Dakotas. Some of the Constitutions mentioned differ slightly from our own in their phraseology, but their substance is exactly the same, with the exception that in a few cases the damage

is not required to be first paid. Under these constitutional provisions, many such cases have arisen, and the courts have been uniform in their holdings that damages are now recoverable by the owners of land abutting upon streets and highways, for any permanent injury inflicted upon such abutting lands, by any material change of grade or obstruction to the abutter's access where the damages thus inflicted exceed the benefits derived from the grading or other improvement. Out of the dozens of cases which might be cited, we cite the following: *Pekin v. Brereton*, 87 Ill. 477, 16 Am. Rep. 629; *Elgin v. Eaton*, 88 Ill. 585, 25 Am. Rep. 412; *Rigney v. Chicago*, 102 Ill. 64; *New Brighton v. United Presbyterian Church*, 96 Pa. 381; *Householder v. Kansas City*, 83 Mo. 488; *Atlanta v. Green*, 67 Ga. 386; *Reardon v. San Francisco*, 66 Cal. 492, 56 Am. Rep. 109; *Montgomery v. Townsend*, 80 Ala. 489, 84 Ala. 478; *Montgomery v. Maddox*, 89 Ala. 181; *McElroy v. Kansas City*, 21 Fed. Rep. 257; *Harmon v. Omaha*, 17 Neb. 548, 52 Am. Rep. 420; *Hammond v. Harvard*, 81 Neb. 685.

Question was made in all these cases, as it has been made in this one, whether the addition of the word "damaged" should be taken to mean anything further than was formerly covered by the word "taken," but it is manifest that no such construction could be sustained. "Damaged" does not mean the same thing as "taken," in ordinary phraseology. The makers of the Illinois Constitution used the word in that instrument for some purpose. Other states changed their constitutions for substantially the same purpose. They took the new phrase subject to the general rule of construction, that the adoption of constitutional or statutory language by one state from another adopts to some extent, at least, the construction put upon the borrowed language by the courts of the state from which it came. After almost twenty years of discussion and decision in Illinois and other states, we put the words "taken or damaged" into our Constitution, and they must have their effect. In *Chicago v. Taylor*, 125 U. S. 161, 81 L. ed. 638, the court said: "The use of the word 'damaged' in the clause providing for compensation to owners of private property, appropriated to public use, could have been with no other intention than that expressed by the state court. Such a change in the organic law of the state was not meaningless. But it would be meaningless if it should be adjudged that the Constitution of 1870 gave no additional or greater security to private property sought to be appropriated to public use than was guaranteed by the former Constitution." It is now too late to urge this argument against the recovery of such damages as are threatened to be caused by the action of the city of Seattle here in question. Every court in which the point has been raised has decided in favor of the private citizen, but, were it now presented to us for the first time in the history of the phrase, we should not be disposed to view it in any way different from that expressed in the cases we have cited. If private property is damaged for the public benefit, the public should make good the loss to the individual. Such always was the equity

of the case, and the Constitution makes the hitherto disregarded equity now the law of it.

In the matter of street grades, however, counsel for the city urge that a dedication should carry with it the right to raise or lower the surface of a street to any extent deemed proper by the municipal authorities, and that to subject the cities to the constitutional rule of damage would hinder, delay, and prevent street improvements, and cause heavy burdens for this class of expenses to be laid upon the public. It is said that, when the owner of land lays it off into lots, blocks, streets, and alleys, he, by his act of dedication of the public places, consents that they may be used in any way consistent with the purpose of the dedication, as the owner of two adjacent lots who sells one of them consents that his grantee may use his purchase as he sees fit from the center of the earth to the sky. But, in order to sustain the appellants' claim, it would be necessary to overlook the fact that a street is laid out for the benefit of abutting lots as well as for public passage, the land in the lots retaining the easement of access over the land in the street, and this easement being the principal motive and consideration for the dedication. The only obligation which a city assumes by its acceptance of a street is to maintain thereon a reasonable roadway, according to the circumstances. It cannot be compelled to fill up chasms or dig down hills to make the most perfect way for travel of every kind. Its duty is done, when, under all the circumstances, it has made provision for travel of the kind suited to the locality. It cannot be compelled to grade, or otherwise improve, a street, and it loses none of its rights by nonuser. For the construction of whatever improvements it does make, it is now quite the custom to assess the entire cost to the abutting land. A harsh application of the old rule would put the dedicator in the position of consenting to all that the municipality might arbitrarily do, even to the destruction of values in his abutting land. But, in fact, the contemplation of no such unreasonable thing as a grade, which would actually reduce the value of his abutting land, can be imputed to him, since it is not in the nature of men to do things which are patently contrary to their self-interests. On the other hand, to enable the city to perform its duty, it must derive from the dedication the right to build a reasonable roadway according to the peculiarities of the locality, and having due regard to the convenience of the abutting property, and that of the public, as well as to its own liability for the flowage of surface water, and the like. Such a street may be said to be fairly contemplated by every dedicator. To go beyond the strict requirements of this case, and perhaps to invite the charge of promulgating mere *dicta*, a dedication should always be taken as a consent that the natural surface of the street at its center line might be the grade to which the roadway should be leveled from either side, since a reasonable roadway could not be made across a slope of much pitch. Along its middle course the street ought to follow the general contour of the land, without slavish adherence to every inequality, the disregard of which can injure no one or make property less valuable. If no street practicable for the

public use can be made without making cuts or fills which will damage abutting land so as to reduce its value below that which it possessed before the street was begun, none should be undertaken at all unless abutting owners waive damages, or until public necessity shall justify paying the cost of a lower or higher grade.

Under the circumstances of this case, we think the court was justified in interposing its injunction, as by the proofs a strong probability, amounting almost to a certainty, was established that the grading of Jefferson street as proposed would seriously reduce both the rental and selling value of respondent's property. A cut of from 14 to 17 feet at the alley would have greatly affected her access to her double house, and would have practically destroyed the use of the alley in connection with all her property. Under the Constitution, she had a right to have this damage ascertained by a jury, and paid to her before the work was done, if the damage thus sustained would leave her property less valuable to sell or rent than it was before; the jury being the judges of the reasonableness of the grade under the dedication, and of the fact and extent of the injury.

Objection is made by counsel to the allowance of the injunction, because it is said that the respondent should be left to her action for damages, as it could not be considered that it was intended by the Constitution that the cities and towns of the state should be stopped in the progress of the work of improving streets by frequent injunctions on the part of property owners. A case has been brought to our notice which is exactly in point in its rulings, viz., *Moore v. Atlanta*, 70 Ga. 612. The Constitution of Georgia provides that private property shall not be taken or damaged without just and equitable compensation being first paid. The city of Atlanta was proceeding to grade a street in front of Moore's property, and he applied for an injunction to restrain the prosecution of the work until his damages should be assessed and paid. The writ was refused, and on appeal the supreme court affirmed the judgment. The decision of this case, as the reading of the opinion shows, was based upon the argument that it was better that one man should be left to recover his damage by ordinary suit at law than the city authorities be hindered in grading a street; or, in other words, the damage to one man was balanced against the possible inconvenience of many, which is not a recognized basis of legal decision. The embarrassments of the constitutional provisions were pointed out, but it seems to us the plain letter of that instrument was disregarded. Justification for the decision was sought in the case of *Sletson v. Chicago &*

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E. R. Co., 75 Ill. 74; but the fact seems to have been entirely overlooked that the Constitution of Illinois does not require that compensation be first made in any such case. We can foresee many difficulties, and perhaps much litigation, likely to ensue from the faithful enforcement of our constitutional requirement that damages be first paid; but we have no choice in the matter, and these difficulties, as well as many others, must be met and dealt with as they arise. It will not be every case in which the property owner deems himself likely to be injured that will justify an injunction, and the courts of the state will undoubtedly do their duty in this particular, and grant no preliminary restraining order or injunction until it is made to appear, with legal probability or certainty, that damages will be incurred by the grading of streets.

Anders, Ch. J., and Dunbar, J., concur.

Hoyt, J., dissenting (Filed Jan. 14, 1893):

I think the judgment of the court below should be reversed. When those under whom the plaintiff claims dedicated the street to public use, it is conceded that they in substance said: "Take this street and use it." I think it equally clear that they in effect further said, "Improve this street so as to adapt it for use as such." Such adaptation would, of course, include such change in the surface thereof, as was necessary to best adapt it to the purposes for which it was designed.

If such was the effect of the dedication, it seems clear that the dedicators could not claim damages against the public for doing that which they had said it should do; and as the plaintiff could get no better right than those under whom she holds, it follows that for the injuries set out in the complaint there could be no recovery.

In the case of *Parke v. Seattle*, just decided, I have at some length given my reasons for holding that for such injuries no action will lie. I shall not repeat them here.

Something is said in the opinion of the majority of the court as to the proper construction of that provision in our Constitution which provides that no property shall be taken or damaged for public use without compensation. I am unable to agree with what is thus said, and if in my opinion a construction of such clause was necessary to the decision of this case, I should feel it my duty at some length to express my dissent from the views thus expressed. But under my view of the effect of the dedication as above stated, the decision of the case does not call for such construction; hence I shall not now discuss it.

Rehearing denied.

ALABAMA SUPREME COURT.

MEMPHIS & CHARLESTON R. CO., *Appt.*,
 BIRMINGHAM, SHEFFIELD & TENN-
 ESSEE RIVER R. CO.

(.....Ala.....)

1. The crossing or intersecting of the road of one railway company by that of another is the taking of property within the meaning of constitutional provisions requiring compensation to be made.
2. The provision of Const., art. 14, § 21, that "every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad, and shall receive and transport each the other's freight, passengers, and cars loaded or empty without delay or discrimination," does not give a railroad company the right to cross another road without compensation.
3. The constitutional right of appeal under Const., art. 14, § 7, from any preliminary assessment of damages by viewers or otherwise in condemnation proceedings is violated by Code 1886, § 1582, which merely provides for the appointment by a probate judge of three arbitrators and the recording of their award without any provisions for appeal, as the general statutes provide for an appeal only from a final judgment, order, or decree of the judges of probate.

(November 7, 1892.)

A PPEAL by defendant from an order of the Circuit Court for Colbert County dismissing a writ of certiorari which sought to review an order of the Probate Court refusing to dismiss a petition, under Code, § 1582, for arbitrators to determine the conditions upon which plaintiff could cross the tracks of defendant's road. *Reversed.*

The facts are stated in the opinion.

Messrs. Humes, Sheffey & Speake for appellant.

Messrs. Simpson & Jones for appellee.

Thorington, J., delivered the opinion of the court:

The sole question raised by this appeal involves the constitutionality of section 1582 of the Code of 1886. This section prescribes the mode by which one railroad company may acquire the right to cross or intersect the road of another, and appellant insists the statute is unconstitutional for the following reasons: (1)

It fails to require notice of the filing of the petition, and hence fails to provide an opportunity to controvert its allegations; (2) it fails to provide for an appeal or a trial by jury; (3) it does not provide for the assessment or payment of just compensation to the injured party.

While the authorities are not altogether uniform or harmonious in regard to the necessity of notice of the initiatory steps in proceedings of this class, it cannot be doubted that under constitutional provisions, such as exist in this state, no statute authorizing the taking of property for a public use by corporations or individuals invested with the exercise of the right of eminent domain is a valid enactment, which fails to secure to the owner of property so taken the right of an appeal from any preliminary assessment of damages by viewers or otherwise, by which a trial by jury may be had according to the course of common law, or which fails to provide that just compensation shall first be made to the party injured; and in considering the question we shall confine the inquiry to the last two grounds urged by appellant against the validity of the Act. The constitutional provisions by which the question under consideration is to be tested are as follows: Article 1, § 24: "That the exercise of the right of eminent domain shall never be abridged, nor so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies, and subjecting them to public use, the same as individuals. But private property shall not be taken or applied for public use, unless just compensation be first made therefor: . . . provided, however, that the General Assembly may, by law, secure to persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall, in all cases, be first made to the owner," etc. Article 14, § 7: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements, which compensation shall be paid before such taking, injury, or destruction. The General Assembly is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporations or individuals, made by

NOTE—The "taking of property" by eminent domain.

On the question what constitutes a "taking of property" within the meaning of a constitutional provision as to compensation, it may be said that modern decisions strongly tend to the doctrine that a destruction of property rights is a taking of property although there may be no dispossession of any physical object in the class of either real or personal property.

The doctrine that easements such as those of light, air, and access to streets constitute property 18 L. R. A.

for which compensation must be given when the easements are destroyed or impaired has effectually displaced the earlier theory that there must be a physical possession in order to constitute a taking of property. *Egerer v. New York C. & H. R. Co.* 14 L. R. A. 381, and *note*, 128 N. Y. 157; *Reining v. York, L. & W. R. Co.* 14 L. R. A. 133, 128 N. Y. 157; *Selden v. Jacksonville*, 14 L. R. A. 370, and *note*, 28 Fla. 558; *Abendroth v. Manhattan R. Co.* 11 L. R. A. 635, 122 N. Y. 1; *Somers v. Metropolitan Elev. R. Co.* 14 L. R. A. 344, 129 N. Y. 573.

See also on this question of "taking," *Vanderlip v. Grand Rapids*, 3 L. R. A. 247, 73 Mich. 523.

viewers or otherwise; and the amount of such damages, in all cases of appeal, shall, on demand of either party, be determined by a jury according to law." Article 14, § 21: "All railroads and canals shall be public highways. . . . Every railroad company shall have the right, with its road, to intersect, connect with, or cross any other railroad, and shall receive and transport, each, the other's freight, passengers, and cars, loaded or empty, without delay or discrimination."

In the absence of constitutional restraints, the power of the state to take private property for the public use reaches every species of property within its jurisdiction, even when acquired by grant from the state. It is a power inhering in sovereignty, and it has been declared that it is impliedly reserved in every grant, and that the franchise of a corporation is not exempt. It may be taken in whole or in part, and, with the other property of the corporation, devoted to other or similar public uses. And in this state it is extended by express constitutional provisions to the property and franchises of corporations, "the same as individuals." Article 1, § 24; *Anniston & C. R. Co. v. Jacksonville, G. & A. R. Co.* 82 Ala. 297. The only restrictions as to the manner of the exercise of this power by the state are to be found in the Constitution, "for nothing of less authority than the organic and fundamental law which lays out the very frame of government could impose them." 6 Am. & Eng. Encyclop. Law, pp. 512, 521. It is clear from the provisions of the Constitution of this state, quoted above, that two restrictions are in express terms imposed by the organic law upon the right of the state to invest individuals and corporations with the exercise of this power, viz.: That just compensation shall first be made to the owner in all cases; and that in cases where private property is taken, injured, or destroyed by the construction or enlargement of the works, highways, or improvements, or individuals, municipal or other corporations invested with the privilege of taking private property for public use, the right of appeal from the preliminary assessment of damages made by viewers or otherwise shall be secured, upon this appeal, on the demand of either party, and the damages shall be determined by a jury according to law. In *Smith v. Inge*, 80 Ala. 283, it is said: "The state itself cannot, in the exercise of the right of eminent domain, take private property for public uses without a regular judgment of condemnation in a proper judicial proceeding, first making payment of just compensation to the owner."

If, therefore, the crossing or intersecting of the road of one railway company by the road of another is taking, injuring, or destroying private property, by the construction or enlargement of the works, highways, or improvements of such company, within the meaning of the Constitution, then the constitutional restrictions or limitations, to which we have referred, are applicable; and the exercise of such right can only be sustained when it is claimed under a valid legislative enactment by which the rights contemplated by these constitutional restrictions are secured to the owner of the property so taken, injured, or destroyed. There is abundant authority in the text-books

and adjudicated cases for the proposition that the crossing or intersecting of the road of one railway company by that of another is the taking of property, within the meaning of constitutional provisions requiring compensation to be made. That to constitute a taking of property it is not necessary there should have been an actual disseisin of the owner, but that it is a "taking" to invade his property by superinduced additions of water, sand, earth, or other material, or by having any artificial structure placed upon it so as effectually to destroy or impair its usefulness. 6 Am. & Eng. Encyclop. Law, p. 542. And in the case of *Pumpelly v. Green Bay & M. Canal Co.*, 80 U. S. 18 Wall. 166, 20 L. ed. 557, it is said that a serious interruption to the common and necessary use of property may amount to a taking, within the meaning of constitutional provisions, and entitle the owner to compensation. In the case of *Chicago & A. R. Co. v. Springfield & N. W. R. Co.*, 67 Ill. 147, it was held, in a case of the construction of one railroad across the track of another, that the company whose track is crossed is entitled to recover, not only just compensation for the land taken, but also for such incidental loss, inconvenience, and damage as might reasonably be expected to result from the construction and use of the crossing in a legal and proper manner. The same principle is recognized in the following cases: *Peoria & P. U. R. Co. v. Peoria & F. R. Co.* 105 Ill. 110, 10 Am. & Eng. R. R. Cas. 129; *Lake Shore & M. S. R. Co. v. Vincinnati, S. & C. R. Co.* 80 Ohio St. 604.

So, also, under an Act which allowed damages when lands were "injuriously affected," it was held that the test applied to determine the proper meaning of the words "injuriously affected," as giving a right to compensation, was whether the act done in carrying out the works in question was an act which would have given a right of action if the works had not been authorized by the statute. In other words, if the act affecting the land had been done by an individual, he would be liable for damages. *Delaplane v. Chicago & N. W. R. Co.* 42 Wis. 214, 24 Am. Rep. 886. And in *McCarthy v. Metropolitan Board of Works*, L. R. 8 C. P. 209, it is said: "The act, therefore, injuriously affecting, must be that which would be wrongful but for the statute. It is enough . . . that it might be prevented by injunction." The question can scarcely be regarded as an open one in this court. While there is no case, so far as we have discovered, which in express terms decides that the crossing or intersecting of one railroad by another is the taking of property, within the meaning of the Constitution, there are cases in which the principle is recognized. In the case of *Mobile & G. R. Co. v. Alabama M. R. Co.* 87 Ala. 508, it is said: "The statutes above referred to confer all the authority to take private property, whether of persons or corporations, that exists in railroad companies organized under the general laws. Authority to take the franchise, or any part, of another corporation, is not given in express terms, except so far as necessary to cross or intersect another railroad, and, if not necessarily implied, it does not exist." In the above quotation we have italicized the language bearing on this particular question. And in

the case of *Highland Ave. & B. R. Co. v. Birmingham Union R. Co.*, 98 Ala. 505, there was a controversy between two corporations as to their respective rights growing out of the crossing of their several tracks on a certain street; the complainant company seeking to enjoin the other from building its track across the former's without making compensation. The court held that it was not a proper case for the interposition of a court of equity, but that the parties should be remitted to their remedies at law.

We cannot yield assent to the argument of appellee's counsel that article 14, § 21, of the Constitution, invests railroad companies with the right to cross and intersect the tracks, the one of the other, without compensation. The argument is that "the crossing of one railroad track by another is not the taking of the property of another, because the Constitution gives to every railroad a right of way to cross any other one, and when one road acquires a right of way it is subject to the right of every other to cross it, and there remains no right of property to adjudicate, but only to determine the terms of the crossing." There would be force in the argument if this section stood alone in the Constitution, and if there was nothing else in the section itself to indicate a contrary intent. But this section is to be construed in connection with section 24 of article 1, and section 7 of article 14, and with all other provisions of the Constitution touching the subject of eminent domain. The language of section 24, art. 1, is that "compensation shall, in all cases, be first made to the owner." The language of section 7, art. 14, is: "Shall make just compensation for the property taken, injured, or destroyed." If the provisions of the two sections last referred to had been embodied in section 21, art. 14, upon which appellee's argument is based, it could not be questioned that, construing the section as a whole, the right to cross and intersect other roads was subject to just compensation first to be made. That those provisions are in separate sections cannot change the rule of construction; they are to be construed together, and operative effect given to each. Appellee's contention, however, is repelled by the language of the section itself. That part of it material to the question is as follows: "Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad, and shall receive and transport, each, the other's freight, passengers, and cars, loaded or empty, without delay or discrimination."

The utmost latitude of construction would not authorize the conclusion that railroad companies are required by this section to receive and transport, each, the other's freight, passengers, and cars, without compensation; yet this result would inevitably follow if the argument of appellee is sound, for it is equally as applicable to this requirement in the section as to that relating to the crossing and intersecting of roads. We entertain no doubt that the intention of the framers of the Constitution was that each of the burdens contemplated by this section as being imposed by one railroad company upon the property or franchises of another should be subject to the other constitutional provisions securing the prepayment of

just compensation, and such is the legal operation and effect of the various constitutional provisions when construed together as a whole. The rights contemplated by section 21, art. 14, of the Constitution, and attempted to be conferred by section 1582 of the Code, involve, therefore, the taking or injuring of property, and any statute designed to provide for the exercise or enforcement thereof must, as we have said, secure to the owner of the property so taken or injured just compensation, which shall be paid before the property is taken or injured, and the right of appeal to a court in which, if demanded, the damages may be determined by a jury "according to law;" that is, by the decisions of this court and according to the course of the common law, a jury of twelve men. *Alabama M. R. Co. v. Newton* (Ala.) 10 So. Rep. 89; *Postal Teleg. Cable Co. v. Alabama G. S. R. Co.* 92 Ala. 831; *Woodward Iron Co. v. Cabanis*, 87 Ala. 828.

It is entirely obvious, from an inspection of the section itself, (Code, § 1582), that it contains no provision for such an appeal. Unless, therefore, the right is secured under some other or general statute relating to appeals, it is fatally open to the objection. The case of *Montgomery S. R. Co. v. Sayre*, 73 Ala. 443, was an *ad quod damnum* proceeding under a statute which provided for an appeal, but failed to designate the court to which the appeal should be taken, the language being: "The same proceedings shall be had as in ordinary cases of appeal from the probate court to the higher courts of the state." It was held that the circuit court of the county was the only "higher court" having a jury as a constituent, and that the statute by implication gave the right of appeal to that court. The case of *Woodward Iron Co. v. Cabanis*, *supra*, grew out of an *ad quod damnum* proceeding under a statute (Code, § 8210) which gave no appeal to a court of which a jury was a constituent part. It was held that under the general statute regulating appeals from the probate court, (Code, § 8640), construed in connection with the constitutional provision relating to appeals and a jury trial in such cases, an appeal would lie from the probate to the circuit court, and that a jury of twelve men could there be impaneled to assess the damages.

We have referred to these decisions for the purpose of showing that the constitutional right of appeal and trial by jury in this class of cases has been jealously guarded by this court, and also for the purpose of showing that they afford no support to the statute we now have under consideration. The case of *Montgomery S. R. Co. v. Sayre* furnishes neither authority nor analogy for the decision of this case, for the reason that there is no provision whatever in section 1582 of the Code touching the right of appeal, and hence nothing to which we can apply the liberal implication indulged by the court in that case in favor of the constitutionality of the statute there considered. Under the statutes considered in *Woodward Iron Co. v. Cabanis*, *supra* (Code 1886, § 3207 *et seq.*, as amended by Acts 1888-89, p. 112), a trial is had before the judge of probate and a jury, a verdict is rendered under the charge of the court, and a judgment of condemnation is entered by the court upon the verdict. By sec-

tion §640 of the Code of 1886, it is provided that "an appeal lies to the circuit or supreme court from any final judgment, order, or decree of the judge of probate;" and the court held that this section, giving a general right of appeal, applied to the case, and that the Constitution was so far self-executing as to entitle the appellant to demand a trial by jury in the circuit court.

It is important to observe that the general statute relating to appeals from the probate court, referred to (Code, § 8640), only authorizes an appeal from any final judgment, order, or decree of the judges of probate. Now, by the section we have under consideration (Code 1886, § 1582), it is not required or contemplated that the judge of probate shall render any "final judgment, order, or decree." Nothing is required of him but to appoint three arbitrators on the application of the party who is the actor, and to record the written award of the arbitrators. The most latitudinarian principles of construction could not justify us in holding that either of these acts performed under the statute by the judge of probate is a final judgment, order, or decree, within the meaning of section 8640 of the Code; nor have we been referred to, or able to discover, any other statute which supplies the omission from section 1582 of all provision for the constitutional right of appeal. This view of the case being conclusive of the invalidity of the statute, it is unnecessary to consider the third ground urged by appellant against its constitutionality, further than to say it is very questionable if the language in the statute, "must determine the terms and conditions upon which such crossing or intersection shall be made," necessarily imports a compensation in money, which is the only kind of compensation meant by the Constitution.

Looking into the history of this section (Code, § 1582), we find it was originally part of an Act entitled "An Act to authorize the incorporation of railroad companies in this state," approved March 8, 1876 (Acts 1875-76, p. 249), being section 15 of that Act. The language there, so far as it is material to this inquiry, is: "They shall also have the right to cross and intersect any railroad in this state, and, in case the terms of said crossing or intersection cannot be mutually agreed upon by the railroad companies in interest, the same shall be fixed and determined by a commission of award, as heretofore arranged for in this Act." By preceding sections of the Act, provision is made for the appointment of such commission of award, who are required to possess the qualifications of jurors, to act under oath, empowered to examine witnesses, and by unanimous verdict to assess the compensation to be made. There is also provision made for an appeal, which, as construed by this court, meant an appeal to the circuit court, where a jury could be demanded. The original Act above referred to was carried into the Code of 1876, and constitutes article 2 of chapter 1 of that Code (Code 1876, §§ 1821-1859), of which section 1842 was section 15 in the original Act. In that section (1842) the language is the same as

above quoted, down to and including the words, "by a commission of award," when the following words are used: "As hereinbefore provided," the preceding provisions being the same as in the original Act, and which we have shown secured an assessment of compensation in money and an appeal affording a jury trial. Section 1842 of the Code of 1876 is carried forward into the Code of 1886 as sections 1581 and 1582 of the latter Code. Under the arrangement of this last-mentioned Code, section 1582 is entirely dissociated from the original sections with which it stood related, and the qualifying reference therein, "as hereinbefore provided," is omitted from the section, and the Code of 1886 was adopted with these changes. The result is the section (1582) as it is now found in the Code of 1886 stands alone, as a distinct and separate statute, embracing all the legislation of the state relating to the crossing and intersecting of one railroad by another. The condemnation proceedings, by section 3207 *et seq.* of the present Code, have no application to the proceedings contemplated by section 1582, for the reason that there is no provision in the latter section or elsewhere making them applicable; and the rule is that the general statutes regulating the taking of private property for public use do not confer the right to so take or subject the property or franchises of a corporation.

In *Anniston & C. R. Co. v. Jacksonville, G. & A. R. Co.*, 82 Ala. 297, it is said: "Lands once taken for a public use, pursuant to law, under the right of eminent domain, cannot, under general laws, and without special authority from the Legislature, be appropriated by proceedings *in invitum* to a different public use. . . . It would require an express Act of legislation to accomplish it, and then only on the prepayment of damages." By reason, therefore, of the dissociation, by the arrangement of the present Code, of this section from the original sections with which it was enacted, and related by express reference therein, and the omission of the express words of reference, and the failure to supply the place of the same with other appropriate words of reference to the other sections of the original Act as they are now contained in the Code, and the adoption of the Code in that shape, the invalidity of the statute (1582) inevitably results. If the conflict between the statute and Constitution were not clear, it would be our duty to uphold it, and we would lean in favor of any reasonable construction, "although it might not at first view seem most obvious and natural," which would effectuate the legislative intent, and make the statute conform to the Constitution. But we are constrained, for the reasons given, to hold that section 1582 of the Code is not a valid, constitutional enactment. It results that the judgment of the circuit court dismissing appellant's petition was erroneous, and it is accordingly reversed. Judgment will be here rendered quashing the proceedings before the probate judge of Colbert county, as prayed in the petition.

Reversed and rendered.

Walker, J., not sitting.

VIRGINIA SUPREME COURT OF APPEALS.

Legh R. PAGE, Admr. of William A.
Thomas, Deceased, *Appt.*,

v.

John H. LEWIS & Wife.

(.....Va.....)

1. A valid gift causa mortis including the valuables in the depository is effected where a man sick in bed on the day of his death sends for securities and the keys to the depository containing other securities all belonging to him, and with the remark, "I am a sick man and don't know what may happen to me," picks up the securities and hands them to the donee, saying, "I give you these," and taking the keys describes in a general way the contents of the depository and handing the keys to the donee says, "These keys I now give you" are where the valuable papers are; "whatever you find you can have—it is yours," and then directs the donee to place the securities and keys in her trunk and lock it, which the donee does.

2. Evidence of statements by a lawyer who went to the bedside of a dying man with an offer to prepare his will that the man made an appointment to meet the lawyer at a future

time for the purpose of having his will drawn, before which time he died, is not admissible to defeat an alleged *donatio causa mortis* where the lawyer is employed in the case and refuses to testify as to what took place at the interview between himself and decedent.

3. Evidence of declarations by the donee and her companion as to the fact of the gift, made on the day of the donor's death, is admissible in support of an alleged *donatio causa mortis* both as part of the *res gestae* and to rebut the inference flowing from testimony that in a conversation three days after the donor's death the donee made no mention of the gift.

4. Evidence of failure to mention an alleged *donatio causa mortis* at an interview three days after the donor's death at which the affairs of the estate were under consideration, and that the donee said that "as there was no will she supposed all she would have" was certain other property mentioned and not including the gift, does not furnish a sufficient basis for even a reasonable conjecture against the gift where the donee had not then consulted a lawyer and had been informed by the family physician that the gift was invalid; especially where the witness giving the testimony contra-

***NOTE*—Sufficiency of constructive delivery to sustain gift causa mortis.**

The above case is an extraordinary one in respect to the magnitude of the gift resting on the testimony of a single witness as well as on the sufficiency of a constructive delivery by transfer of keys.

The question of the sufficiency of such a constructive delivery is one about which there is some conflict but the main case is fairly well supported by the prior decisions.

In an early English case, *Jones v. Selby*, Prec. in Ch. 800, the delivery of the key to a trunk was regarded as a sufficient delivery of the contents to sustain a gift *causa mortis*, and the question whether a tally upon the government for £500 was given therewith was held to depend on its presence in the trunk at the time of the gift. This decision seems fairly to represent the law to-day.

In *Jones v. Brown*, 84 N. H. 439, where a gift *causa mortis* by a married woman was held invalid without her husband's consent, it was held on the question of the sufficiency of the delivery of things in a chest that a delivery of the key was sufficient.

And in *Sheegog v. Perkins*, 4 Baxt. 273, it is said: "As to the manner of the gift by delivering the key it has been several times held that this would be a sufficient delivery."

In *Coleman v. Parker*, 114 Mass. 80, it was held that a key placed in the hands of another person by the donor who relinquished all dominion over it was a sufficient delivery of the contents of a trunk to which the key belonged, but that it was otherwise where the donor after having called for the key and opened the trunk directed the key to be replaced where it was found and it was left there until after his death.

In *Cooper v. Burr*, 45 Barb. 9, a sufficient delivery of personal property in trunks, bureaux, etc., was held to be made for the purpose of a gift *causa mortis* by a delivery of the keys.

In *Phipard v. Phipard*, 55 Hun. 433, a delivery to one of the donees of a key to a box in a safe-deposit vault with an order to the custodian for its delivery was held sufficient as to a gift of an insurance policy in such box although there were other papers of the donor therein, where with the 18 L. R. A.

policy there was a paper signed by the insured with attesting witnesses stating that the insurance was for the benefit of the donees in the event of the donor's death before the maturity of the policy. The principal ground of the decision in this case, however, was that a trust was created for the donees.

In *Stephenson v. King*, 81 Ky. 425, 50 Am. Rep. 173, negotiable notes and bonds transferable by delivery are held to be sufficiently delivered for the purpose of a gift *causa mortis* by actual delivery of a letter from an agent acknowledging possession of them with a statement of their amounts and by delivery also of a key to a small writing desk in which the letter was kept.

In *Devol v. Dye*, 7 L. R. A. 439, 123 Ind. 321, where a donor having a private box in a bank vault instructed a person who had the keys to count from the box a certain amount of money and label it as the property of the donee and deliver it to him with another such package in the event of the donor's death, and when informed that the packages are prepared gives approval and never again takes possession of the keys, it was held that a sufficient delivery was made.

But there are cases somewhat inconsistent with those above cited.

In *Powell v. Hellicar*, 26 Beav. 351, it was held that there was not a good delivery of the contents of a dressing case and boxes for a gift *causa mortis* by the delivery to a person of the keys thereof with directions to keep them and deliver the contents of the dressing case and box to the donee after the donor's death.

And in *Hatch v. Atkins*, 56 Me. 324, 96 Am. Dec. 464, the delivery to a person of the key of a trunk kept in a closet of the donor's own room with directions to keep it for the donee was held not a sufficient delivery of certain contents of the trunk to make a valid gift *causa mortis* where the donor had other papers in the trunk and this remained under his immediate observation. In this case there was also a lack of evidence of the alleged gift.

In *Gano v. Fisk*, 43 Ohio St. 462, 54 Am. Rep. 819, it was held there was no delivery of the contents of a box on a bureau in the donor's room where he

dicted himself on material points and had always acted adversely to the claimant.

5. One competent, credible witness is sufficient to establish a gift *causa mortis*.

6. A gift *causa mortis* may extend to the whole of the donor's personal estate, however large.

7. The mere existence for precaution against loss or accident in the hands of a third person of a duplicate set of keys to the receptacle where valuable papers are kept, will not impair the validity of a gift of the papers *causa mortis* by delivery of the keys in the donor's possession.

8. That the donor of valuables *causa mortis* in transferring them to the donee used the expression "to be yours in case of my death," will not convert the transaction into a testamentary disposition so as to prevent its taking effect as a *donatio causa mortis*.

9. A *donatio causa mortis* is not within the provisions of Code, § 8414, providing that no gift shall be valid unless actual possession come to and remain in the donee, and that "if donor and donee reside together at the time of the gift possession at the place of their residence shall not be sufficient possession" within the meaning of the section.

10. Delivery of possession of a bank pass-book in consummation of a gift-*causa*

mortis is not sufficient to transfer the bank deposit.

(Lacy, J., dissents.)

(June 16, 1892.)

APPEAL by defendant from a decree of the Chancery Court of Richmond in favor of plaintiffs in a suit brought to establish a gift *causa mortis*. *Affirmed*.

The facts are stated in the opinion.

Messrs. Guy & Gilliam, Staples & Munford, Green & Miller, Peatross & Harris, William J. Robertson, and G. W. Hansbrough for appellant.

Messrs. Edmund Waddill, Jr., Christian & Christian, Edgar Allen, W. W. Gordon, and E. C. Burks for appellees.

Fauntleroy, J., delivered the opinion of the court:

The petition of Leigh R. Page, administrator of William A. Thomas, deceased, represents that, on the 4th of January, 1889, the said William A. Thomas died intestate, leaving an estate valued at some \$225,000, of which some \$20,000 was realty, \$18,000 on deposit in the Planters' National Bank of Richmond, and the balance, represented by bonds, stocks, choses in action, and gold coin, deposited in a rented box in the vaults of the

old one child in the presence of others that he wanted her to take the box and divide the contents between them equally and to go and get the key, which she did and after finding by trial that it fitted the lock gave it to her husband to keep, but no division or delivery of the contents of the box was made during the donor's life.

In *Keddel v. Dobree*, 10 Sim. 244, a delivery to a donee of a locked cash box with the key, but with directions to get the key after the donor's death from his son, and with the injunction that the box should be returned to the donor every three months while he lived, was held not sufficient for a gift *causa mortis* as the donor retained control of the property.

The frequently quoted test of delivery that it shall be as good as can be made under the circumstances may serve to explain in some degree the lack of agreement in the above decisions as in several of those in which the delivery is held insufficient the property was at hand and of such kind that it could have been delivered as easily as the key.

In *Bunn v. Markham*, 7 Taunt. 224, a direction that keys should be delivered after the donor's decease was held insufficient as a constructive delivery, but here there was not even a constructive delivery during the donor's life.

Gift of savings bank deposit.

The authorities prior to the main case were well settled in accordance with the minority view of Fauntleroy, J., in that case, that a gift *causa mortis* of money in a savings bank may be made by delivery of the savings bank book. *Ridden v. Thrall*, 11 L. R. A. 684, 125 N. Y. 572; *Pierce v. Boston Five Cents Sav. Bank*, 129 Mass. 426, 37 Am. Rep. 871; *Walsh v. Bowery Sav. Bank*, 15 Daly, 406, 406; *Glynn v. Seaman's Fund Sav. Bank*, 9 N. Y. S. R. 498; *Camp's App.*, 38 Conn. 88, 4 Am. Rep. 89.

And a *fortiori* a delivery of the book together with an assignment is sufficient for such a gift. *Sheedy v. Roach*, 124 Mass. 472, 26 Am. Rep. 690.

But a sufficient delivery of such a book is not 18 L. R. A.

made for a gift *causa mortis* by mere words of gift without actually delivering the book although it was at the time in a trunk to which the donee, who was the donor's husband, had access and in which he also kept his papers. *Dean v. Dean*, 48 Vt. 387.

Other instances.

A delivery of receipts for the consideration money of the purchase of annuities was held in an early case not a sufficient delivery for a gift *causa mortis* of such annuities. *Ward v. Turner*, 3 Ves. Sr. 431.

But the delivery of an absolute assignment in writing of shares of stock in a corporation is sufficient for a gift *causa mortis* although the certificates of stock are not delivered and the transfer is not completed on the books of the corporation. *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 830.

And the delivery of an attorney's receipt for a bond in suit and which was filed among the papers in the case is a sufficient delivery of the bond for the purpose of a gift *causa mortis*, this being the best possible delivery. *Eiam v. Keen*, 4 Leigh, 833, 26 Am. Dec. 822.

In *Ellis v. Secor*, 81 Mich. 185, 18 Am. Rep. 178, a valid gift *causa mortis* of securities in a valise was held to be made by writing on a slate by the bedside of the donor stating that she wanted the donee to take possession of all her property and directing him to look in the valise, while in the valise with the securities was an envelope directed to him containing a writing which authorized him to take possession of the effects and do with them as he saw fit. This decision touches another question not entered upon in this note, as to the necessity of any delivery to sustain a gift *causa mortis*. That question will be taken up in a subsequent note.

For notes on the general subject of gifts *causa mortis*, see *Ridden v. Thrall* (N. Y.) 11 L. R. A. 684; *Devol v. Dye* (Ind.) 7 L. R. A. 439; *Williams v. Guile* (N. Y.) 6 L. R. A. 306; *Drew v. Hagerty* (Me.) 3 L. R. A. 230; *Walsh's App.* (Pa.) 1 L. R. A. 585.

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said bank. That on the 14th day of January, 1889, the county court of Henrico county, on the motion of the heirs-at-law of the said decedent, appointed William R. Quarles and Mann S. Quarles curators of the said estate, who immediately qualified as such, by giving bond in the penalty of \$300,000, and entered upon the discharge of their duties. That on the 29th day of January, 1889, said Bettie Lewis, along with her husband, filed her bill in the chancery court of the city of Richmond, against the aforesaid curators, in which she asserted that said William A. Thomas, deceased, during his last illness, by gift *causa mortis*, gave her the keys to the tin box in the vault of the Planters' National Bank, above described, and with them all the property contained therein. That he gave her the pass-book showing the status of his account with said Planters' Bank for money placed on deposit therein, and with it gave to her the balance on deposit to his credit in said bank, amounting, as aforesaid, to some \$18,000; and that he also gave to her several negotiable notes, aggregating less than \$1,000, which he had with him at his residence at the time of his last illness. That, to this bill, the curators filed their joint demurrer and answer, denying the claim asserted by said Bettie Lewis; denying that said Thomas had attempted during his last illness to make a gift to the plaintiff of said property; and insisting that actual possession of the several subjects of this pretended donation had never come to or remained with the plaintiff; and that no possession, either actual or constructive, by her, at the joint residence of the donor and donee, could render valid the alleged gift, the same not being evidenced by deed or will. That on the 19th day of February, 1889, petitioner, Leigh R. Page, was appointed administrator of the estate of said William A. Thomas, deceased, by the county court of Henrico county, and, as such, he filed his answer to the bill of said Bettie Lewis. Before the assets in the hands of the curators aforesaid could be turned over to petitioner, the chancery court of the city of Richmond, on the motion of Bettie Lewis, appointed N. W. Bowe and I. A. Coke receivers, to take charge of and hold of all the aforesaid assets, pending a decision of the questions raised by the suit aforesaid. After the appointment of the aforesaid receivers, depositions were taken by both plaintiff and defendants, and the case made ready for a hearing at the June term, 1890, of the chancery court. The cause was argued, elaborately and exhaustively, before the Honorable E. H. Fitzhugh, the judge of the said court. No decree was, however, rendered by him, he having unexpectedly and suddenly died before the next term of his court. The Honorable W. J. Leake having been appointed his successor, the cause was again argued, at great length, before him; and on the 8th day of January, 1891, a decree was pronounced by him, sustaining the claim of the said Bettie Lewis (as preferred in her bill) to all the personal estate of the said William A. Thomas, deceased, except the sum of \$18,000, money on deposit in the Planters' National Bank, which was awarded to petitioner, as administrator afore-

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said. From this decree the case is here on appeal.

The question raised in the controversy, and to be decided by this court, is, What constitutes a valid gift *causa mortis*? and whether the evidence adduced by the complainant comes up to the law's requirements to establish such a gift by the decedent, William A. Thomas, to the complainant Bettie Thomas Lewis, by and through the facts and circumstances detailed in the bill and attested by the proofs. It is essential to a correct and just estimate of the facts of the case, as disclosed by the record, that they be viewed in the light of the history and relations of the parties to the controversy, the congruities of the case, and the legal weight of the testimony.

Bettie Thomas Lewis, who, before her marriage, was Bettie Thomas, is the only living child of the late William A. Thomas, a wealthy retired merchant, who, at the age of 70 years and enfeebled by long sickness, departed this life, intestate, on the 4th day of January, 1889, at his residence, in or near to the city of Richmond, possessed of a large estate of both real and personal property, but principally personalty. He never married, but cohabited with a woman of half white blood, formerly his slave, in the county of Pittsylvania, Va., by whom he was the father of two daughters, Bettie, and an older sister, Fannie, who married and died, soon after the late civil war, without issue. Bettie, 85 years of age when her father died, and Fannie were always recognized and acknowledged by William A. Thomas as his children; they called him father; and he called them and cherished and lived with them as his children. The death of Fannie was a great grief to him; and after that event, his whole and devoted affection was centered upon Bettie, as the "daughter of his heart and house," whom he loved "passing well," and from whom he was never thereafter separated, except for the two years that he sent her to a boarding school. Soon after the termination of the late war, he removed to Richmond to engage in business, and he purchased a small farm just outside the city limits for a home for himself and Bettie; and there they lived together for more than twenty years; she presiding at his table and over his household affairs, and administering to him in sickness and in health, nursing and caring for him with the constant assiduities of a devoted and dutiful daughter, and he providing for her comfort and pleasure, in every conceivable form that lavish parental love and large means could suggest. He built the house in which they lived for her; and, according to her directions he planned and furnished it. He occupied a room intercommunicating with Bettie's; and, during his long and languishing age, enfeebled by sickness and suffering, he preferred and tolerated no ministry but hers to his wants and his weariness. He provided for her an intelligent, agreeable female living-companion in his house until her marriage to John H. Lewis; and, for many years previous and up to his death, Fannie Coles, an educated, intellectual woman,—the natural and recognized daughter of the late John S. Coles, of Albemarle county,—was her household

companion, friend, and roommate. He urged Bettie to make a trip to Europe with him; and for eight or ten summers, next before his death, he visited Saratoga Springs, taking with him Bettie and Fannie Coles; and there, as at his own home, sitting and eating with them at the same table. For Bettie's mother he provided a home, where, for a time, she lived, but this he sold; and, at the time of his death, she lived at his house with Bettie, though the proof in the record is that he did not, of late years of his life, cohabit with her. William A. Thomas is represented, by the witnesses of the appellant, as a man honest, just, close to his interest, unusually prudent, and of fine business capacity, simple and frugal in his habits. He is described by the witness Dr. H. McGuire, who was his attending physician, chosen friend, and adviser, as "a peculiar character, anyhow. I think, too, he had some little superstition about making his will. I think it was a dislike, that belongs to a great many men, to provide for death in any way." This "peculiar character, anyhow," cut off from society by the kind and circumstance of his household affinities, lived, isolated in his own home, almost absolutely without social recognition or intercourse. He had a few business friends, and no enemies. He had no relations of legal blood, except some collateral kindred, who had never visited him, in health or in sickness, and whom he knew of only by the importunity of occasional begging letters; of which he complained as an annoyance, saying: "Here is a begging letter. The only use my relatives have for me is to get all out of me they can; but if they expect to get what I have when I die they will be mistaken." Dr. McGuire says: "From some things he said to me, I don't know what, I had an idea that he did not like his relatives; for I sometimes used these facts in urging him to make his will."

Mr. A. Judson Watkins, an adverse witness (whose acts and animus, bearing upon this contest over William A. Thomas' dying dispositions, will be the subject of analysis further on in this opinion), says: "I had a conversation with him [Mr. Thomas] on Wednesday evening (he died on Friday), which was the last I had of about an hour's duration. I had frequently talked with and persuaded him, with all the power that was in me, not to neglect further providing for Bettie, if he so intended. . . . He did refer to Mr. Haxall's will, and I think he said, in course of conversation that he was very feeble, and that he wanted to see me especially in regard to making some moneyed arrangement. And, furthermore, I think I remarked to him: 'If you were to die without a will, the lawyers and others [what others?] will get the most you have.' He followed me to the door, and said to me, 'I am going to make everything all right.'" He did die, 48 hours after that interview without a will; and, whatever may be the ultimate issue of the contest made by "the others" over William A. Thomas' large estate, the event will fully verify the other branch of Mr. Watkins' warning prediction. Mrs. Sarah Phillips, a neighbor who lived the length of two city squares and for twenty-one or twenty-two years near Mr. Thomas, and who had been employed by him to teach his daughter Bettie, 18 L. R. A.

and who says that she saw a great deal of both of them, often and intimately, says: "I never heard him refer to his relations but once. He said that he had lately gotten a letter from one of them; that he knew from the style it was written in, what he wanted, and that was money; that he never answered that letter, but rather shoved it off in the wastebasket; that he (Thomas) had had to look out for himself since he was very young, and that others might do the same." Mrs. Mary F. Boyd, a near neighbor and intimate of Mr. Thomas and his family for fifteen years before his death, whose husband, as a merchant, had business and personal relations with him, says: "I heard Mr. Thomas say, conversing with my husband about the property, 'Oh, William, I have bought all my relatives off.'" Mr. Stephen B. Hughes, the most intimate and trusted friend of Mr. Thomas, says: "I have known Mr. Thomas since 1850. We lived together, in the same store, for many years, occupied the same room together, and were partners in business for about three years. And these friendly relations continued up to the time of his death." This witness, with very much other testimony equally important in its bearing upon the relations and affection existing between Mr. Thomas and his daughter Bettie, says they were "of the most affectionate nature, that of father and daughter. I have been present when Mr. Thomas was sick, and I have seen for myself. When Thomas was sick, he usually sent for me. I was, several years ago, sent for to see Mr. Thomas. I found Thomas, as I thought, quite sick, and I asked Thomas to allow me to send him a trained nurse; and he said, 'No,' that he preferred Bettie to anybody else. It was during that sickness that Thomas first told me that Bettie was his daughter. It was during that spell of sickness that Thomas told me, at his death Bettie Lewis would be amply provided for. Some three or four summers ago, when Mr. Thomas was making his arrangements to go to Saratoga, I told him that I did not think he ought to venture so far from home, as feeble as he was, without having some one to care for him that he could rely on; and he told me that he was going to take Bettie with him; that he would rely on her sooner than any one else. During his last spell of sickness Mr. Thomas frequently told me of her kindness and attention, and believed but for her he would not have lived to have gotten back from Saratoga. Mr. Thomas told me that he was very feeble; his appetite was poor; and he would rather be there with Bettie, because she knew better how to care for him than any one else. He got me to go and buy a trunk for her, and had her name marked on it." After stating that he had heard Mr. Thomas speak, more than once, of his intention to provide amply for Bettie at his death, he said: "She was the only one I ever heard him say he was going to make provision for. Thomas used to get his mail at our store; and I have heard Thomas remark, 'Here's a begging letter,' or 'Another begging letter,' and the only use his relations had for him was to get all out of him they could; but, if they expected to get what he had when he died that they would be mistaken."

Fannie Coles, who was the bedroom com-

panion of his daughter Bettie and an inmate of his home and confidence for many years previous and up to his death, says that she never knew any of his relatives to be at his house but did remember his handing to Bettie a begging letter, which he thought he had put in the wastebasket at Drewry's, but afterwards found a part of it in his pocket. She also remembered another begging letter (Exhibit A.) as to which she says: "I have heard Mr. Thomas tell Bettie about this letter, and he took it and gave it to her, and told her he had nothing to send them, and that he had given them all he expected to give them, long years ago; and she said, 'Don't be so hard on the poor thing;' and he said to her, 'Bettie if I left you alone you and I would both go to the poorhouse together, because there is no end to your giving, and I am not going to give them a cent.'"

There is in the record very much more testimony, equally strong, explicit, unimpeached, and uncontradicted, attesting the life-long, avowed and unwavering solicitude and purpose of this isolated old man to nourish tenderly while he lived, and to provide for amply at his death, his devoted and faithful daughter Bettie, the only light of his long life, and the only love which quickened the emotions of his introverted and self-centered soul. There is no particle of evidence—and none could be adduced by the appellant, aided by the direction of able, accomplished, and assiduous counsel, and prompted by the large stake of the controversy—to prove that William A. Thomas ever declared or intimated an intention to provide for any of his collateral kindred at all, much less to allow them to take and enjoy the acquisitions of his long life of industry, thrift, frugality and self-denial. But while we are asked to deny judicial credence to the clearest, the most consistent and convincing testimony that this dying and devoted father did give, with all due and legal solemnities, the larger portion—not all—of his property to his only child and darling daughter, we are deliberately invoked to infer (without the slightest evidence to warrant the deduction, and in disregard of full, incontrovertible proof to the contrary) that it was William A. Thomas' dying design to leave his beloved only child in destitution and disappointed helplessness; and to devolve, by the Statute of Distributions, his whole estate upon collateral kindred, with whom he had no intercourse, and for whom he cared nothing,—strangers, absolutely, to his heart and his home. And the only inducement urged for this illogical and unwarranted inference is the circumstance that Mr. Thomas had the portrait of B. F. Gravely, who had married Mr. Thomas' cousin; and that in a letter of condolence, dated March 2, 1882, in reply to a letter announcing the death of B. F. Gravely, he expressed kindly regard, and asked Mr. Gravely's son, "Can I do anything for the family?" The inference is that he did, then, give them aid; and to this be, doubtless, had reference when he declared (as detailed in the evidence of Stephen B. Hughes, Fannie Coles, Mrs. Boyd and sundry others) that he had given to them, long years ago, all he intended ever to give them.

We have given this unavoidably long narrative of the relations, circumstances, congruities and situation of the parties to this cause to show that the avowed and constant object of Mr. Thomas' life, labor and love was solicitude and provision for his daughter Bettie; and that there is not one *scintilla* of proof in the record that, through all the years of his life, and in all the references he ever made to his intended disposition of his property, he ever had in his heart or mind a purpose to provide particularly for any other than his cherished child, to whom he was bound by the strongest ties of nature and affection; to whom he owed the undivided obligation of a father; and whose whole tenor of life, as shown by the record in this case, from her birth to the moment of his death, was an unvarying demonstration of dutiful devotion and filial confidence and affection. During the long years of his declining health and "cold gradations of decay," there was no planning or plotting after property in her heavy heart; but reposing in child-like confidence and disinterested trust in the love of her father, Dr. McGuire says that, when repeatedly warned and advised by him (as often he had urged upon her father, on all the occasions of his critical illness), that, if he should die without a will, the law would deprive her of everything, "she always seemed rather indifferent about it, and was always more concerned about his health than his money."

The *factum* of the gift depends mainly upon the testimony of Fanny Coles, detailing the circumstances, actions, and accompanying statements of Mr. Thomas during the period of impending dissolution; and, if that testimony be credible, consistent, uncontradicted and corroborated by concomitant circumstance, it establishes, by legal and sufficient evidence, the gift, as a valid donation *mortis causa*, by William A. Thomas to the claimant, his daughter Bettie Lewis. Her testimony is very voluminous, and we will state only so much of it as is necessary to the conclusion. She was subjected to the ordeal of 433 searching questions and answers, and to a cross-examination of many days, by a powerful array of practiced, skillful, able and accomplished counsel for the contestant,—a fiery furnace of trial and a labyrinth of entanglement, through which she (nor any other human intelligence) could not have passed successfully without the panoply of conscious truth and the thread of absolute consistency. Bettie Lewis went upon the witness stand and offered to undergo the same process; but the appellant peremptorily refused to let her testify, when well he and his astute counsel knew that, if (argued and insisted now) there was a collusion of untruth and fraud between Fanny Coles and her, all that was necessary to catch and convict them was to let them both testify. On Thursday, the 8d day of January, 1889, William A. Thomas was taken seriously ill, and he died in the early part of the night of Friday,—the next day. It was during that illness that he made to his daughter Bettie the gift which is the subject of controversy in this case, and to which the chancery court of the city of Richmond, upon the evidence adduced, has solemnly adjudged she is entitled by law.

The witness Fannie Coles says: "Mr. Thom-

as called Bettie to his bedside, and said, 'Bettie, I am a very sick man, I do not know what may happen;' and he said, 'Bettie look into my pants' pocket, and bring me my keys, my penknives, my two purses, and look in the inside of my vest pocket, and bring me a package of papers tied with a red string.' She brought them to his bed to him, and he said, 'Bettie, I am going to give you these things as yours.' He gave her the keys to his top bureau drawer, and told her that in that drawer she would find two notes in a white envelope; to get these notes out of the drawer,—that they were hers. Then he opened a small black purse and took out a small package of white tissue paper. Out of this paper he took some keys, and he said, 'Bettie, here are the keys to my safe at Drewry & Co's, and to the box I have in the vault of the bank.' He says, 'At Drewry & Co's, in the safe, you will not find anything of any great value but whatever you find in that safe you can have. Now, Bettie, these keys that I now give you that belong to the box in the vault at the bank is where all my valuables are. Whatever you find in that box, you can have as yours; and, Bettie, whatever you do, don't let any one get these keys away from you on any pretense. Swing on to them as you would your life.' Then he took up his pocketbook, and gave it to her, and told her it had no great amount in the pocketbook, but that it was her's. Then he took up the package of papers that was tied with a red string, and he said, 'Bettie, in this package you will find my bank book, showing you how much I have in bank. Whatever it calls for, you can have as yours, and in this package also you will find some notes. They will be money for you; you can have them also. Bettie, I wish you to take these papers, my purses, and my knives,—I give you these knives also,—and put them in your trunk. I don't want you to put them in my bureau, but put them between your clothes, for safe-keeping; for, Bettie, you will have to take care of these things now. I have been taking care of them all these years for you.'"

As to what occurred on the afternoon of Friday, the next day, after Mr. Gilliam left, the witness further testified: "I went up stairs after seeing the gentleman (Mr. Gilliam) out, that Dr. McGuire sent up and knocked at Mr. Thomas' door. Mr. Thomas spoke, and said: 'Come in, Fannie,' and said, 'Take a seat.' I said, 'No, sir; I thank you. I don't care about sitting down.' He said, 'Fannie, take that chair there by the table.' I said, 'No, sir; I don't care about sitting down.' He said, 'Take that seat;' and I sat down. In a minute or so a servant knocked at the door, and said, 'Miss Bettie, I have everything all ready for you now.' Bettie said to him, 'Father, won't you have some lunch now? It is time you were eating something, as the doctor said you must eat all you can.' She turned to me and said, 'Fannie, go down stairs, and bring something nice up here for father's lunch.' He turned to me and said, 'Fannie, keep your seat until I tell you to go,' and he said to Bettie, 'I have something more important to do than to eat now.' Then he said to Bettie, 'Where are those things I gave you last night?' and he said, 'I hope you have got them where

I told you to put them, safe under lock and key. Bettie told him, 'Yes, sir; she had; they were safe.' And he asked, 'Where were they?' and she told him they were safe. And he told her to go and get them, and bring them to him. She turned to get them, and instead of putting them in her trunk, where he had told her the night before, she had dropped them in his bureau drawer. And he got very angry with her for putting them in his bureau drawer, and said to her, 'Look here, now, Bettie, you had better do as I tell you about these things I have given you, for your very life hangs on them, and the bread you eat.' Bettie brought the things, and laid them on the table in front of him, and he turned to her, and he said, 'Bettie, where is that white envelope with those two notes in it; get it out of the drawer, and hand that here also.' Then he asked her and said, 'Bettie, where is your trunk at?' She said, 'In my room behind the door.' He said, 'Now, Bettie, I want you to do for once in your life just as I tell you about these things.' Then he took the package of papers with the red string round, untied it, and he said, 'Bettie, I want to show these to you, and show you the importance of taking care of them.' He untied the envelope, and took out his bank book, and he says, 'Bettie, here is my bank book, which shows you exactly how much I have in bank. I give you this book, and whatever it calls for you will find in the bank, and you can have the money.' Then he laid the bank book on the table, and took the notes out of the large envelope, and he says, 'Bettie, here's some notes which will be money for you also.' Then he picked up that white envelope, and said, 'There two notes in here which will be money for you also. I give these also.' Then he laid his hands on them, and said, 'Bettie, these are yours, and you will have to take care of them.' Then he picked up a red pocketbook, and he said, 'Bettie, here's my pocketbook. You will find a little change in it. Here, take it, keep it, and take good care of it,'—and laid it with the rest of his papers. Then he picked up his little black purse, and he says, 'Bettie, what I am going to give you now is of great importance and very valuable.' And he undid this little black purse, and took out the keys, and said, 'Bettie, these keys belong to the safe at Drewry & Co's, and these which I hold in my hand,' he says, 'belong to the box which I have in the vault in the bank where all my valuables are.' He says, 'These keys open the safe at Drewry & Co's. You won't find anything of any great value in this safe, but what you find in there you can have,—it is yours.' He then handed her the keys of the safe, and says, 'Now, Bettie, these keys I now give you are where all my bonds, deeds, and valuable papers are.' He said, 'Bettie, these keys I want you to swing on to as you would your life. Don't let anybody get them away from you on any pretense. In that box, Bettie, in the vault you will find everything valuable I possess in this world. Whatever you find, Bettie, you can have,—it is yours.' Then he handed her those keys, and handed her the purse, and told her to be very careful to wrap those keys up in tissue paper as she found them. Then he gave her his penknives, and

said that he set great store by them, and told her not to give them away to anybody, and to be careful not to let anybody steal them from her. Then he turned and tied these papers all together. He took the two purses, and slipped them together between the red string, and handed them to Bettie; and I was sitting by the table, as I first told you, and he said to her, 'Bettie, I have given you everything I possessed in the world.' Then he said to me, 'Fannie, you see me give Bettie these things?' I said, 'Yes, sir.' Then he said to her, 'Bettie, you will have these things to take care of.' He said, 'Bettie, I am a sick man, and I don't know what may happen to me, and I have been taking care of these things all my life; and, Bettie, you know how careful I am about my papers and keys; now you will have to do the same.' He said, 'Now, Bettie, I want you to take this package in your room, and put it in your own trunk, raise your underclothes up, and place them between your clothes. Lock the trunk, and bring me the key here. Bettie, I want to see if your trunk key is a good one.' He took the two keys to the trunk, and looked at them, and said, 'Yes, Bettie, they will do;' and he asked her had she strapped the trunk. She told him, 'No, she locked it;' and he said to her, 'Bettie, are you crazy?' She said 'No,' that she thought locking the trunk was sufficient; and he told her it was not sufficient, and to go back and strap it up; that he had given her all that he had in the world, and that if she didn't take care of it she would wind up in the poorhouse. Then he turned to me, and asked me again, and said, 'Now, Fannie, you have seen me give Bettie everything I possess in the world.' Then he turned to me, and told me that I could go,—that he was through with me. And Bettie said to me, 'Fannie, go down stairs to the storeroom, and get a bottle of that liquid bread, and take the cork out, and bring me a glassful up here for father.' I got the liquid bread, and carried it up stairs, and handed it to Bettie. She handed it to her father. He took a sip of it, and turned to me, and said again to me, 'Fannie, you see me give Bettie everything I possess in this world, didn't you?' I said, 'Yes, sir; I did.' And he turned to me and said, 'Fannie, remember that now.' And I said, 'Yes, sir.' And he told her to take special care of the trunk keys; and, whatever she did, not to leave the trunk open, and let any one steal those things out of there that he had given her; and if she did, she would go to the poorhouse; and to keep her trunk keys on her person day and night."

After the conversation last detailed by the witness, Thomas became much worse late on Friday evening, and Dr. McGuire was again sent for. He arrived at eight o'clock that night, and left a little after eight. Thomas grew rapidly worse after the doctor left, and the witness Fannie Coles testifies "that Thomas called Bettie and said to her, 'Oh, Bettie, I am a mighty sick man,—sicker than you have any idea about;' and he says, 'Bettie, where are those things I have given you?' She says, 'In my trunk, safe.' And he says, 'Bettie, where are your trunk keys?' And she said to him, 'I have got them in my bosom, here.' And he said, 'That is right, Bettie; keep your keys on your person.' And he says, 'Bettie, make sure

of it again; I have given you everything I possess in this world.' He says, 'Fannie, you hear me give them to Bettie again, don't you?' I said, 'Yes, sir.' He says, 'Now, Fannie, remember.' And he said, 'Bettie, I am sicker than ever I was in my life.' And Bettie says, 'I shall send for the doctor.' He says, 'Oh, Bettie, I don't think he can do much good.' Then he turned to her, and he says, 'Oh, Bettie, remember, now, I have given you everything;' and he turned over and complained of a severe pain in his side, and in a few minutes he was dead."

It is vehemently charged that the testimony of Fannie Coles, as to the *factum* of the gift, is false; that it is the result of a conspiracy with Bettie Lewis to defraud the legal distributees of William A. Thomas; that no such gift as she testifies to was ever made. The charge is easily asserted; but law, logic, and a decent respect for human nature all require clear and indubitable proof to induce judicial credence to such an atrocity. Why should this witness not be believed? Why should a court of justice, in the teeth of her clear, consistent, convincing and uncontradicted testimony, gratuitously brand her as a perjured conspirator with Bettie Thomas Lewis, without a particle of evidence, of either an uncontradicted or credible witness or a circumstance, simply because William A. Thomas, a dying father, with many years' infallible knowledge of her intelligence and integrity had called upon her, with his expiring breath, to witness and attest the consummation of the life-long solicitude of his heart, and his constantly declared purpose to provide amply, at his death, for his cherished child, and in a legal method, with parental piety, shed his parting benediction and blessing on "a duteous daughter's head?" Her statements in evidence are consistent throughout; they are natural, reasonable, and most probable, in themselves; while they are corroborated by the evidence of Dr. McGuire, Stephen B. Hughes, the dying declaration of William A. Thomas himself, and by all the concomitant circumstances of the *res gestæ*. She is wholly unimpeached in any of the ways known to the law, and her character for truth is as fair as that of any other witness in the cause. She is the daughter of a wealthy farmer of Albemarle county, and her mother was a colored woman of mixed blood. She resided with her father in his house, where he employed white persons to teach her, till she was sent, at the age of thirteen years, to the normal high school in Richmond for several years, when she became a teacher in the public schools of Virginia for five years or more, until, her health failing, she became the chosen companion of Bettie Lewis in her father's house for many years previous and up to his death. She was thirty years old when she testified, and had lived in Virginia all her life; and she was subjected to a protracted and pertinacious cross-examination, which reviewed, with microscopic and relentless scrutiny, her whole life, and which disclosed no single circumstance affecting her moral character or discrediting her triple armor of truth. No material statement of fact, made by her in her testimony, is contradicted by any other witness. It is strenuously asserted that she is

contradicted by Dr. McGuire; but this is neither just nor true in fact. She says that, when she went to Dr. McGuire's office on Friday morning to let him know (as he had instructed the night before should be done) the condition of Mr. Thomas, the doctor inquired of her whether Mr. Thomas had made any will; that she told him he had not; that Mr. Thomas had given Bettie everything the night before; and that Dr. McGuire replied, "It was not worth a cent." Dr. McGuire does not remember Fannie's then telling him about Thomas' having given his property to Bettie the night before; but he says, "The conversation between Fannie and myself took place while a good many patients were waiting to see me. She may have stated it, though I am entirely unable to recall it. My memory is not very perfect about such things." The statement of Fannie Coles is positive as to what was said; while Dr. McGuire merely says he does not recall it, though he admits that, for the very sufficient reasons he gives, her statement may be true. But it is made obviously and undoubtedly true by what Dr. McGuire then immediately did and said. Soon after Fannie Coles left his office, he went to see Mr. Thomas, and he says: "Bettie told me, after I got in the house, that her father had given her the keys, his bank book, and papers, as far as I can recollect. I think she told me she had put them in the top bureau drawer. She told me he had given them to her. They were to be hers. I told her they were not worth a cent; that unless he made a will the law would give her nothing." Dr. McGuire had never conceived of a gift *mortis causa*, and therefore, in his oft-expressed solicitude for Mr. Thomas to provide for Bettie by will, he told Bettie, as he had told Fannie Coles in his office but an hour or two before, that the gift to Bettie was "not worth a cent, and that unless her father made a will the law would give her nothing."

Fannie Coles testified before Dr. McGuire did, and she is corroborated by both the language and substance of Dr. McGuire's statement; and even if this were not so, it would be Dr. McGuire's mere failure of recollection, which happens daily in judicial investigations without giving rise to a suspicion of untruthfulness in the witness. Fannie Coles' testimony in minute detail of the making of this dying gift of his property by William A. Thomas to his daughter Bettie is corroborated by Dr. McGuire's statement of what passed between him and Mr. Thomas in the chamber of death within an hour of his last breath. Dr. McGuire had in his mid-day visit to Mr. Thomas, on Friday, told him of his extreme illness, and for the last time of often-repeated admonitions to him, of the urgency and duty of his making his will to provide against his leaving his daughter penniless, and to the tender mercies of his uncared-for collateral kindred; and he asked Mr. Thomas' consent to his sending to him a lawyer to write his will. Accordingly, he had sent Mr. M. M. Gilliam out in the early afternoon of that day. Mr. Gilliam stayed only a few minutes—8 or 10—at most, and left the premises. Mr. Thomas became rapidly and alarmingly worse, and Dr. McGuire was summoned, and arrived upon the scene at about 8 o'clock that night, and left a

few minutes thereafter, leaving directions as to what was to be done for Mr. Thomas that night. He states: "After that was finished, I said to him, 'Has Mr. Gilliam been here?' 'Yes,' he answered, 'that's all right, doctor,' with a waive of his hand, as if the matter was settled, and looked to me as if he expected me to approve of what he had said. I said to him, 'I am glad you have done it. You have only done justice.' He then said, 'You will be very well satisfied, or perfectly satisfied, with what I have done.'" What had this dying, devoted father "done," to repair his failure to convey the valuable city lots to Dr. McGuire as trustee for his daughter, and to build costly houses thereon, and to provide for her by will, when, with his expiring breath, he calmly and coolly assures Dr. McGuire's iterated, and over and over again reiterated, anxiety about provision for his daughter Bettie,—"That's all right, doctor. You will be very well satisfied, or perfectly satisfied, with what I have done." He meant, and could only mean, that he "had done" that ample provision for his daughter that he always assured Dr. McGuire he intended to make,—not by will, but by giving and delivering to her, on his deathbed, the bulk of his personal property, which was just as effectual, and just as legal, as a will.

It is argued that Mr. Thomas did not make the gift *mortis causa* of his property to his child Bettie, as distinctly and incontrovertibly proved, because of his oft and emphatic statement of intention to provide for her by will; and time and time again, it is argued that, in the eight or ten minutes of Mr. Gilliam's presence, with him alone, in the death chamber, only a brief time on Friday afternoon before he expired, he made an appointment with Mr. Gilliam to go to Mr. Gilliam's office the next day to have his will written. Aside from the utter improbability, not to say impossibility, of an enfeebled and dying old man, in the country, beyond the limits of the city of Richmond, making an engagement at 4 o'clock P. M. to arise from what proved to be his deathbed early that night, and to come into the city and to a lawyer's office the next day, there is no evidence in the record of any such purpose or possibility. What passed between Mr. Thomas and Mr. Gilliam, in those eight or ten minutes, we can never judicially know. Thomas is dead; and Mr. Gilliam, one of the counsel for appellant, has declined to testify in this case. The appellant, by his cross-examination, elicited from Dr. McGuire: "I think Mr. Gilliam told me a short time afterwards that Mr. Thomas, in his interview with him, said there were some papers that he wanted to get hold of, then out of reach, and that he had postponed the making of his will until the next day. I think he had an appointment with Mr. Gilliam for the next day. I think Mr. Gilliam said this." Both this question and answer were objected to by the plaintiffs as illegal. Mr. Gilliam's attitude, of the Sphinx, cannot be operated, as hearsay evidence in this case, by any *Cedipus*, however respectable; and, howsoever important or interesting Mr. Gilliam's pregnancy of what occurred in that brief interview with the dying man may be, he cannot be delivered by the process of obstetrics, unknown to the science of the law. If, too, the

field of conjecture be open, it is the most reasonable supposition that if Mr. Thomas did, in fact, want his will written the next day, it was only for the purpose of devising to his daughter, in addition to the personal property he had given her, his valuable real estate, which he knew could not be given except by deed or will. While no witness testifies that Thomas ever said that he intended to give his whole estate to his daughter, yet he frequently declared his purpose to provide for her liberally, and no one ever heard him say that he intended to give anything to any one else; and the plain and positive proof is that he did not intend (but emphatically asserted to the contrary) that his collateral kindred should have any part of "what he had at his death." To whom, then, but his daughter, must he have intended his property to go at his death? If he had left her his whole estate by a will, instead of the larger part, only, by *donatio mortis causa*, all just-minded persons would have said, as Dr. McGuire's last utterance to him, "You have only done justice."

Mr. Stephen B. Hughes testifies: "I was at Thomas' house the night of his death. I asked Bettie Lewis where Mr. Thomas' keys were. She said that she had them; that her father had given them to her, and told her to lock them up; that they were hers, and not to give them to anybody. I heard Fannie Coles say that she was present when Mr. Thomas gave Bettie Lewis the keys, and told her to lock them up and not to give them to anybody,—that they were hers (Bettie Lewis', I mean), and took me into the back chamber, and showed me the trunk that they were locked up in." And this witness says that this fact, together with what Mr. Thomas had previously told him were his intentions towards Bettie, were his reasons for offering to deliver to Bettie the duplicate set of keys which he held. When Bettie Lewis told Dr. McGuire, as she unquestionably did tell him, on Friday, before he had seen Mr. Thomas, and just as he was about to enter Mr. Thomas' room, that her father had made the gift to her, she might reasonably have known that he would mention it to her father, as he was urging him to make a will; and it is impossible to believe, without contradicting all human experience, that she would ever have made this statement to Dr. McGuire, at the time and under the circumstances, if it had been false and fabricated, as alleged. Those declarations of Bettie Lewis and Fannie Coles, as well as the declaration of Bettie Lewis to Mr. Hughes, are competent evidence, on both of two grounds,—as part of the *res gesta*, and as the declaration of a party in possession, and to rebut and repel the inference sought to be drawn from the testimony of the witness for the appellants, Watkins, as to the silence of Bettie Lewis in respect to her claim, in her interview with him on Monday night next after Thomas died. It is insisted that her silence on that occasion as to any gift made to her by her father was equivalent to an admission that none had been made; that she had no claim, and pretended to none. Shall it be, in a court of justice, that she may not repel this inference by the testimony of Dr. McGuire and Stephen B. Hughes that she had, to them, on prior occasions, asserted her claim? If the silence of

Bettie Lewis as to the gift, in her conversation with Watkins on Monday night, is a circumstance prejudicial to her claim, what is the significance of the assertion of her claim on Friday night before—the night that Thomas died—to Mr. Hughes, and to Dr. McGuire on Friday morning, while Mr. Thomas was yet living? What she said to Mr. Hughes was only in reply to his direct inquiry about the keys; and Watkins did not in that conversation, on Monday night, ask her anything about the keys; and she did not make any statement to Watkins then about the gift, because (it may have been) of intuitive distrust, or because Dr. McGuire had told her, as he had told Fannie Coles, that the gift "was not worth a cent." Dr. McGuire as before stated, had never heard of such a thing, in law, as a gift *mortis causa*; and she relying on Dr. McGuire's opinion, and not then having consulted any lawyer about the matter, there was no occasion for her to mention the gift in that conversation with Watkins.

Mr. Thomas was buried on Sunday. On the night of Monday, the next day, Watkins called to see Bettie, and he says that she did not then say to him that her father had given her his money, his bank book, or other securities, or the key to his box in the bank or his safe at Drewry & Co's, and that she did then say, "as there was no will, she supposed that all she would have was the property held by me as trustee, and that she wished I would see Mr. Gilliam in her behalf." This statement, if true, has already been explained by what Dr. McGuire and others had so impressively told Bettie Lewis would be her condition if her father died without a will; but is it not manifestly impossible for Bettie Lewis to have affirmed positively, as a fact in her knowledge, on Monday night, that Mr. Thomas had left "no will, and she knew it," when then there had been no opening or examination of Mr. Thomas' papers or places of safe deposit? Dr. McGuire says: "Bettie Lewis certainly did not know that before the old man's death; for she and Fannie both told me that they didn't know whether the old man had made a will or not, when Mr. Gilliam was there."

Bettie Lewis has been prepotently denied the privilege of testifying in this case, notwithstanding the great concern she has at stake, and simple justice demands that the statements of this witness, Watkins, for the appellant, should be tested by all the touchstones of truth,—probability and consistency, which are the fixed standards of evidence. Out of the mouth of this witness himself the records show that he involves himself in flat and flagrant self contradictions; but, first, his attitude and animus in the case are manifested by his interview with Bettie Lewis on Thursday night, next following. He says: "I told Bettie Lewis that I had been to see Mr. Gilliam for her, and stated the case to him the best I could; and he said it was impossible to make a case of it, and that he was sorry he could not do something for her. She said it made no difference, that she had employed other counsel, viz., Judge Waddill, Judge Christian, and Edgar Allen. She then said she was very much obliged to me for seeing Mr. Gilliam for her. I said to her, I had nothing but her interest at stake, and that I

would be glad to know exactly what Mr. Thomas said to her in his last moments. Fannie Coles, who was sitting near by, said: 'Bettie, Judge Christian told you not to talk to any one on the subject.' I said, 'If such are your instructions, I certainly don't want to hear anything about it.'" By this, Mr. Watkins' own version, it appears that, after Bettie Lewis had told him she had confided her case to the counsel of her choice he, adroitly and artfully prefacing his question with the professing of his disinterested solitude for her interest at stake, asked her to tell him "exactly what Mr. Thomas said to her in his last moments." The object of this attempt is obvious enough; but by the significance of Mr. Watkins' attitude in this case, as disclosed by the record, it is made perspicuously plain. Fannie Coles' account of this interview, in response to the 287th cross-question, shows that Mr. Watkins used importunity and expostulation in his endeavor to induce Bettie Lewis to let him "know exactly what Mr. Thomas said to her in his last moments," and that it was not until he had been repeatedly denied and thwarted in his attempt that he said, (if indeed, he said it at all,) "If such are your instructions, I certainly don't want to hear anything about it." Fannie Coles says: "Mr. Watkins came out there one night, and asked Bettie about her father giving her the keys. Her reply was to him: 'Mr. Watkins, I do not care to talk on that subject at all.' Mr. Watkins turned to me, and said: 'Fannie, don't you think Bettie ought to tell me all about the keys, for I am just the same to her as her father?' I said: 'Mr. Watkins, I don't know anything about that. She has her lawyers, and she ought to do as they told her to do.' And Mr. Watkins said: 'Now, Fannie, you know there is nothing in the world that I would not do for Bettie.' I said: 'You and Bettie can suit yourselves about the matter. I have no more to say.' Mr. Watkins again asked her. She said: 'Mr. Watkins, I do not care to talk on that subject to-night.' And I remember now, as you mention the subject, that Mr. Watkins said to her: 'Bettie, I only came out here to-night to find out all about those keys.'" The record shows that this witness, who professed that he had nothing but Bettie Lewis' interest in view, and who had promised Mr. Thomas (as he says) on the 16th day of February, 1878, "I will do the very best for her as long as I live," and who undertook to see Mr. Gilliam for the purpose of stating "her case" to him, and of seeing whether he "could make a case of it," was, a day or two after, if not at the very time, he was inviting Bettie Lewis' confidence on the ground of his fatherly interest in and for her, actually conferring with Mr. Thomas' next of kin, and entertaining a proposition to be appointed one of the curators, which only failed because Mr. Pace (Page) objected to going his security, and that, although he averred his intimate knowledge of Mr. Thomas' affairs, yet he refused to tell what he knew when requested so to do by Bettie Lewis' counsel. And this witness, (except a Mr. Gravely, who knows nothing) is the only witness who has been found to defeat the fully attested claim of Bettie Lewis to her father's bounty. He fixes Monday night, next after Mr. Thomas'

death, as the date he was out at Mr. Thomas' house, by the fact that he went there to see an insurance policy; and he was certain he saw the policy there that night, and he swears that he is certain that he saw Clay Thomas there that same evening. Yet he swears that it was on Thursday night that he went to see, and did see and examine, the policy, and that it was on Thursday night that he first saw Clay Thomas there. This is the unenviable attitude of this, the only witness to support the contest of Mr. Thomas' collateral kindred, and to defeat his dying disposition of the bulk of his personal property.

The testimony and the circumstances relied on by the appellant to show that no such gift was made by Mr. Thomas as sworn to by Fannie Coles, and attested by corroborating facts, do not, we think, furnish a sufficient basis for even reasonable conjecture; much less to assure the guarded discretion of a court of justice. The circumstance that there is but one direct witness to the gift, competent to testify, (the appellant declining to allow the donee as a witness when offered,) does not affect the validity of the gift. One witness, if credible, is sufficient. The law does not require more than one; and especially, as in this case, when that one is not only unimpeached, but corroborated. Nor does the magnitude of the gift affect its validity. It may extend to the whole of the donor's personal estate. The law fixes no limit. In the case of *Duffield v. Elwes*, 1 Bligh, N. S. 497, the gift *causa mortis* was of the value of \$165,000. In *Hatch v. Atkinson*, 56 Me. 327, 96 Am. Dec. 464; the court says: "The common law does not require the gift to be executed in the presence of any stated number of witnesses; nor does it limit the amount of the property that may thus be disposed of." *Ward v. Turner*, 1 White & T. Lead. Cas. Eq. pt. 2, p. 1251, note; 2 Schouler, Pers. Prop. 132-136.

The *factum* of the gift in this case being clearly and conclusively proved, as we think it indisputably has been, it only remains to state the law, and apply it to the facts proved. They show all the essential attributes or constituent elements of a *donatio mortis causa*, as defined by the law and established by the course of adjudication. The gift was made *in periculo mortis*, under the apprehension of death as imminent; and it was of personal property, such as, under the law, may be the subject of a gift *mortis causa*. Possession of delivery was made at the time of the gift; and the donor died of that illness in a few hours after the making of the gift. Thus the gift, inchoate, conditional, and defeasible when made, became absolute at the donor's death. Delivery is essential. It may be either actual, by manual tradition of the subject of the gift, or constructive, by delivery of the means of obtaining possession. Constructive delivery is always sufficient when actual, manual delivery is either impracticable or inconvenient. The contents of a warehouse, trunk, box, or other depository may be sufficiently delivered by delivery of the key of the receptacle. *Jones v. Selby*, Prec. in Ch. 300; *Ward v. Turner*, 2 Ves. Sr. 431; 1 White & T. Lead. Cas. Eq. 1205; *Jones v. Brown*, 34 N. H. 445; *Cooper v. Burr*, 45 Barb. 10; *Penfield*

v. *Thayer*, 2 E. D. Smith, 805; *Westerlo v. Dewitt*, 86 N. Y. 841, 98 Am. Dec. 517; *Ellis v. Secor*, 81 Mich. 185, 18 Am. Rep. 178; *Hillebrand v. Brewer*, 6 Tex. 45, 55 Am. Dec. 757; *Elam v. Keen*, 4 Leigh, 838, 26 Am. Dec. 322; *Stephenson v. King*, 81 Ky. 425, 50 Am. Rep. 178; *Lee v. Boak*, 11 Gratt. 182.

Many cases were cited by the appellant. In some of them it did not appear that there was any intention to give, while in others the delivery of possession was not complete; the donor intentionally retaining control or dominion. In the cases of *Miller v. Jeffress*, 4 Gratt. 472; *Lewis v. Mason*, 84 Va. 781; *Yancey v. Field*, 85 Va. 756; *Rowe v. Marchant*, 86 Va. 177,—there was no delivery whatever, either actual or constructive. The delivery of the keys to Bettie Lewis, with words of gift, by her father upon his deathbed, invested her with the same means of obtaining possession that Thomas had, and made her the owner, with title defeasible only by recovery or revocation of the donor, or by a deficiency of assets to pay creditors; and the mere existence in Stephen B. Hughes' hands of a duplicate set of keys, for precaution against loss or accident, which he had no right or authority to use, did not impair the validity of the gift which he did make to his daughter in his last moments, in the most unqualified manner; and being thus invested with lawful ownership, the law, in case of refusal by the officers of the bank, would open the doors to her. It is contended that the gift was testamentary, because of the words in the affidavits of Bettie Lewis and Fannie Coles,—“were hers in case of his death;” “to be hers in case of his death.” The affidavits were prepared by counsel and certified by the notary as a predication for the appointment of receivers, and they were not intended, and could not be regarded, as evidence; and they do not purport to give the language of the affiants, nor to state the language and actions, in detail, of Mr. Thomas in making the gift. But even if Mr. Thomas had used the very words, “to be hers in case of his death,” it would have been but expressing in terms the very definition, substance, and form of a gift *mortis causa*, as given by all the law-writers and adjudged cases,—that it is conditional, defeasible, not to be absolute and irrevocable unless and until the death of the donor from the impending peril, under the apprehension of which the gift was made. Bouvier, Law Dict. “*Donatio mortis causa*,” 1 Abbott, Law Dict. 402; 2 Jacobs, Law Dict. 807; 3 Pom. Eq. Jur. § 1146; 2 Schouler, Pers. Prop. 2d ed. chap. 5, § 185; *Parish v. Stone*, 14 Pick. 198, 25 Am. Dec. 878; *Grover v. Grover*, 24 Pick. 261, 35 Am. Dec. 319; *Gano v. Flak*, 43 Ohio St. 462, 54 Am. Rep. 819; *Taylor v. Henry*, 48 Md. 550, 80 Am. Rep. 486.

The cases in which gifts made in similar and identical language by dying donors have been held to be valid donations *mortis causa* are numerous; the principle being that the expression, “In case of my death it is yours,” or like words, do not of themselves make a testamentary disposition, but merely express the condition which the law annexes to every donation *mortis causa*. *Snellgrove v. Baily*, 3 Atk. 214; English notes to *Ward v. Turner*, 1 White & T. Lead. Cas. Eq. 1222; *Ashbrook v.*

Ryon, 3 Bush, 228, 93 Am. Dec. 481; *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 318.

In the case of *Sterling v. Wilkinson*, 83 Va. 791, the gift was made more than three years before the donor died, and was not made in view of death impending; and the donor actually did retain and exercise control over the subject of the gift by disposing of so many of the bonds as were necessary to indemnify his indorsers. In the case of *Basket v. Hassell*, 107 U. S. 602, 27 L. ed. 500, the decision turned alone on the construction and legal effect of the indorsement upon the certificate by the donor: “Pay to Martin Basket; . . . no one else; then not until my death.” This was held to be a testamentary disposition; but in the opinion of the court, Mr. Justice Matthews says: “The certificate was payable on demand; and it is unquestionable that a delivery of it to the donee with an indorsement in blank, or a special indorsement to the donee, or without indorsement, would have transferred the whole title and interest of the donor in the fund represented by it, and might have been valid as a *donatio mortis causa*.”

It is contended that the gift by Thomas, in this case, was invalid because it comprised the bulk of his estate. The *jus disponendi* is the essential value and element of property, and the exercise of that right is commended in the beatitude, “It is more blessed to give than to receive.” By the law of Virginia a person may make a dying disposition of all of his personal property, *donatio mortis causa*; and there is no limit as to the extent of the gift,—whatever of the whole or of the part,—*inter vivos* or *donatio mortis causa*. Such limitation can only be by express legislation, and the courts are invested with no such function. The Roman or civil law of *donationes mortis causa* did recognize the limitation or restriction; but the common law does not limit the amount, absolute or comparative, of the personal estate which may thus be disposed of. *Michener v. Dale*, 23 Pa. 59; *Seabright v. Seabright*, 28 W. Va. 481; *Hatch v. Atkinson*, 56 Me. 327, 96 Am. Dec. 464; *White & T. Lead. Cas. Eq. pt. 2, p. 1251*; 2 Schouler, Pers. Prop. 182-186.

It is contended that the gift in this case comes within the operation of section 2414 of the Code of Virginia; and as the donor and donee resided together at the time of the gift, possession by the donee at the common place of residence was not sufficient, and for that reason the gift must fail. The section is: “No gift of any goods or chattels shall be valid unless by deed or will, or unless actual possession shall have come to and remained with the donee, or some person claiming under him. If the donor and donee reside together at the time of the gift, possession at the place of their residence shall not be a sufficient possession, within the meaning of this section.” In the construction of statutes the general rule is that the words used in the statute are to be construed according to their natural and ordinary, popular and accepted, use and meaning, unless it plainly appear that it was intended by the Legislature to give to them a different, special, and extraordinary meaning. All the law-writers use the simple term “gift,” when used without qualification,

to express the "ordinary gift" or "simple gift" which transfers an absolute and irrevocable title to the donee, as contradistinguished from the extraordinary and technical gift *mortis causa*, which is made under the apprehension of impending death, and transfers only a conditional, defeasible, and revocable interest. The peculiar gift *mortis causa* is always designated by its special, technical name; and it is never understood or intended to be embraced or expressed by the term "gift," merely. A gift *mortis causa* is a very different thing from a "gift," in many essential particulars. 2 Kent, Com. lecture 88; 2 Schouler, Pers. Prop. 2d ed. § 64. The policy of the section (2414) originated in 1757, and again in 1758 and in 1787, in the Revised Code of 1819, in the Code of 1849 and in the Code of 1887; and in none of these enactments is the special, peculiar, and distinctive technical descriptive phrase, "gifts *mortis causa*," to be found. The mischief intended to be guarded against in the policy of the statute was as to gifts *inter vivos*; and until 1849 it was applicable only to gifts of slaves. Then it was made to embrace all "goods and chattels;" but it would violate both reason and analogy to hold that in its new, any more than in its ancient, form, it would embrace gifts *mortis causa*. It is an established rule of construction that the existing law is not intended to be changed unless such intention plainly appear; and the inference is irresistible that the Legislature did not intend to abrogate the common law of *donatio mortis causa*, without having expressly, and by proper descriptive legal language, said so. *Paramore v. Taylor*, 11 Gratt. 242, 243; *Wenonah S. B. Owners v. Bragdon*, 21 Gratt. 695; *Durham v. Dunk'y*, 6 Rand. (Va.) 189. The disposition of personal property by *donatio mortis causa* has been a principle and practice of the common law, both in England and in the states of this Union, for centuries past; and although, since the day of Lord Hardwicke, there have been extrajudicial utterances in deprecation of it, it is to-day a fixed principle of enlightened jurisprudence in all civilized countries. It is the imperative function of the courts to interpret and operate the law as it is, not as they may think it ought to be.

In the able and elaborate opinion of Judge Leake, filed with the record in this case, he decided (saying "but certainly not without doubts," "the question to my mind is a very doubtful one") that the gift by Mr. Thomas of his bank book, showing the amount of his deposits in the Planters' National Bank, was ineffectual in law as a *donatio mortis causa* of the money to his credit in the said bank; and he decreed accordingly. In this, I am of the opinion the decree under review is erroneous, and that it should be, under the rule, in this particular, corrected in favor of the appellees, and in all other respects affirmed, but the majority of the court think the decree is wholly right, and that it must be affirmed as it is. Every species of personal property—in its largest sense—capable of delivery, actual or constructive, may be the subject of a valid gift *mortis causa*, including money, bank notes, stocks, bonds, notes, due bills, certificates of deposit, and any other written evidence of debt. *Lee v. Book*, 11 Gratt. 182, and cases there

cited; *Elam v. Keen*, 4 Leigh, 838, 26 Am. Dec. 822; 1 White & T. Lead. Cas. Eq. 1205; *Duffield v. Elwes*, 1 Bligh, N. S. 497; *Grover v. Grover*, 24 Pick. 265, 85 Am. Dec. 819. In the case of *Coleman v. Parker*, 114 Mass. 83, it is said: "This term 'delivery' is not to be taken in such a narrow sense as to import that the chattel or property is to go literally into the hands of the recipient, and to be carried away. There are many articles which might be made the subjects of a donation *mortis causa*, in which a manual delivery of that kind might be inconvenient or impracticable. We have no doubt that a trunk, with its contents, might be effectually given and delivered in such a case by a delivery of the key." In the case of *Cooper v. Burr*, 45 Barb. 9, it is said: "The situation, relation, and circumstances of the parties, and of the subject of the gift, may be taken into consideration in determining the intent to give, and the fact as to delivery. A total exclusion of the power or means of resuming possession by the donor is not necessary." In *Elam v. Keen*, 4 Leigh, 835, 26 Am. Dec. 822, Judge Carr said: "There are many things of which actual, manual tradition cannot be made, either from their nature or their situation at the time. It is not the intention of the law to take from the owner the power of giving these. It merely requires that he shall do what under the circumstances will in reason be considered equivalent to an actual delivery." In *Hatch v. Atkinson*, 56 Me. 824, 96 Am. Dec. 464, the court said that delivery must be as complete "as the nature of the property would admit of." See *Wing v. Merchant*, 57 Me. 883; *Dole v. Lincoln*, 81 Me. 422; *Hillebrand v. Brewer*, 6 Tex. 45, 55 Am. Dec. 757; *Noble v. Smith*, 2 Johns. 52, 8 Am. Dec. 899; *Jones v. Brown*, 34 N. H. 445; *Marsh v. Fuller*, 18 N. H. 360. In *Stephenson v. King*, 81 Ky. 425, 50 Am. Rep. 173, the court, referring to the case of *Aslibrook v. Ryon*, as to the bank book, says: "What evidence the pass-book contains of the deposit in that case does not appear. If an ordinary pass-book, (and it must be so inferred,) it was an acknowledgment by the bank that the donor had to his credit in the bank that much money; and when actually delivered, we cannot see why it did not pass the right." Suppose Mr. Thomas, instead of having certificates of deposits made and entered by the bank in his bank book, had taken a separate receipt or certificate of deposit for each deposit at the time it was made. Would not the delivery, with words of gift of each one, of such receipts or certificates of deposit have been as effectual in law to pass the title to his money in bank as the delivery of the letter in *Stephenson v. King*, or the attorney's receipt for claims in his hands for collection in *Elam v. Keen*? Mr. Thomas' bank book had just been written up or balanced by the bank and it showed on its face the balance due to him by the bank. It was the bank's acknowledgment of indebtedness to Thomas, and the only voucher or evidence which he had, upon which the law implies a promise to pay; and it was transferable by delivery without writing, like any other chose in action. It passed the equitable title, and that is sufficient. The "beneficial owner" of any chose in action may sue upon it in his own

name. Va. Code 1887, § 2860. There is a difference between a savings bank pass-book and an ordinary bank book, in that by a special method and agreement, on the mere presentation of the savings bank pass-book, the bank will pay, but this is the mere special mode of dealing agreed on by the parties in that case; and, though the bank would have the right to require evidence to satisfy it that Mr. Thomas had duly delivered, with words of gift sufficient in law to transfer his title to his money in the bank to his donee, Bettie Lewis, his daughter, yet that would not, any more than in the case of the keys, affect her title and right to demand the money, which the law would enforce.

This case was first argued before Chancellor Fitzhugh, and submitted for his decision; but he died in a few days, leaving nothing to show what conclusion he would have reached upon the facts. He had (as it appears by what is stated in the petition for appeal) noted down a few platitudes or propositions of law, which (no more than if he had copied the Decalogue) do not afford the slightest clue as to what he would have decreed upon the facts under the law.

We have given to this case elaborate consideration and the closest scrutiny; and upon the law and the facts, our judgment is to affirm the decree of the Chancery Court of the city of Richmond.

Lewis, P.:

I concur in the opinion that the decree of the chancery court ought to be affirmed, and add a few words to what has been said by the court, only because of the reliance for the appellant upon the case of *Yancey v. Field*, 85 Va. 756. It has been asserted that that was a case of a gift *mortis causa*, which this court refused to sustain, because of its want of compliance with the statute, now carried into section 2414 of the Code. In other words, that this court, in that case, construed that statute as applying to gifts *mortis causa*. There is no warrant whatever of such a proposition. In the first place, it was not claimed that the alleged gift in that case was a gift of that description. On the contrary, it was distinctly claimed as a gift *inter vivos*. The petition filed in the lower court, after stating that Judge Field died indebted to Yancey, further averred as follows: "Your petitioners further represent that the said James P. Yancey, a short time before his death, gave to your petitioner, Edmonia, the indebtedness to him by the said R. H. Field, she, the said Edmonia, being a niece of the said Jas. P. Yancey; that the bonds evidencing said indebtedness could not be delivered, as they had been filed with the commissioner in the said suit of *Yancey v. Field*. And your petitioners insist that they are, by virtue of the said gift, entitled to the said indebtedness, and to have the said debts indorsed for their benefit." The same counsel who prepared this petition argued the case for the appellees in this court, and both in his oral and printed arguments he insisted that the alleged gift was valid as a completed gift *inter vivos*. In his brief, filed with the record, he said: "The testimony proves not only the gift, but that it was a completed gift *inter vivos*."

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And, again: "In the case at bar there is no claim, by virtue of a nuncupative will or other testamentary act. From the very first the gift was claimed as an act *inter vivos*." It will thus be seen that the case was presented to the lower court and to this court as a gift *inter vivos* and as such it was dealt with. As the appellees themselves admitted that there had been no delivery of the subject-matter, that, as the court said, was decisive of the case, whether viewed as an intended gift *inter vivos* or *mortis causa*; and this was all that was necessary to the decision of the case. Reference, however, was made in the opinion to some of the general principles of the common law relating to gifts, and to the difference between the two classes of gifts, attention being especially called to the necessity of a delivery in all cases. And as illustrative merely, or rather to call attention to the fact that the common-law requirement of delivery in case of a verbal gift had been incorporated in our statute law, the statute was referred to. The court, however, did not say the statute was intended to apply to gifts *mortis causa*, for no such question, as we have seen, was before the court; and, therefore, the expression of any opinion on that subject would have been purely *obiter*. This, indeed, is so obvious from the opinion itself, that I ought, perhaps, to beg pardon for adding anything to what has been said in the opinion of the court in this case.

Lacy, J., dissenting:

As appears from the opinion of the majority of the court, this is a suit to enforce against the administrator of a dead man's estate an alleged gift of the whole estate, amounting to over \$200,000, which alleged gift is claimed to have been made by the decedent in disregard of all of his heirs and distributees,—his next of kin,—a few minutes before his death, to a colored woman living in his house, who claims to be the result of illicit intercourse with a colored slave woman. It also appears from the opinion of the majority that the alleged gift consisted of goods and chattels in the house and goods and chattels out of the house, where the alleged donor and donee resided together. The claim is that the goods and chattels in question were, as to certain keys, pocketbook, and two pocket-knives, actually delivered into the donee's possession. That money, etc., in a bank vault, and money, etc., in an iron safe, and money on deposit in bank subject to check, were symbolically delivered by the delivery of the keys and the pass-book of the bank, in which deposits were entered. It is not pretended that there was any further delivery than such as I have mentioned, either as to the thing delivered or the manner of its delivery. So that, if everything was done in manner and form as this woman Lewis alleges, then the gift was made by the donor to the donee, at their common residence, with delivery of possession of keys as to the great bulk of the property given, and not actual delivery. Let us consider first whether the goods and chattels in question could pass from the donor to the donee in this way, and become the property of the donee. Our statute laws provide general rules as to the creation and limitation of estates, and their

qualities, and the manner of making valid gifts is regulated by the law from the earliest times of which we have any account. The law has, to a greater or less degree, thrown some protection around the estates of dying men, and provided safeguards against the perjuries and frauds employed by the designing to obtain the possession of the estates of the deceased person. Of those I will speak briefly hereafter.

It is profitable to consider first what are the regulations to be found in the Virginia law, prescribing general rules as to the creation of estates. It is provided by law in this state that "no gift of any goods and chattels shall be valid unless by deed or will, or unless actual possession shall have come to and remained with the donee or some person claiming under him. If the donor and donee reside together at the time of the gift, possession at the place of their residence shall not be sufficient possession within the meaning of this section." Va. Code, § 2414, chap. 107, p. 591. It must be admitted—it cannot be denied—that Thomas and Bettie Lewis were domiciled together. It is also distinctly proved that they did reside together at the time of the alleged gift. It is equally true that no actual possession ever came to Bettie Lewis of any important part of the large estate said to have been given to her, and that there was no possession of any sort except such as may be construed to pass with the key to the bank vault box and iron safe, of which another person had a duplicate key, and with the pass-book of the bank. The pocketknives and some notes were actually delivered into Bettie Lewis' hand, but even this was at their common domicile, where they resided together. This statute is conclusive of the case, unless in some way it can be avoided. This is attempted to be done by the assertion that this statute does not apply to this kind of gift; that this statute was made to protect creditors, and to prevent fraudulent acts, by way of gifts falsely alleged to be made, from defrauding creditors of their just debts, and that a gift of this sort does not affect creditors. But there is no language of this sort to be found in this section nor in this entire chapter. It does not treat of the rights of creditors as against the claims of fraudulent alienees. Chapter 109 of the Code treats "of acts valid between the parties, but void as to creditors and purchasers." This chapter, as its title declares, prescribes general rules as to the creation and termination of estates and their qualities. Section 2414 enacts a general rule as to all gifts, and prescribes what shall be necessary in order to create an estate in goods and chattels by a valid gift, and declares all gifts not so made invalid. No gift of any goods or chattels shall be valid unless, etc. This is an alleged gift, alleged to have been made by a donor to a donee, when donor and donee resided together at the time of the alleged gift. The word "gift" is not limited, but is used in its full signification. If this term does not include this kind of gift, what word could be used to describe it? If the statute was intended to apply to gifts *inter vivos* only, why is the word "will" in the statute? Gifts *inter vivos* are not given by will; a will takes effect at the death of the testator. A gift *inter vivos* is not—cannot be—bestowed by will. It may

be by deed or by actual and complete delivery of possession, so as to cut off and determine the possession, control, and dominion of the former owner; otherwise it is incomplete, and, being without consideration, cannot be enforced. A will is the appropriate method to give gifts to take effect after the death of the testator or donor; bequests and legacies are allowed and enforced against the executor, or persons entitled without a will. If a will is not made, then there is allowed, by the law, a gift, which has certain characteristics and attributes appropriately signified by the words "*mortis causa*." Among other things, it is revocable by the recovery of the sick man from the impending peril which threatened him. But it is well settled that, like all other gifts, and as a gift, it must be completely given, and actual possession consummated, so as to cut off the possession, control, and dominion of the donor; interrupt his possession just as completely as is necessary in all gifts. In other words, the same sort of delivery of possession is necessary in the one case as in the other. In this respect there is no difference between gifts, whether *inter vivos* or *mortis causa*. And when the kind of possession is prescribed by statute, that sort must be given, or there is no gift; the attempt is abortive, and the gift is invalid. I do not see any reason in construing this statute to limit the meaning of the word "gift" to one kind of gift only; the word applies to both kinds,—the reason of the law applies, as we well know, to the one as well as to the other. The statute has never been otherwise construed, but has been often construed in this state, and always in the same way, and I will cite the cases, and there are none *per contra* until this.

There is only one other state in the Union which embodies this statute in its Code of laws,—the state of West Virginia,—and there this statute has been construed, and construed in accordance with the Virginia decisions. *Dirkeschied v. Exchange Bank*, 28 W. Va. 340. It is there considered that the principal object which the Legislature had in view in the passage of the law as it stood in the Code of 1849 was to protect the estates of decedents from the rapacity of unscrupulous attendants residing with and constantly with and constantly surrounding them, and to prevent them from appropriating to their own use the slaves or other personal property belonging to the alleged donor. And just in proportion as his personal property was valuable and of a character to be readily appropriated was it the more necessary that, when claiming as a gift, the actual possession of the property should be required to come to and remain in good faith with the alleged donee. Where the donee resides with the donor, so many opportunities of unfair dealing may be found, and so many temptations to commit perjury may exist, the Legislature determined to render the same impossible by declaring that "no gift of goods or chattels should be valid unless actual possession shall have come to and remain with the donee, or some person claiming under him. And if the donor and donee reside together at the time of the gift, possession at the place of their residence shall not be sufficient possession within the meaning of this section." The de-

livery of everything which is claimed to have been delivered in this case is invalid under this statute. The money, stocks, bonds, etc., were never delivered at all, actually or otherwise. But it is said that the keys were actually delivered, and that the stocks, bonds, etc., were given and were not at the place of the common residence of the donor and donee, and so were not affected by the statute. The answer to this is that delivery is necessary, and here there is no delivery. If the delivery of the keys symbolized the valuables, the symbolical delivery was incomplete and invalid, and, if the keys and pocketknives were not validly given, then there was no gift, for nothing else is alleged to have been given. One of the learned counsel who argued this case here by brief insists that "it would be absurd to suggest that a delivery of keys and a pocketbook as representative or symbolical of the gifts would be valid gifts of chattels; and that the chattels themselves, if delivered as the symbols were, would be invalid and ineffectual." That would defeat the object and destroy the spirit of the statute. That would make the shadow more potent than the substance. Just here let us consider what becomes of the symbol itself in such a delivery of possession, for the symbol in this case was a key, a chattel, and that was the thing delivered, if anything was, at "the place of their residence." I think it is clear that the reason as well as the letter of the law applies equally to every species of property alleged to be the subject of the gift. This section first came into our law in the Code of 1849, where sections 2418 and 2414 of the present Code were embodied in section 1 of chapter 116. And the words, "if the donor and donee reside together at the time of the gift, possession at the place of their residence shall not be sufficient possession within the meaning of this section," first then appeared in our law. The Code of 1849 was not, like its predecessors, a compilation of revised statutes, but an Act of assembly, one of the chief objects of which, as expressed in the preamble to the Act, was to arrange the subjects under appropriate titles; and the title of chapter 107 of the present Code is a copy of the title of chapter 116 of that Code; so the Legislature there declared that this section prescribed prerequisites to a valid gift, and declared that to be the object of its enactment; and the revisers have provided the same language in the preamble to the present Code, to arrange them in appropriate titles, etc. The learned lawyers who revised and codified our laws appended to this section a note referring to the decisions construing this section (most of the marginal references being to decisions found in the Code of 1849, and decided, therefore, before the enactment of the law in question). The note is as follows: "*Donatio mortis causa*. *Miller v. Jeffress*, 4 Gratt. 472; *Lee v. Boak*, 11 Gratt. 182; *Morrison v. Grubb*, 23 Gratt. 842; *Basket v. Hassell*, 107 U. S. 602, 27 L. ed. 500."

The first case referred to by the learned lawyers who composed the board of revisers as appropriate to this section, as to what is necessary to render valid a *donatio mortis causa*, is the case of *Miller v. Jeffress*, *supra*. That was a controversy over an alleged gift to the donee of bonds which the alleged donor

held against him. The court rejected the claim of the donee. In that case *Judge Allen* said: "As the witnesses examined to prove the alleged donation vary somewhat as to the precise words used by the decedent, the certificate written and signed at the time, and referred to and recognized by the witnesses when giving their testimony, can be more safely relied on as showing what did actually occur than the recollection of the witnesses after so great an interval." The certificates and the depositions vary in this case, as I will hereafter show. *Judge Allen* said further: "The words themselves import a future benefit; . . . imply not a present donation, but a future enjoyment. The words were that his friend *Jeffress* should have all the bonds of his, in his possession. Viewing the words as clearly testamentary, that they were so intended, and not as importing any present gift or parting with dominion over the thing, I am of the opinion [says *Judge Allen*] the appellee is not entitled to claim the bonds as a donation *causa mortis*." In the same case *Judge Baldwin* said, in delivering the opinion of the court: "The court is of the opinion that the appellee, *Jeffress*, has shown no right to the bonds assigned to and placed in the hands of *Jeffress & Co.* [of which firm he was partner] by *Paschal Folkes*, deceased; the subsequent parol gift to said *Jeffress* under which he claims having never been perfected by delivery, which was not the less essential to its validity because the gift was in the donor's last sickness and in contemplation of approaching death. A *donatio mortis causa* is of a mixed character, being partly testamentary and partly donative. From an indulgence to the nature of the emergency, the law dispenses with the solemnities of a testament, and for that very reason requires the essentials of a gift." I will pause here to ask, What are the essentials of a gift in this state? My answer is: They are prescribed in section 2414 of the Code, *supra*,—by deed or will, or by actual possession delivered to the donee, and, if the donor and donee reside together, possession at the place of their residence is not sufficient. *Judge Baldwin* says further: "A delivery is indispensable to the validity of a *donatio mortis causa*. It must be an actual delivery of the thing itself, as of a watch or a ring, or of the means of getting the possession and enjoyment of the thing, as of a key of a trunk or a warehouse in which the thing is deposited; or, if the thing be in action, of the instrument, by using which the chose is to be reduced into possession, as a bond or a receipt, or the like. . . . It is the naked case of an abortive nuncupative will which the disappointed legatee is now seeking to convert into a *donatio mortis causa*."

In the case of *Lee v. Boak*, 11 Gratt. 185, *Judge Moncre* said: "Whether the donation was valid or not depends upon whether there was a sufficient delivery of possession to perfect the gift. All gifts, except by will, must be attended by delivery of possession to make them valid. Until such delivery, they are inchoate and revocable; indeed, mere nullities. The donation in this case, as found by the jury, was a *donatio mortis causa*. But there is no difference, in this respect, between *donations mortis causa* and *inter vivos*. The same kind

of delivery of possession which is necessary to make good the one is necessary to make good the other." And in the case of *Morrison v. Grubb*, 28 Gratt. 350, Judge Anderson, delivering the opinion of the court, when speaking of the delivery of possession of a gift, says: "And it matters not whether it was a gift *causa mortis* or *inter vivos*." In a recent case in this court (*Yancey v. Field*, 85 Va. 756), the statute concerning gifts, which I have been considering, came up for consideration. The case was an alleged *donatio causa mortis*. The circuit court had sustained the gift, but this court, for want of compliance with the requirements of the statute (Va. Code, § 2414) as to delivery, reversed the trial court and refused to sustain the gift with reluctance, it being stated in the opinion: "This conclusion, however, has been reached not without reluctance. Had we the authority to execute the alleged gift, or, in other words, to give effect to the manifest intention of the decedent to aid this worthy lady, the court without hesitation would affirm the decree; but we have no such authority. Our province is not to make the law, but to administer it; and we must therefore decide this case according to the settled law as it is written, and not permit a hard case to make bad law." Blackstone says: "A true and proper gift is always accompanied with delivery of possession, and takes effect immediately." 2 Com. 441, citing *Ward v. Turner*, 2 Ves. Sr. 481; and, quoting from and citing *Basket v. Hassell*, 107 U. S. 602, 27 L. ed. 500, says: "Indeed, we have a statute which expressly enacts that no gift of any goods or chattels shall be valid unless by deed or will, or unless accompanied by actual possession, and that, if the donor and donee reside together, possession at their residence will not suffice." Code, § 2414. It is, however, now decided in this case that this statute, so expressly quoted, and held by the unanimous opinion of this court in *Yancey v. Field* to render a gift *mortis causa* invalid, has no application to such an alleged gift. I am of opinion that the words of the statute clearly and unequivocally apply to all gifts. "No gift . . . shall be valid unless," is equivalent to "every gift shall be invalid unless;" and, as there was no delivery of possession, actual or otherwise, claimed except at the common residence of the alleged donor and donee, this supposed gift is invalid. So the law is written. The decision here must rest upon the assertion that a gift *mortis causa* is not a gift; that is, that the word "gift" does not apply to a gift with a particular motive. The words of the statute are general, and include all gifts, and they have been so distinctly held in this court up to this case. A gift is the voluntary transfer of a thing without consideration,—a transfer of the title to property to one who receives it without paying for it.

This case was first considered in the chancery court of Richmond by the late chancellor, Edward H. Fitzhugh, who died before decree in the cause, but not before he had partially written his opinion, and such was his eminence in his profession that his opinions have upon appeal here been several times adopted by this court in full, as the best exposition of his opinion that could be made of the law of

the subject, and recorded as the opinion of the appellate court; and I have turned to his opinion to see what was his construction of the particular question upon which I think this case should be determined,—the delivery of possession set forth in the testimony. Judge Fitzhugh says, among other things: "The question in this case is whether the gift set up in the plaintiff's bill has been maintained as a valid gift *causa mortis*, under the law and the evidence, so as to confer a title to the property,—the subject of the gift,—to the donee. As was justly observed by one of the counsel in argument, the Statute of Descents and Distribution has long been held as a wise and just and natural disposition of a man's property if he chooses to die intestate. If he thinks proper to make a different disposition of his property than that prescribed by law in case of intestacy, he is at liberty to make a will. Our Statute of Wills can fully guard him against imposition in his dying hours. A man may make a gift *causa mortis*, but for obvious reasons the courts are extremely guarded and cautious in the establishment of such gifts. Every reason which the wisdom of the law deems to be necessary to establish a will applies with equal if not greater force to the establishment of a gift *causa mortis*; and because of the opening which this mode of transfer affords to fraud, the law watches it with jealousy and does not permit it, with its attendant uncertainties, to take the place of a will. It is apparent, if these remarks are sound, that the court should require the clearest proof of the donor's intention to make the gift, and of every requisite necessary to make a valid donation *causa mortis*. One of these requisites is delivery." And the learned chancellor, after quoting extensively from the case of *Yancey v. Field*, *supra*, recently decided here, says: "This, I think, is a sound exposition of the law. It conforms to the policy of the law, which watches this mode of transfer of property with so much caution and jealousy; and, moreover, it seems to be the view which our supreme court of appeals has taken of it, and which is therefore binding on this court" (chancery court of Richmond city). In view of these extracts, it cannot be doubted what his decision was to be in this case.

Mr. Minor, in his third volume, speaking of the mode of perfecting the gift of a chattel between donor and donee (referring to a separate head,—the mode of perfecting a gift of chattels as to third parties), after referring to actual delivery, or its equivalent when the thing was incapable of actual delivery, as a prerequisite to a valid gift, says: "The donor must part not only with the possession, but with the dominion of the property." Says further, at page 81: "Much embarrassment having arisen, when the donor and donee lived together (as, for example, in the case of father and child), in respect to what should be a sufficient delivery of the possession, it has been judicially enacted that 'if the donor and donee reside together at the time of the gift, possession at the place of their residence shall not be sufficient possession within the meaning of this section.'"

It was decided in this court in *Shirley v. Long*, 6 Rand. (Va.) 764, that a parol gift of a

slave to a son by his father, when they resided together, was void as between the donor and donee for want of actual possession. See also *Hunter v. Jones*, 6 Rand. (Va.) 541; *Slaughter v. Tutt*, 12 Leigh, 147; *Tutt v. Slaughter*, 5 Gratt. 334. This is a controversy as to the validity of a gift between the parties which is not valid as between them; that is, is no gift unless delivered in the mode prescribed by law.

I think this is conclusive of this case, but the learned chancellor who rendered the opinion appealed from has sustained the alleged gifts as to all except the alleged gift of the bank deposit by delivering the pass-book. As to this pass-book, I think he was right; as to all else, wrong. There was no valid gift, under the law, of anything. I do not consider it necessary to review the evidence, therefore, to sustain my view, as, admitting all that is claimed to be true, the gift was invalid for want of delivery; but I do not mean to concede that all that is testified to appears to me to be credible. It is an alleged gift of everything the donor possessed. This is the claim. Who was the donor? An infirm, sick man, advanced in years. At his bedside was the alleged donee, a colored married woman, acknowledged to be his child by the donor, no longer young. At her elbow another colored woman, which latter is the sole witness to prove the gift of this large estate, who, with much detail, recites the circumstances of the gift. No other person was present, no other witness was called in, although others were in the house. The gift is not of a trifle, or a competency merely, but of everything the donor had in the world. What are the circumstances that tended to discredit this sweeping gift of everything the donor had in the world?

First. The donor had an intimate friend who had been chosen by him (the donor) to hold certain property for the alleged donee, and to whom he had conveyed certain lots in Richmond in trust for the alleged donee, and to whom, in a long intimacy, he had often spoken concerning this woman, and to whom he had said that a large bequest to the donee in her situation would do her no good. When the trustee called, after the donor's death, the donee said Thomas had made no will. She supposed she would get nothing except what he held in trust for her. When the story of the keys, etc., was noised abroad, he called to inquire about it, and asked the donee about it, and expressed his interest in her. The single witness, who was again at her elbow, cautioned her to say nothing on the subject, alleging that this was the advice of her counsel.

Secondly. It is also shown that Thomas, the donor, was negotiating with another gentleman and had procured his consent to act as trustee,—to hold other property for the donee,—about the time of his death; so that he appears to have considered a trustee necessary to hold and protect such property as he should give her.

Thirdly. It is also shown that at the time of his death he had consulted with a lawyer about making his will, and had an engagement to attend at the lawyer's office the next day after his death, to make his will. This lawyer was spoken to by the trustee of the

donee to attend to her interest to establish this gift, or concerning it, but declined upon the ground that she had no case.

Fourthly. Although Thomas, the donor, as the evidence shows, was in the habit of talking a good deal about his property and his disposition of it, yet there is no person to whom he ever, before his gift, mentioned such an intention as giving all of his property to this woman, while Mr. Watkins, a witness, says he expressed a contrary purpose.

Fifthly. He had relatives with whom he was on good terms, and one of whom he was especially fond of, whose portrait hung over,—always over,—the mantel in the room where he slept; and a letter from him is exhibited by a relative, written by Thomas to inquire the full names of certain relatives of the deceased.

These circumstances stand not conclusively disproving the evidence of the single witness, but they do not render it any more probable. Moreover, the affidavit filed at the commencement and first assertion of the claim set up a gift testamentary in character, to be effected only after the death of the donor, (*Basket v. Hassell*, 107 U. S. 614, 27 L. ed. 500; *Sterling v. Wilkinson*, 88 Va. 791,) whereas, in her deposition, she, the single witness, leaves out all that indicates a postponement of the effectual delivery of the gift to the death of the decedent. The case alleged in her deposition is an absolute gift of everything the donor had, completely given, and the whole detail gone over more than once. If the law does not favor such gifts, (as it does not,) then, in strictness, this gift is not established by the testimony of one inconsistent witness.

I forbear comment upon the policy of the law which permits such gifts at all on the dying bed, but will refer to the remarks of Mr. Schouler in his treatise on the Law of Personal Property (vol. 2, pp. 182, 183, 184,) and the cases there cited, especially the views of Lord Eldon in *Duffield v. Elwes*, 1 Bligh, N. S. 538. In Virginia, I have heretofore thought that the character of delivery required by our statute would sufficiently protect the dying man, but, if there is no statute concerning the kind of delivery necessary to pass a dying man's estate on his deathbed by gift, then our Statute of Wills appears to be useless. This question is of no importance, so far as creditors are concerned; such gifts do not affect them or their debts; but the next of kin and distributees, near in blood or remote, are all concerned. One child against another, or one child against grandchildren, all may rest at the mercy of attendants. It opens wide the door for fraud and perjury, and I think Lord Eldon was right when he said: "Improvements in the law, or somethings which have been considered improvements, have been lately proposed; and if, among those things called 'improvements,' this donation *mortis causa* were struck out of our law altogether, it would be quite as well." "And at the present day, [says a learned author above mentioned,] when the effort to carry out the giver's intention has resulted in encouragement to a giver to leave his deliberate intention in lasting doubt, when legal consistency seems to require reluctant courts to uphold a nurse in sole attendance upon some foolish person in carrying off stock, bonds, and

promissory notes with little more ado than floor sweepings, or waste paper, utterly regardless of the claims of kindred, it is no wonder that we find the reports full of judicial regrets that the gift *causa mortis* was ever admitted to our law at all." Schouler, Pers. Prop. 184; *Wolsh v. Sexton*, 55 Barb. 251; *Tillinghast v. Wheaton*, 8 R. I. 586, 94 Am. Dec.

126. "It is far better that a gift of this kind occasionally fall, than that the rules of law be so relaxed as to encourage fraud and perjury." *Hatch v. Atkinson*, 56 Me. 824, 96 Am. Dec. 464.

I feel constrained to dissent from the opinion of the other judges for the foregoing reasons.

CONNECTICUT SUPREME COURT OF ERRORS.

Mary C. CROMPTON, Admx., etc., of George Crompton, Deceased, *Appt.*,

v.

George BEACH.

(.....Conn.....)

1. The exercise of an option by the vendor in a conditional sale to enforce payment of a note given for the purchase price defeats his right under the contract to re-take the property upon default although he is unable fully to collect the note because of the purchaser's insolvency.

2. On the passing of title under a conditional sale by the vendor's election no lien or incumbrance inures to his benefit for any unpaid portion of the purchase money.

3. There can be no contract which shall give to one party all the benefits and to the other as well as the public all the burdens of both a conditional sale and a chattel mortgage.

(April 1, 1892.)

APPEAL by plaintiff from a judgment of the Superior Court for Hartford County in favor of defendant in an action brought to recover possession of certain machinery which was alleged to be unlawfully withheld from plaintiff by defendant. *Affirmed.*

During the lifetime of George Crompton he entered into a contract with the Home Woolen Mills Company, of which the following is a copy:

"This memorandum of an agreement made this third (3d) day of March A. D. eighteen hundred and eighty-six, between George Crompton, of the city of Worcester, state of Massachusetts, of the first part, and the Home Woolen Company, Charles M. Beach, Treasurer, of Beacon Falls, County of New Haven, state of Connecticut, of the second part.

"That whereas the said George Crompton of the first part agrees to deliver to the said party of the second part, certain articles of machinery, to wit:

"Thirty (30) Broad Compton '1888' Fancy Looms (twenty-eight of which are single-beam looms, and two are double-beam looms) and fixtures thereto belonging, amounting to twelve thousand four hundred and fifty-six

dollars and sixty-nine cents, and the party of the second part agrees to give the party of the first part their promissory note, dated the average shipping date of the looms, and payable eight (8) months from its date, for \$12,456.69.

"It is hereby agreed by the said parties, that the party of the second part shall be permitted to take the said property into their possession, and the same to take to and set up in the mill occupied by them in Beacon Falls, Conn., agreeing to keep the same in good order, and also to keep the same insured for the full cost of the same, for the benefit of the party of the first part, and to hold the said machinery, as the property of the party of the first part, until the above note or renewals thereof have been fully paid, according to the tenor thereof, when the machinery above named shall be sold to, and become the property of, the party of the second part.

"And the party of the first part is hereby bound to sell and relinquish his claim to said property, upon payment of the said note or renewals thereof, and does agree to consider the same as sold and delivered, when said note or renewals thereof are paid.

"And it is further agreed, that upon default of the payment of said note, or renewals thereof, when the same shall become due, as also in default of said machinery being kept in good order, and insured as above provided, the party of the first part shall have the right at any time to resume possession of the machinery, and to enter the premises and remove the same as his own property. And if any portion of said note, or renewals thereof, shall remain unpaid, when possession shall be so taken by the party of the first part, or his authorized agent, then the amount which may have been paid shall be for the use of the said machinery while in possession of the party of the second part, and said notes shall then be canceled and given up.

"Witness the hand and seal of the parties aforesaid.

"GEO. CROMPTON, [SEAL.]

"CHAR. M. BEACH, Treasurer. [SEAL.]

"Witness: J. A. WARE to G. C., C. J. BURNELL for C. M. B., Treasurer."

In pursuance of this contract the promissory note mentioned therein was executed and subsequently renewed. Prior to the time the re-

NOTE.—For notes on the general subject of conditional sales, see *Hays v. Jordan* (Ga.) 9 L. R. A. 572; *Hineman v. Matthews* (Pa.) 10 L. R. A. 238; *Tufts v. D'Arcambal* (Mich.) 12 L. R. A. 446; *Weinstein v. Freyer* (Ala.) 12 L. R. A. 700.

For notes on election of remedies generally, see *Fowler v. Bowery Sav. Bank* (N. Y.) 4 L. R. A. 18 L. R. A.

145; *Conrow v. Little* (N. Y.) 5 L. R. A. 698; *Terry v. Munger* (N. Y.) 8 L. R. A. 216; *Crossman v. Universal Rubber Co.* (N. Y.) 18 L. R. A. 91.

For note on election of remedy in case of fraudulent purchase, see *Union Cent. L. Ins. Co. v. Scheidler* (Ind.) 15 L. R. A. 89.

newed note matured the Home Woolen Mills Company ceased to do business and when the note matured made default of payment. Suit was brought upon the note and an attachment issued. An assignment for benefit of creditors having been subsequently made the amount of the note was presented as a claim against the insolvent estate and the claim was allowed and a 25 per cent dividend paid thereon. Subsequently this action was brought to recover the machinery for which the note was given.

Further facts appear in the opinion.

Messrs. Chamberlin, White & Mills, for appellant:

Until payment of the judgment on the note given for the property the other remedy was not barred.

Drake v. Mitchell, 8 East, 251; *Lord v. Bigelow*, 124 Mass. 185; *Vanuzem v. Burr*, 151 Mass. 886.

Messrs. Robinson & Robinson, for appellee:

Appellant under the contract had the option, upon default of payment, to take possession of the looms or to sue the note for their purchase price.

See *Butler v. Hildreth*, 46 Mass. 49; *Bailey v. Hervey*, 185 Mass. 172; *Beach's Appeal*, 58 Conn. 464.

These two remedies, one of which involves a rescission the other an affirmation of the sale, are inconsistent.

If a party has the option to affirm or disaffirm a sale, he must either affirm or disaffirm it altogether.

2 Smith, Lead. Cas. 1838.

The assertion of one or two inconsistent remedies is a renunciation of the other.

Benjamin, Sales, § 489; 2 Smith, Lead. Cas. 1872, 1877 *et seq.*; *Connahan v. Thompson*, 111 Mass. 272.

The appellant elected her remedy when she brought suit, and attached property of the Home Woolen Mills Company amply sufficient to secure her claim.

See *Butler v. Hildreth*, *supra*; *Smith v. Field*, 5 T. R. 408; *Bukley v. Morgan*, 46 Conn. 898; *Terry v. Munger*, 8 L. R. A. 216, 121 N. Y. 161; *Lehman v. Van Winkle*, 92 A. 443.

The fact that she recovered only a part of her claim for the purchase price does not resurrect the remedy of repossession, which died by her own election.

See *Bailey v. Hervey*, and *Smith v. Field*, *supra*; 6 Am. & Eng. Encyclop. of Law, 250, note 3.

Is this contract of conditional sale an absolute sale with a mortgage back?

Some contracts possessing other and peculiar features have been held to be such in effect.

See *Dederick v. Wolf*, 68 Miss. 500; *Benjamin, Sales*, § 452; 8 Am. & Eng. Encyclop. of Law, 37. See *contra*, *Minneapolis Harvester Works v. Hally*, 27 Minn. 495.

A conditional sale is not a mortgage.

Bailey v. Hervey, *supra*.

Fenn, J., delivered the opinion of the court:

The present contention grows out of the same contract which was considered by the court in *Beach's Appeal*, 58 Conn. 464, and the facts therein stated are applicable to this 18 L. R. A.

case, but need not be repeated here. Under the authority of that decision the plaintiff, as administratrix of George Crompton, having secured a dividend of 25 per cent from the insolvent estate of the Home Woolen Mills Company, brought the present action of replevin for the property against the defendant, who is the trustee in insolvency of said company; and the sole question for our decision is the one considered, but not determined, by the court in the former case, whether the vendor, having elected to enforce the claim upon the note, could at the same time retain the right to retake the machinery if the note was not fully paid. The superior court held that such right could not be retained, and rendered judgment in favor of the defendant for the return of the property, with damages for the replevin and detention, and the plaintiff appealed.

The contract appears in full in the former case (58 Conn. 465), but we will repeat the closing paragraph, which is that, upon default, the vendor "shall have the right, at any time, to resume possession of the machinery, and to enter the premises and remove the same as his own property; and if any portion of said note, or renewals thereof, shall remain unpaid, when possession shall be so taken by the party of the first part or his authorized agent, then the amount which may have been paid shall be for the use of said machinery while in possession of the party of the second part, and said note shall then be canceled and given up." It is the present claim of the plaintiff that, although by reason of the express stipulation, after possession had been resumed, no further right to recover the purchase price would exist, yet, by resorting to her remedies in the order in fact taken, both the remedy by collection and that by resumption were open to her. The argument in favor of such claim appears to be threefold: *First*. That the default of the vendee did not operate as a rescission of the contract; that the rights of the vendor survived such default; and that the rights of the parties thereafter existing were to be determined, not alone by the ordinary methods furnished by the law, but by those and such other proceedings as were expressly provided in the agreement itself, namely, that, until the vendor exercised his right to resume possession, "the amount which might have been paid should be for the use of the machinery." *Second*. That in this case the remedies provided by the law and the agreement of the parties are cumulative and collateral, and that each, except as limited in their order by the contract, might be pursued independently, until full satisfaction resulted. *Third*. That the vendor had, under the contract, a lien upon the property, which was in effect a mortgage, and was entitled to the same relief as if the title had been transferred and reconveyed for security. We will consider each of these claims separately. In reference to the first, that the default of the vendee did not operate as a rescission of the contract, it is true, and constitutes the basis of the decision in the former case of *Beach's Appeal*. But it must be manifest to any one who examines that case that this court did not then attribute to such facts the consequences which the plaintiff now asserts. In-

deed, it is very evident that, while leaving the question now at issue in form undecided, the minds of both the majority and minority of the court were strongly opposed to the plaintiff's present position. This the plaintiff concedes, and a considerable portion of the brief presented in her behalf, and of the oral arguments based thereon, was devoted to an effort to explain how this court was led into its "apparent error," which error is said to have consisted in "presuming that the case of *Bailey v. Hervey*," 185 Mass. 173, cited in 58 Conn. 480, "was based on a contract similar, in effect, to the one under consideration," and therefore, as Judge Loomis said in the former opinion, "directly in point." The plaintiff says that, in fact, the contract in *Bailey v. Hervey* differed from the one now under consideration, and was, in effect, the same as in *Hins v. Roberts*, 48 Conn. 267, 40 Am. Rep. 170, followed by *Loomis v. Bragg*, 50 Conn. 228, 47 Am. Rep. 688, in which the vendor's only remedy was held by this court to be the retaking of the property. To demonstrate this, since it does not appear in the reported case, the plaintiff's counsel have been at the exceptional pains of procuring what is stated to be an exact copy of the actual contract construed in *Bailey v. Hervey*, and have caused the same to be printed in full for our examination at the end of their brief. The argument is that such contract would not have been construed in Connecticut as it was in Massachusetts, as conferring an option upon the vendor; that the assumption on which the opinion is conditioned is directly negated by the law of this court as declared in *Loomis v. Bragg*, "a decision not then published, and doubtless unknown to *Justice Allen*;" and that, therefore, the case is erroneous, and should have been decided upon other and better grounds, by which the same result might have been reached, and should not have been recognized as an authority by this court. Conceding this, for argument's sake only, we fail to see how it in any wise affects what Judge Loomis declares to be "the clear and cogent reasoning contained in the opinion cited;" for the Massachusetts court having, whether correctly or otherwise, held that the contract was one which did vest an option in the vendor, and was therefore similar to that now before us, the correctness and force of the reasoning upon the premises assumed does not depend in the least upon the truth of the premises themselves. Nor is this court concerned to discover the fidelity to principle, in all its parts, of the case cited from another jurisdiction, but contents itself with so much of the logic of the case as applies clearly and with force to our own. The court there said, in discussing a contract which it at least considered and held to be similar in effect to what we have determined the one before us to be: "When the plaintiff discontinued his payments on account, what was the legal position of the defendants? If it be assumed that they might, at their option, either retain the goods as their own property, without any obligation to account for the proceeds or value to the plaintiff, or that they might collect the price in full, it is plain that they were not entitled to do both. They could not treat the transaction as a valid sale and an invalid one at the same time. If

they reclaimed their property it must be on the ground that they elected to treat the transaction as no sale. If they brought an action for the price, they would thereby affirm it as a sale. Two inconsistent courses being open to them, they must elect which they would pursue, and electing one, they are debarred from the other. Reclaiming the goods would show an election to forego the right to recover the price. But, instead of reclaiming the goods in the first instance, they brought an action against Bailey for the price, made an attachment of his property by trustee process, and entered their action in court, and he was defaulted." As Judge Loomis has aptly said, "to accept this as good law would be to establish a principle which would, upon the facts found, preclude the appellee from hereafter reclaiming the machinery in question." We do so accept it, because it commends itself to our judgment, and so clearly does this appear that although, as Judge Loomis further adds, we "are aware that it may receive further support from other decisions to the same effect," we deem their citation uncalled for.

The plaintiff, however, says that she did not exercise any option until she resumed possession; that the provision of the contract, that the amount paid should be for the use of the machinery, applies equally whether such payment, prior to such resumption, was by the voluntary act of the vendee or was coerced by the legal action of the vendor. This claim is, we think, not only opposed to the reasoning which we have quoted and approved, but requires for its support a construction of the contract which must be based upon a presumed intention of the parties, which is neither found expressed in the language of the instrument, nor can it be conceived of as existing in the mind of its makers. The only thing which, in case of the vendee's default, the contract expressly provides for, is the right of the vendor to retake the property, which is to operate as a discharge of the note; and, although we have held that the vendor had the option to enforce payment instead, it cannot reasonably be supposed that the parties ever intended that the vendor, through the exercise of an option not expressly given, could by reversal of the order of procedure, instead of retaking the property and canceling the note, collect the note, and then retake the property. Cases cited by the plaintiff's counsel, which hold that, when the option is exercised by retaking, the amount already voluntarily paid may be retained, and cannot be recovered back by the vendee are not in point. These are payments made by the vendee in affirmance of a contract which it does not lie in his power to disaffirm; and while the contract remains in force, and when the vendor makes default, and it thereby becomes the right of the vendor to elect whether he will affirm or disaffirm, if he does the latter, under a contract similar to the present, the vendor is under no obligation to return to the vendee what he has paid in part performance of a contract which it was his fault that he did not perform altogether. But, while voluntary payments are made by the vendee in affirmance of the contract, involuntary ones can only be coerced after default, and import a like affirmance on the part of the vendor, be-

cause upon such default, it being the right of the vendor to elect whether he will affirm or disaffirm, though it may be true that he might defer such election for a considerable time, yet whenever he brings an action to recover the contract price, he does affirm it, just as much as he disaffirms it when he retakes the property. To say, therefore, that the vendor's option, in the case before us was not exercised until the retaking, is erroneous. It involves a double election,—to affirm the sale to get as much as possible out of the general assets of the insolvent estate, and then to rescind it to get as much more as possible out of the property specifically; which seems to us, it must be said, a fast and loose fingering of the contract. The plaintiff insists that there is no injustice in this, since she only seeks to obtain the amount of the purchase price of the property; and cannot get more; that, whenever the sum collected equals the debt, the property vests in the vendee; and whenever such sum, less than the debt, is enough to make the balance due below the value of the property, the vendee can obtain title by paying the remainder. There seems to be an inconsistency in this reasoning. If not only what is voluntarily paid, (in this case nothing was in fact so paid,) but what she collects may be held as rent, why is the plaintiff under any obligation to apply it as part payment upon the note? When she retakes the property it is her duty under the contract to cancel and give up the note. But the note being discharged, is she thereupon to return the property? If the sum received is rent merely, why does not the whole purchase price continue due? If, on the other hand, she is bound to apply it in part payment, why is it not because she has elected to treat the obligation as absolute, and not as conditional? We think the plaintiff is mistaken in her claim.

Coming, then, to the second point in the plaintiff's argument, that the law and the agreement, taken together, give to her cumulative remedies, which she is entitled to pursue separately until they result in satisfaction, the answer to this claim appears to be clearly embraced in what has already been said. This is not a question of remedy, but of right. The contract was conditional. The note should be paid or the property might be retaken. There was an option. True, this court has held that such option belonged to the vendor, and not to the vendee. The debt was absolute if the vendor elected to treat it as such. The plaintiff's intestate, or she as his administratrix, might therefore, upon the vendee's default, demand and enforce either pay-

ment or return. If the latter, that by the express terms of the instrument inured to discharge the note; if the former, that equally, though by operation of law, transferred and confirmed the title. Having elected, therefore, to enforce the note, the plaintiff is entitled to all the remedies which the law or the contract gives her for that purpose, but not for any other purpose. She could attach the property. She did in fact attach other property. Insolvency intervening, the claim was presented and the dividend received. What other remedy for the enforcement of the debt exists? Not now to retake the property as a means to that end. A contract of conditional sale imposes no lien upon property in favor of the vendor, for that or any other purpose. He does not sell and receive back a pledge. He retains the title until he elects to part with it, and when he does so elect the title passes from him; but nothing else thereby springs up in its place in the nature of a lien or incumbrance upon the property, inuring to his benefit.

And this brings us directly to the remaining claim of the plaintiff, that the contract in question is in the nature of a mortgage. It is not a mortgage. If it had been, it must, in order to be valid, have been executed with statutory formalities, which are lacking, and recorded. It would require foreclosure to perfect title, and it ought to have been considered by the commissioners on the insolvent estate as security for the plaintiff's claim upon the property of such estate, which was not done. It is not, therefore, claimed to be a mortgage, but that it was in the nature of a mortgage. We think, however, that it is just as far from the nature of a mortgage as any other conditional sale,—no more and no less; and that to hold that, between conditional sales, a class of contracts so often construed and so clearly defined in this state, and chattel mortgages proper, there is an intermediate and anomalous species of contracts, which the court will regard as importing in favor of a vendor all the benefits of both a mortgage and a conditional sale, and against the vendee, the trustee for the benefit of creditors of the vendee's insolvent estate, and the public generally, to whom such unrecorded and undisclosed conveyances operate too often disadvantageously, all the burdens of both, with none of the advantages of either, would be opposed to public policy, and cannot be and is not law.

There is no error in the judgment complained of.

The other Judges concurred.

ILLINOIS SUPREME COURT.

AMERICAN LIVE STOCK COMMISSION
CO., *Appt.*,

v.

CHICAGO LIVE STOCK EXCHANGE *et*
al.

(.....Ill.....)

1. The transfer to a corporation by its

NOTE.—On the question what constitutes such a public business as to be subject to control by the government, see in connection with the above 18 L. R. A.

former manager of a certificate of membership in an incorporated exchange which he held merely as its representative and the request of the corporation that a certificate be issued to its present manager, does not give the corporation or its new manager any rights as a member of such exchange where the rules of the latter require a formal application

case, the very elaborate discussion by the opinions of the court in *People v. Budd*, 5 L. R. A. 550, 117 N. Y. 1, *aff'd* in 148 U. S. 517, 36 L. ed. 247.

for membership with payment of an initiation fee and an approval of the new member by the board of directors.

2. A court of chancery will not undertake to force a member upon a corporation which is not engaged in commercial business but merely furnishes to its members facilities for carrying on business, against the will of those whose duty it is to pass upon application for membership.

3. The illegality of the by-laws or contract of a stock exchange as being in restraint of trade cannot be invoked by a stranger as a ground of compelling the members of such exchange to disobey such rules as the law does not prohibit a contract in restraint of trade but merely declines after they are made to recognize their validity.

4. The fact that a livestock market owned by a private corporation is the largest in the world does not make the business therein of an incorporated stock exchange which has no corporate relation with the market company, a public business such that the exchange can be compelled to deal with all persons at that market without discrimination.

5. The mere fact that the business of a particular market has become the largest in the world does not give to the courts any power to declare the market public and impressed with a public use or to apply to it any rules of public policy peculiar to that class of markets, although the Legislature might be warranted in making such a declaration.

6. On sustaining a motion to dissolve an injunction where the bill is in effect for an injunction only the bill may be dismissed.

(Magruder, J., *dissentia*.)

(October 31, 1892.)

APPEAL by plaintiff from a decree of the Appellate Court, First District, affirming a decree of the Circuit Court for Cook County, dismissing the bill in a suit brought to enjoin defendants from refusing to admit plaintiff to membership and also awarding damages sustained by reason of the suing out of a preliminary injunction. *Affirmed.*

Statement by Bailey, Ch. J.:

This was a bill in chancery brought by the American Live Stock Commission Company against the Chicago Live Stock Exchange and H. D. Rogers, for an injunction. A preliminary injunction having been issued, the Chicago Live Stock Exchange appeared and demurred to the bill, and, the demurrer being overruled, it filed an answer, and entered its motion to dissolve the injunction. - Said motion, being heard on bill, answer, and the affidavits filed by the respective parties, was sustained. The defendant then filed its suggestion of damages, and upon the evidence adduced the court awarded the defendant damages sustained by reason of suing out the injunction in the sum of \$1,250, and rendered

its decree therefor, and also entered a decree dismissing the bill at the complainant's costs, for want of equity. Both decrees have been affirmed by the appellate court on appeal, and the present appeal is from said judgment of affirmance.

The facts, as alleged in the bill, so far as they need be stated, are these: The Chicago Live Stock Exchange is a corporation organized under the laws of this state, March 13, 1884, by certain commission merchants engaged in the business of buying and selling livestock for others on commission, and was organized in the interest of commission merchants and dealers in livestock at the Union Stock Yards, a public livestock market in Cook county, Ill. Upon the organization of said exchange, the commission merchants and buyers of livestock at the Union Stock Yards became and are now members thereof, and the members of the exchange have combined and confederated in order to control the selling of the livestock which may arrive at said market, and, by reason of such combination, it has become impossible for one not a member of the exchange to sell livestock in said public market; for, while the rules of the exchange allow its members to buy from owners of livestock, the usage of owners not to accompany their stock, and their lack of acquaintance with purchasers and dealers, and of familiarity with the methods of dealing, render it necessary to employ a representative to sell their stock; and, by the rules of the exchange, such representative must be a member thereof, as purchasers will buy of no others than members or the owners of stock. In the year 1889 there were shipped to the Union Stock Yards, and sold in said market, 3,023,281 cattle, 123,968 calves, 5,998,526 hogs, 1,823,469 sheep, 79,928 horses, making a total of 11,117,170 head of livestock, said livestock having been raised and forwarded to the Union Stock Yards by the farmers of Illinois, Wisconsin, Michigan, and other states and territories, whereby the livestock market at said stock yards has become and now is the largest market of livestock in the world. Said exchange, shortly after its organization, adopted a body of rules and by-laws which, in 1889, were codified into a system. Of these rules, rule 8 fixed the qualifications and mode of admission of members, and rule 9 established certain minimum rates of commissions to be charged by members for selling livestock. The bill alleges that the rates of commission thus fixed are unjust and unreasonable to those engaged in raising livestock, and who are compelled by circumstances to ship the same to said market, that market having long since become a public market, the prices upon which to a great degree fix the value of livestock throughout the United States; that, under the alleged purposes for which said corporation was formed, its members have joined and confederated together to coerce persons sending stock to said stock yards to pay an unreasonable price to them for selling, or to prevent such stock from being sold until a member of the exchange should be employed to sell the

As to conclusiveness of by-laws of associations, see *Thomas v. Musical Protective Union* (N. Y.) 8 L. R. A. 175, and *note*, 121 N. Y. 45, 18 L. R. A.

As to review of the suspension of a member of an association, see *Connelly v. Masonic Mut. Ben. Asso.* 9 L. R. A. 423, and *note*, 56 Conn. 553.

same at unreasonable rates of commission; that a great proportion of the livestock shipped to said market is purchased by four persons or firms, at least to such an extent that their refusal to purchase from an individual or firm renders it impossible for such person or firm to sell stock in said market, and each of said buyers is a member of the exchange, and submits to and is bound by its rules and regulations, and will refuse to purchase from persons who are not in harmony with the exchange, and will refuse to trade with or purchase from persons or corporations when forbidden to do so by the exchange.

The bill further alleges that this condition of things existed on the 1st day of January, 1889, and had so existed for a number of years prior thereto, and that a large number of stock producers in the states and territories aforesaid, feeling the grievances to which they were and had been subjected, conferred together as to the best means of relief from the oppressions aforesaid, and determined to organize and form a corporation for the purpose of selling their own stock, by having their corporation become a member of the exchange, so as to handle and sell their own stock on said public market; and after selling such stock as might be consigned to it by its shareholders and others, and charging the regular commissions therefor, to relieve its shareholders of such excessive charges by returning to them, by way of dividends, all sums their corporation should receive in excess of the expense of such handling and selling; that in pursuance of such arrangements, and in the interest of said stock producers, the American Live Stock Commission Company was organized, under the laws of this state, March 2, 1889; that after its organization its board of directors appointed H. D. Rogers its manager at Chicago, and gave him authority to attend to its business, and see to receiving such livestock as might be consigned to it, and sell the same for said company, in accordance with the rules and by-laws of the exchange; that, in order to sell livestock at the stock-yards market, it was found to be necessary for the complainant corporation to become a member of the exchange, and for that purpose, and under that necessity, it caused its manager to purchase from the legal holder thereof a certificate of membership, and caused the same to be transferred to its manager, and for which it paid the sum of \$100, and thereupon its manager signed an agreement to abide by the rules, regulations, and by-laws of the association; and all amendments that might in due form be made thereto, in conformity with the requirements of rule 8 of said exchange; and thereupon the exchange, at the complainant's request, took up said certificate so purchased and issued to Rogers, as such manager, to be held by him in trust for the complainant, a new certificate of membership, admitting him, under the description of "H. D. Rogers, Manager," to full and regular membership and according in the exchange.

It is further alleged that, by virtue of such membership, Rogers represented the complainant, as its manager, in the exchange, selling stock and doing other necessary business for it, until December 14, 1889, when the office of manager was abolished, whereupon Rogers

resigned, and Eli Titus was appointed general manager of the complainant; that Rogers afterwards, and about January 5, 1890, having ceased to act for the complainant, assigned said certificate of membership in blank and delivered it to the complainant; that afterwards, and on or about January 18, 1890, without the knowledge or consent of the complainant, he surreptitiously and secretly abstracted said certificate from the complainant's desk, and now has the same, and refuses to surrender it to the complainant, and threatens to hold it and enjoy the privileges of membership in the exchange which it affords, as though he was the owner thereof; that the complainant has requested the exchange to issue to its general manager a duplicate certificate, and thereupon the exchange investigated the complainant's claim, and admitted that it was the owner of said certificate, but refused, and now refuses, to issue to the complainant such duplicate, or any other evidence of its right to membership in the exchange; that the exchange now threatens to deny the complainant the privileges of the exchange, and to notify its members to refuse to purchase livestock from the complainant, and to expel the complainant from membership, and has conspired with Rogers to have him withhold said certificate, and thus deprive the complainant of its rights therein.

The bill further alleges that the object of the complainant's organization was to enable its shareholders, all of whom are feeders of livestock and shippers of the same to said market, to procure the sale of such livestock at reasonable cost and under favorable circumstances, and, to the end that this might be done at the lowest cost, it has offered to and has sold on said market livestock for other producers, and has made the charges therefor in strict accordance with the rules of the exchange, and, after making such charges and collecting the same, at the end of the year it had earned, as the result of its services, after deducting all expenses, the sum of \$40,498.83, and thereupon, in December, 1889, it proceeded to declare a dividend, and distribute its net earnings among its shareholders, in accordance with the purpose announced in its articles of incorporation, that is to say, 65 per cent of such net earnings to its shareholders in the ratio of the amount of livestock shipped by each respectively, and the remaining 35 per cent in proportion to the number of shares of stock owned by them; that such division of profits was not in conflict with any rule of the exchange, and was just and equitable, and injurious to no one, and that the complainant is obliged by law to so distribute its net earnings.

It is also alleged that the members of the exchange, further conspiring to reap unreasonable profits and to prevent the complainant's shareholders from obtaining the sale of their stock at small expense, on February 4, 1890, against the complainant's objection, amended its said rule 8, by adding thereto the two following paragraphs, viz.: (1) "No person shall be received for membership in this exchange who in any manner represents or acts for, either as an officer, agent, or broker, or commission merchant, any other livestock corporation or exchange, whose charter regu-

tations, rules, or by-laws provide for discrimination in rates or charges or commissions between stockholders or other patrons or customers, whether under guise of dividends, drawbacks, or any other scheme or device whatever." (2) "If any member of this exchange shall hereafter act for, either as officer, agent, broker, or commission merchant, any other livestock corporation or exchange, whose charter, regulations, rules, or by-laws provide for discrimination in rates or charges or commissions between stockholders or other persons or customers, whether under the guise of dividends, drawbacks, or any other scheme or device whatever, he shall be liable to suspension for the first offense, and to expulsion for any subsequent offense." That at the same time the exchange amended its rule 9 by adding thereto the following: "Nobody in this exchange shall buy, or cause to be bought, at the Union Stock Yards, Chicago, Ill., from any agent, individual, firm, incorporation, or other livestock commission company, who are or may be regularly selling livestock for non-residents on commission, unless some one or more of the members of such firm or stockholders of such company are members in good standing of this exchange; provided, however, that any party or parties beginning a livestock commission business at said yards shall not be considered subject to this rule until thirty days from the date of their beginning such business; and provided, further, that nothing herein contained shall be construed as in any manner prohibiting any party from selling his own livestock on the market of such stock yards, or any member of this exchange from buying such stock of the owner." The bill prays for an injunction restraining Rogers from using or disposing of said certificate of membership, and restraining the exchange from issuing any certificate in place thereof to any other than the complainant or its authorized general manager; that said amendments to said rules and by-laws of the exchange be held to be null and void; that the exchange be enjoined from notifying its members, or any of them, not to purchase livestock in said general market or elsewhere from the complainant, and from in any manner endeavoring to prevent the complainant and its agents from selling livestock on the market of the Union Stock Yards, and from taking any steps to try the complainant for any supposed violation of said rule 9, or any of said amended by-laws; and that on final hearing said injunction be made perpetual, and said Rogers be required to surrender said certificate, and the exchange be required to issue said certificate to the complainant, and that the complainant be permitted to enjoy its privileges, unvexed by any unjust, unreasonable, or illegal restraints; and also a general prayer for relief.

The Chicago Live Stock Exchange answered, denying the equities of the bill, and particularly denying, among other things, that its members had confederated to control the selling of livestock at the Union Stock Yards by its own members or otherwise, or that it had interfered or attempted to interfere with the action of any other persons, not members of the exchange, in buying or selling at said yards, or that it was impossible for one not a

member to sell livestock in said market, or that it was necessary for shippers of cattle to said yards to employ a representative to sell their stock. The answer alleged that the Union Stock Yards Company is a private corporation and is accustomed to forbid and prevent such persons or corporations as it saw fit from entering upon or doing business at its stock yards. The answer also alleges that it is a matter of no concern, except to the defendant and its members, whether the defendant has adopted a body of rules or by-laws, or has altered them, or as to what rules it has adopted; that the complainant is not a member of the defendant corporation, or interested in its rules, and has no right to inquire into them or call them in question; that it is no concern of the complainant, or any one else, as to what commissions are charged by commission merchants, or as to what rules or regulations the defendant may have made or shall make as to the rate of commissions, or as to what rules or regulations it shall make for the government of its affairs or that of its members. It denies that the rates of commission prescribed by the defendant's rules are unjust or unreasonable, but avers that they are low, minimum rates, and the lowest that any reputable or responsible merchant can afford to charge for handling stock. The answer further avers that the establishment by the members of the exchange of uniform rates of commission was essential to the correction and prevention of certain evils in their business of buying and selling livestock on commission at said stock yards; that, prior to the adoption of the rule establishing such uniform rates, great demoralization and abuses had grown up in said business, but that they had in a great measure been corrected by that rule. The defendant denies that the refusal of any four firms doing business at the stock yards to purchase of an individual renders it impossible for such individual to sell his stock at said stock yards; that the defendant does not know whether or not purchasers of livestock who are members of the exchange will refuse to purchase from persons who are not in harmony with the exchange, or whether they will refuse or decline to trade with or purchase from persons or corporations, or from agents, when forbidden to do so by the exchange. The answer charges that the promoters of the complainant corporation conspired to defeat and destroy the work and benefit of the exchange, and to injure the business of its members, and prevent equality among shippers in the matter of commissions, and to get discriminations in rates of transportation, and other undue advantages, and to control and raise the price of livestock, and that for these purposes that corporation was formed; that the complainant's shareholders confederated to control the livestock market of Chicago, and the market price of beef, and have conspired to injure the commission merchants at the stock yards and to avoid and defeat the restrictions and rules of exchange, and at the same time get to themselves the benefit of said exchange; and while said corporation nominally charges its shareholders, as well as others, the full rates of commission fixed by the rules of the exchange, it returns to its shareholders and distributes

among them 65 per cent of its net earnings, in the ratio of the amount of livestock shipped by each; that said distribution of 65 per cent of its net earnings was an attempted evasion of rule 9 of the exchange, and, if such evasion were permitted, other members of the exchange, who are bound by said rule, would be put to a great disadvantage, and would be unable to meet said competition.

The answer avers that it is not, and has never been, necessary, in order to buy or sell stock on commission at the Union Stock Yards, that the person so attempting to do should become a member of the exchange, and that it was and is not necessary that the complainant should become a member of the exchange; that the defendant has never attempted to prevent any person or corporation from buying or selling livestock at said yards who was not a member of the exchange, and does not intend so to do; and that its members have not confederated together to prevent any person or corporation not a member from buying or selling livestock at said yards, or to interfere with them in their action in that behalf. It admits that, at the date alleged, Rogers presented to the defendant an application for and was admitted to membership, but the defendant denies that the complainant ever became a member, or that Rogers was admitted at its request; that defendant does not know who Rogers represented, but that his membership in the exchange was merely personal to himself; that, when he applied for membership, the fact that he was to act for a corporation, which was to divide its earnings as the complainant has done, was, at the instance of the complainant, and for the purpose of getting its agent into said exchange, concealed from the defendant. The answer admits that Rogers signed the blank assignment on the back of his certificate of membership, but denies, on information and belief, that he delivered it so indorsed to the complainant. It also denies that the complainant has requested the defendant to issue said certificate to Titus, or that the complainant or Titus has applied for membership, as provided by said rule 8, or that the defendant is refusing to issue to the complainant a certificate or other evidence of its rights in the exchange, or that the defendant has ever threatened to deny the complainant such rights, or threatened to notify any of the members of the exchange not to purchase livestock from the complainant, or to expel the complainant from its pretended membership, as those questions have not arisen for its consideration; but the defendant now denies that the complainant is a member of the exchange, or that it has a right to become a member thereof.

Both the bill and answer are verified by affidavits, and, in addition thereto, the parties produced and read at the hearing of the motion to dissolve the injunction a large number of affidavits of officers and members of the two corporations in question, and of shippers of livestock to the stock-yards market, and of dealers in that market, corroborative of the allegations of the bill and answer, respectively, and, upon the case thus made, an order was entered dissolving the injunction, and a further order was subsequently entered dismissing the bill for want of equity. Prior to the submis-

sion of the motion to dissolve the injunction, however, a hearing was had as to defendant Rogers, upon the bill taken *pro confesso*, and at that hearing the court found that the certificate of membership in the exchange held by Rogers was paid for with the complainant's funds, and was held by Rogers in trust for the complainant, and it was thereupon decreed that said certificate was the property of the complainant, and Rogers was ordered, within thirty days, to surrender and deliver the same to the complainant, and he was also perpetually enjoined from exercising any further privileges or rights under said certificate, as against the complainant.

The further facts necessary to a proper understanding of the case will be found sufficiently stated in the opinion of the court.

Mr. William Brown for appellant.

Messrs. Miller, Starr & Leman, for appellee:

The bill does not sufficiently show that complainant is a member of the exchange.

It shows that complainant never complied with one of the requirements. It never itself applied for membership, and membership in this association is a personal privilege.

Barclay v. Smith, 107 Ill. 349, 47 Am. Rep. 437.

Whatever complainant's rights as against Rogers may have been, it got no rights of membership, as against the exchange, from the fact that the certificate was purchased with its money.

Weaver v. Fisher, 110 Ill. 146.

It would not be within complainant's corporate powers to become a member of another corporation either directly or through an agent.

People v. Chicago Gas Trust Co. 8 L. R. A. 497, 130 Ill. 268.

Even if complainant were a member, it does not in its bill show such interference or danger of interference with its rights of membership as would justify the interference of a court of equity. Apprehension or mere threats of future injury do not constitute sufficient grounds.

Troy v. Doniphan County Comrs. 32 Kan. 507; *Thomas v. Musical Mut. P. Union*, 8 L. R. A. 175, 121 N. Y. 45.

There are no facts whatever alleged in the bill showing that the exchange had ever interfered in any way with any legal rights of complainant.

Sparhawk v. Union Pass. R. Co. 54 Pa. 401; *Gause v. Perkins*, 56 N. C. 177, 69 Am. Dec. 728; *Delaware, L. & W. R. Co. v. Central Stock Yards & T. Co.* 6 L. R. A. 855, 46 N. J. Eq. 280; *Thomas v. Musical Mut. P. Union*, *supra*; *Morawetz, Priv. Corp.* §§ 1041, 1132, note 1; *High, Inj.* § 23.

A court of equity will not interfere with the action or contemplated action of an association like this upon the question of membership or expulsion from membership therein.

Sturges v. Board of Trade, 86 Ill. 441; *Baxter v. Board of Trade*, 83 Ill. 146; *Robinson v. Yates City Lodge*, 86 Ill. 598; *Pitcher v. Chicago Board of Trade*, 20 Ill. App. 323; *Gregg v. Medical Soc.* 111 Mass. 185, 15 Am. Rep. 24; *Thompson v. Society of Tammany*, 17 Hun, 305

A court of equity does not, at the suit of private persons, entertain suits to restrain illegal acts or illegal combinations or violations by corporations of corporate duty.

Thomas v. Musical Mut. P. Union, supra; Sparhawk v. Union Pass. R. Co. 54 Pa. 401; *Billard v. Erhart*, 85 Kan. 611; *Gause v. Perkins*, 56 N. C. 177, 69 Am. Dec. 728; *Delaware, L. & W. R. Co. v. Central Stock Yards & T. Co.* 6 L. R. A. 855, 46 N. J. Eq. 280; *High, Inj.* § 23; *Morawetz, Priv. Corp.* §§ 1041, 1182, *note 1*.

A person, who is not a member of an association, cannot attack its rules which bind no one not a member.

Ward v. Johnson, 95 Ill. 215; *Green's Brice, Ultra Vires*, 678 *note (a)*.

A rule or agreement among the members of the exchange as to the rates of commission charges does not contravene public policy, but is valid.

Live Stock Assn. v. Levy, 22 Jones & S. 32; *Palmer v. Stebbins*, 3 Pick. 188, 15 Am. Dec. 204; *Master Stevedores Assn. v. Walsh*, 2 Daly, 1; *Carew v. Rutherford*, 106 Mass. 14, 8 Am. Rep. 287; *Bowen v. Matheson*, 14 Allen, 499; *Snow v. Wheeler*, 118 Mass. 179; *Greenhood, Pub. Pol.* 658.

The rules of the exchange that forbid its members or buyers of livestock from buying from any regular commission merchant, who is not a member of the exchange, is not against public policy.

Thomas v. Musical Mut. P. Union, Live Stock Assn. v. Levy, Palmer v. Stebbins, Master Stevedores Assn. v. Walsh, Carew v. Rutherford, and Bowen v. Matheson, supra; Collins v. Locke, L. R. 4 App. Cas. 674; *Central S. Roller Co. v. Cushman*, 148 Mass. 358; *Marsh v. Russell*, 66 N. Y. 288; *Com. v. Hunt*, 4 Met. 111, 38 Am. Dec. 346; *Skrainka v. Scharringhausen*, 8 Mo. App. 522; *Long v. Toul*, 42 Mo. 545, 97 Am. Dec. 355; *Van Marter v. Babcock*, 28 Barb. 638; *Chitty, Cont.* 11th Am. ed. 962, 983, and *notes*; *Jones v. Fell*, 5 Fla. 510; *Greenhood, Pub. Pol.* 653 *at seq.*; *Palmer v. Stebbins*, 3 Pick. 188, 15 Am. Dec. 204; *Wharton, Cont.* § 442; *McHenry v. Jewett*, 90 N. Y. 62; *Hurst v. New York Produce Exch.* 100 N. Y. 605; *Desplaines v. Poyer*, 123 Ill. 111; *Cooley, Torts*, 278; *Printing & N. Reg. Co. v. Sampson*, L. R. 19 Eq. Cas. 462.

Delaware, L. & W. R. Co. v. Central Stock Yards & T. Co. 8 L. R. A. 855, 46 N. J. Eq. 280, holds that even in the case of a yard company a party with whom it refuses dealings has no remedy in a court of equity.

The company, by becoming incorporated, did not submit its property and services to public use.

Ladd v. Southern Cotton Press & Mfg. Co. 58 Tex. 172; *Seeligson v. Taylor Compress Co.* 56 Tex. 219; *Bouvier, Law Dict.* title, *Market*; *Jacob, Law Dict.* title, *Market*; *Caldwell v. Alton*, 33 Ill. 417, 75 Am. Dec. 282.

The Union Stock Yards does not contain a single distinguishing characteristic of a public market.

Comyn, Com. Dig. title, *Market*; *Lee v. Bayes*, 18 C. B. 599.

If these commission merchants and dealers at the Union Stock Yards who were members of the Live Stock Exchange, and bound by its 18 L. R. A.

rules, are engaged in private business, these rules in question are valid beyond doubt.

Greenhood, Pub. Pol. 658.

Those who are engaged in a business *juris publici*, or have to do with such business, are not entirely forbidden to form combinations or rules or agreements like the rules in question, where it is clear that the public interest cannot be thereby prejudiced, or where the public, so far as interested, is benefited as a result thereof.

Wiggins Ferry Co. v. Chicago & A. R. Co. 73 Mo. 389, 39 Am. Rep. 519.

It has been held that a combination between a coal company and a carrying company, by which the latter grants to the former half of its capacity is not of itself invalid.

Whart. Cont. § 442; *Com. v. Delaware & H. Canal Co.* 43 Pa. 295. See also *Western U. Teleg. Co. v. Chicago & P. R. Co.* 86 Ill. 246, 29 Am. Rep. 38; *Payne v. Western & A. R. Co.* 13 Lea, 507, 49 Am. Rep. 666; *Mogul S.S. Co. v. McGregor*, 58 L. J. N. S. 465, L. R. 28 Q. B. Div. 598.

Many well-considered cases have sustained agreements on the part of a railway company to make pooling or combination agreements, where the public interest was not thereby injured.

Hare v. London & N. W. R. Co. 2 Johns. & H. 80; *Shrewsbury & B. R. Co. v. London & N. W. R. Co.* 17 Q. B. 652; *South Sea Co. v. London R. Co.* 2 Nev. & M. 341; *Eclipse T. B. Co. v. Pontchartrain R. Co.* 24 La. Ann. 1; *Shipper v. Pennsylvania R. Co.* 47 Pa. 338; *American Rapid Teleg. Co. v. Connecticut Teleg. Co.* 49 Conn. 852, 44 Am. Rep. 287; 1 *Whart. Cont.* § 442; *Morawetz, Priv. Corp.* §§ 1130, 1181; *Midland R. Co. v. London & N. W. R. Co.* L. R. 2 Eq. 524; *Greenhood, Pub. Pol.* 684, 689. See also *Gibbs v. Baltimore Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979; *Chicago Gas Light & O. Co. v. People's Gas Light & O. Co.* 121 Ill. 580; *New Orleans Gas Light Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; *Louisville Gas Co. v. Citizens Gas Light Co.* 115 U. S. 688, 29 L. ed. 510; *Richardson v. Mellish*, 2 Bing. 242; *Hilton v. Eckersley*, 6 El. & Bl. 47.

Bailey, Oh. J., delivered the opinion of the court:

This case, so far as it relates to defendant Rogers, having been disposed of in the complainant's favor by a decree from which no appeal has been taken, and of which no complaint is made, the only questions now presented are those which relate to the equities which the complainant is seeking to enforce as against the Chicago Live Stock Exchange. Said livestock exchange is a corporation, not for pecuniary profit, organized March 13, 1884, under the laws of this state, the objects for which it was organized, as declared by its articles of incorporation being: "To establish and maintain a commercial exchange; to promote uniformity in the customs and usages of our merchants; to provide for the speedy adjustment of all disputes between its members; to facilitate the receiving of livestock, as well as provide for good management and the inspection thereof, thereby guarding against the sale or use of un-

sound or unhealthy meats; to secure to members a corporation in furtherance of their legitimate purposes." Said corporation has no capital stock, and is itself engaged in no commercial business, but limits its corporate enterprise to furnishing to its members facilities for carrying on, each for himself, the business of buying, selling, and dealing in livestock, meats, and other like commodities, and to adopting and enforcing by-laws, rules, and regulations by which the business of its members shall be conducted and governed. The location of the exchange, and the place where its members carry on their business of dealing in livestock under and in subordination to its rules, is the Union Stock Yards, Chicago. The Union Stock Yards and Transit Company, to which the stock yards belong, is also a private corporation, not itself engaged in the business of buying, selling, or dealing in livestock, but merely owning and furnishing very extensive stock yards, to which livestock is shipped in great quantities, from all parts of the west, for sale, and where buyers and sellers of livestock, acting either for themselves or as the representatives of others, resort for the purpose of carrying on their business. The Union Stock Yards have thus become the place to which nearly all the livestock shipped to Chicago for sale is consigned, and where, as it is said, more livestock is annually bought and sold than in any other market in the world. No corporate relation exists between the stock yards and transit company and the Chicago Live Stock Exchange, the latter corporation being formed merely by an association of commission merchants engaged in selling livestock for others on commission, and parties engaged in the business of buying livestock for themselves, in said market. The evidence shows that the commission merchants and buyers representing much the largest portion of the business done at said market are members of the exchange, though many parties, both sellers and buyers, are not members.

The case sought to be made by the complainant is presented under two aspects: *First*, it is claimed that, either by itself or through its general manager, the complainant is, or is entitled to be, admitted a member of the exchange, and it accordingly prays for an injunction restraining the exchange from taking any steps to try the complainant for a violation of its rules, or to impose upon the complainant's privileges as a member any illegal or unreasonable restraints, and it also prays that the certificate of membership in Roger's hands be issued to the complainant; *secondly*, it claims that, if it is not a member and entitled to the privileges of membership, the exchange should be restrained from putting in force certain rules it has adopted for the government of its own members, and particularly its amendments to rules 8 and 9. We are unable to see upon what principle it can be justly claimed that the complainant is a member of the exchange, or entitled to the privileges of membership, or that it is in a position where it can insist upon being admitted to membership as a matter of right. Whatever may have been its rights while Rogers, its manager, was a member, those rights no longer exist, as, by its own admission, Rogers is no longer its manager, and

is no longer a member of the exchange. Nor can there be any just pretense that the complainant itself is a member or has ever applied for membership. The exchange is a corporation having rules or by-laws determining the qualifications for membership, and prescribing the mode in which members may be admitted, and there is no pretense that the complainant has ever brought itself within the terms of said rules or by-laws, so as to be entitled to membership. Rule 8 of the exchange provides as follows: "On and after May 1, 1884, any person of good character and credit, and of legal age, whose interests are centered at the Union Stock Yards, on presenting a written application, indorsed by two members, and stating the name and business avocation of the applicant, after ten days' notice of such application shall have been posted on the bulletin of the exchange, may be admitted to membership in the association, upon approval by at least seven affirmative ballot votes of the board of directors, and upon payment of an initiation fee of \$500, or on presentation of a certificate of unimpaired or forfeited membership, duly transferred, and by signing an agreement to abide by the rules, regulations, and by-laws of the association, and all amendments that may, in due form, be made thereto."

Said association had an undoubted right to adopt this rule, and as it prescribes the mode, and the only mode in which membership in the exchange can be obtained, no one can justly claim to be a member who has not been admitted in the mode thus prescribed. It may well be questioned whether, under this rule, a corporation, in its corporate character, can be admitted to membership in the exchange, as said rule seems to contemplate only the admission of natural persons. But, even if that were otherwise, there is no pretense that the complainant itself has ever made application for membership, or that any of the subsequent steps necessary to vest an applicant with the character and rights of membership have been taken, or that they have resulted favorably to the complainant. Nor is it pretended that since Rogers ceased to be the complainant's manager, and thereby ceased to be its representative on the exchange, any formal application for membership has been made by Titus, its general manager, or by any other person in its behalf; but the evidence, on the other hand, is clear and undisputed that no such application has been made. The fact alleged in the bill, if it be a fact, that the complainant has requested the exchange to issue the certificate of membership formerly held by Rogers to Titus, avails the complainant nothing, as the exchange is under no obligation to admit a member upon such request, but can, in conformity with its rules, admit to membership only upon formal application, duly presented and approved in the manner in said rules prescribed. The equitable, or even legal, ownership of the unimpaired or forfeited certificate of membership formerly issued to Rogers, and duly transferred to it, does not constitute it a member, or entitle it to any rights as such. The only way in which the complainant can avail itself of such certificate is by tendering it in lieu of the prescribed initiation fee, in case the complainant or its representative, on proper

application, shall be admitted to membership, or, in case such application should not be granted, then by selling it for a consideration to some other person who may desire to become a member.

It may also be noticed, in immediate connection with the point now under consideration, that a court of chancery has no power to order the exchange to issue the certificate of membership, formerly held by Rogers, to the complainant or its general manager, so as to constitute it or him a member. Before an applicant can become a member, his application must, among other things, be indorsed by two members, and must receive the approval of at least seven members of the board of directors, voting by ballot. Members and directors of such corporations, in acting upon applications for membership, are necessarily entitled to a freedom which is not subject to judicial compulsion. No two members can be compelled to indorse an application, nor can any seven members of the board of directors be compelled to vote in its favor, but both are entitled to act upon their own judgment, and according to their own choice. In other words, a court of chancery will not undertake to force upon a corporation of this character a member, against the will of those whose duty it is to pass upon applications for membership.

The complainant, then, not being a member of said exchange, nor entitled, either directly or indirectly, to any of the rights arising from membership therein, the question is presented whether it can complain of any of the rules adopted by the exchange for the government of the conduct of its own members, or invoke the aid of a court of equity to restrain their enforcement. The complainant is a joint-stock corporation, organized May 8, 1880, under the laws of this state, with a capital stock of \$100,000, divided into shares of \$100 each, the shareholders consisting principally, if not exclusively, of persons and firms engaged in the business of shipping livestock to the Union Stock Yards at Chicago for sale. The principal office of said corporation is located at the stock yards, and the objects for which said corporation was formed, as declared by its articles of incorporation, are as follows: "To engage in the business of buying, selling, and handling livestock upon commission at the Union Stock Yards, state of Illinois, and at such other points throughout the United States as may be deemed advisable, and also to encourage the stockholders of said corporation to raise, improve, feed, and ship to market livestock; and, in order to better effectuate said latter object, it is hereby expressly stipulated and agreed, by and between the parties hereto, that the net earnings of said corporation shall be distributed among the stockholders thereof annually, in the following manner, to wit: Sixty-five per cent of said net earnings shall be distributed to said stockholders in the ratio of the number of stock shipped by each stockholder to the said corporation for sale during the current year for which said dividend shall be declared, and the remaining thirty-five per cent of said net earnings shall be distributed to the shareholders in said corporation in the ratio of the amount owned by each shareholder in said corporation. It is

hereby further expressly agreed and stipulated that no one person shall have the right to subscribe for or own more than twenty-five shares of stock in said corporation at any time during the existence of said proposed corporation."

Said corporation, on being organized, appointed Rogers as its manager, and he applied for admission as a member of the exchange, and was admitted a member thereof, his initiation fee being paid by the presentation of an outstanding certificate of membership which had been purchased with the money of the complainant. The evidence shows—and upon this point there seems to be no dispute—that, when Rogers applied for membership, no disclosure was made by him as to the plan upon which the complainant corporation was organized, and particularly the obligation which it assumed by its articles of incorporation, to distribute annually among its shareholders 65 per cent of its net earnings in the proportion of the number of livestock shipped by each to said corporation for sale. Rogers was admitted to membership upon investigation by the exchange of his own personal character and credit, and in ignorance of this peculiar feature of the scheme upon which the corporation represented by him was organized. The complainant thereupon embarked in the business of receiving consignments of livestock, both from its shareholders and others, and in selling the same on commission at the stock yards, the rates of commission charged by it in all cases being in conformity to the schedule of rates established by the exchange. Said business was managed by Rogers, who, being a member of the exchange, was enabled to avail himself, in the management of said business, of all the privileges which such membership afforded.

In November, 1889, the complainant, having realized a considerable sum of money as the net profits of its business up to that time, distributed such net profits to its shareholders, as required by its articles of incorporation; and the exchange being informed of such distribution, and regarding it as a virtual evasion of its rules establishing minimum rates of commissions, instituted proceedings against the complainant and its manager for a violation of its rules. Rogers set up in defense of these charges, in substance, that the complainant was not a member of the exchange, nor subject to its jurisdiction; that, so far as his action as a member of the exchange was concerned, he had strictly conformed to said rules by charging and collecting the rates of commissions thereby established; and, having collected them, he had accounted for and paid the same over to his principal, the complainant, as it was his legal duty to do; and that he had no responsibility for the disposition which the complainant had subsequently seen fit to make of the same. These suggestions seem to have been acquiesced in by the exchange, as the proceedings against both the complainant and its manager appear to have been thereupon abandoned. The exchange, however, for the purpose, as may well be presumed, of protecting itself against similar evasions of its rules in the future, amended its eighth rule so as to provide, in substance, that no person

should be received for membership in the exchange who, in any manner, acts for or represents any other livestock corporation whose charter, regulations, rules, or by-laws provide for discrimination in rates or charges for commissions between stockholders and other patrons or customers, whether under the guise of dividends, drawbacks, or any other scheme or device whatever, and that no member of the exchange should act, as agent or otherwise, for any livestock corporation whose charter, regulations, rules, or by-laws provide for such discrimination, and subjecting a member thus offending to suspension or expulsion. At the same time rule 9 was so amended as to prohibit all members of the exchange from buying any livestock, or causing the same to be bought, at the stock yards, from any corporation or livestock company which is or may be regularly selling livestock for nonresidents on commission, unless some one or more of the stockholders of such company are members of the exchange in good standing. It must be admitted that these amended rules, if enforced by the exchange and obeyed by its members, will have the effect of debarring the complainant, so long as it adheres to its present policy of distributing its net earnings among its shareholders, from becoming, either by itself or its officer or agent, a member of the exchange, or entitled to the privileges of membership, and also that the members of the exchange will refuse to purchase of it or its agents any of the livestock consigned to it for sale at said stock yards. The question, then, is whether these facts are sufficient to entitle the complainant to a decree declaring the invalidity or illegality of these rules, and to an injunction restraining their enforcement.

A voluntary association, whether incorporated or not, has, within certain well-defined limits, power to make and enforce by-laws for the government of its members. Such by-laws are ordinarily matters between the association and its members alone, and with which strangers have no concern. If the association, or a majority of its members, pass by-laws which are unreasonable, or contrary to law or public policy, and attempt to enforce them as against a dissenting or unwilling minority such minority may undoubtedly, in proper cases, appeal to the courts for relief against their enforcement. But mere strangers have ordinarily no right to interfere. As to them, such by-laws are matters of no concern. They do not apply to and are not binding upon them.

In the present case, no member of the exchange is making any complaint of these by-laws, nor is there any suggestion either in the pleadings or proofs, that these by-laws have been passed, or are likely to be enforced, against the objection of a minority of the members, or against the objection of any one member, of the exchange. So far, then, as this proceeding is concerned, it must be assumed that they were adopted with the assent and concurrence of all the members, and are therefore satisfactory to all alike. They are therefore to be regarded as analogous to or in the nature of a unanimous compact or agreement among the members of the exchange not to buy livestock of the corporations engaged

in selling the same on commission, unless one or more of the shareholders thereof are members of the exchange, and excluding from membership the representatives of the complainant, so long as it persists in its present policy of practically cutting rates of commissions by distributing back a portion of its net earnings to shippers; or, more specifically stated, said by-laws may be viewed as in the nature of a unanimous compact among the members of the exchange not to deal with complainant or its agents so long as it persists in its said policy.

Two questions arise: (1) Whether such compact or agreement is illegal or contrary to public policy; and (2) if it is so, whether a court of equity will interpose in behalf of the complainant, and set it aside and enjoin its performance. Admitting the right of the complainant to embark in and prosecute the business for which it was organized freely and without improper obstruction, it does not follow that it has a right to deal with parties who are unwilling to so deal, or to compel those who do not choose to do so to purchase its property. Absolute freedom of commercial intercourse to which a party may be entitled is not interfered with by the refusal of another to deal with such party on any terms. The refusal of any or all of the members of the exchange to purchase livestock of the complainant is merely an exercise of their clear legal prerogative, and, if they have a right to so refuse, it is difficult to see how an agreement, as between themselves, to abstain from dealing with the complainant, is a matter in respect to which the complainant is entitled to any species of equitable relief.

If it be admitted that said by-laws are so far a restraint of trade as to be invalid for that reason, we are unable to see that the position of the complainant is in any respect improved. By-laws or contracts in restraint of trade are illegal only in the sense that the law will not enforce them. They are simply void. The law does not prohibit the making of contracts in restraint of trade. It merely declines, after they have been made, to recognize their validity. *Mogul SS. Co. v. McGregor*, L. R. 23 Q. B. Div. 598, 619. A party to such contract is not bound to perform it, but he may perform it if he sees fit, and his doing so exposes him to no legal animadversion. If the by-laws in question are invalid because of being in improper restraint of trade, they are merely void, and the members of the exchange, being under no obligation to obey them, may, perhaps, be entitled, at their own instance, to protection against such disciplinary consequences as the exchange may see fit to impose in case of disobedience. But such protection cannot be invoked in their behalf by a stranger, nor can they be required to disobey such rules except at their own volition. There is no suggestion in the record that they are seeking to disobey said rules, or desire to do so. The evidence fails to show that the exchange has taken or contemplates taking any steps for the enforcement of said rules, or that it will have any occasion so to do. These rules having been adopted, presumably, with the approval of the members of the exchange, there is no reason to suppose that they will not be volun-

tarily obeyed, and such voluntary obedience is a matter which the courts have no power to restrain.

But the position is taken on behalf the complainant, and most strenuously insisted upon, that the livestock market at the Union Stock Yards, by reason of its magnitude, and its far-reaching influence upon the commerce of the country, has become a public market, and therefore impressed with a public use; and that not only said market, but all those doing business therein, are brought within the influence of those rules of public policy which apply to and govern public employments, and which it is the business of the courts to administer and enforce. After giving this contention our patient consideration, we are unable to yield to it our assent. The market itself is established and owned by the Union Stock Yards & Transit Company, a private corporation, not itself engaged in the business of buying and selling livestock, but which provides the ground, and has established very extensive stock yards, to which livestock shipped to Chicago for sale may be consigned, and where buyers and sellers may meet, either in person or by their agents, and transact the business of buying and selling such livestock. The bill alleges, and the truth of the allegation is not questioned, that the amount of business annually transacted at said stock yards is such as to constitute the market thus established the largest livestock market in the world. If it be admitted that the magnitude of the business transacted at said market, and its influence upon the general commerce of the country, are of themselves sufficient to constitute the stock yards a public market, so as to impress upon it a public use, it would probably follow that certain public duties and obligations would thereby be imposed upon the stock yards company. It would doubtless be held bound to keep its market open alike to all who might desire to do business therein, and, perhaps, to make no discrimination between individuals. But it does not follow that dealers resorting to said market for purposes of trade would be subjected to similar rules of public policy. They would deal with each other merely upon the footing of private parties, owing each other no duties except those which the rules of honesty and fair dealing impose. Each would be at liberty to deal or decline to deal with others precisely as he might see fit. The rules of trade would be no different from what they are in other markets, whether public or private. Nor can it be seen how combinations between merchants doing business in such public market, either with a view of increasing or diminishing competition, or of enhancing or diminishing prices, would be subjected to any rules different from those which apply to such combinations wherever made. As individual merchants, they would be subjected, in their dealings with each other, to no peculiar rules of public policy growing out of the fact that such dealings were in a public market, and an agreement among any number of them not to deal with a particular person or class of persons would not, of itself, subject them to such rules, but they would be amenable only to those general rules of law applicable to that sort of agreements. But we are not prepared to hold

that the mere fact that the business of a particular market has become very large gives to the courts any power to declare such markets public, and impressed with a public use, or to apply to them any rules of public policy peculiar to that class of markets. It may well be doubted whether the term "public market," in the sense in which it is sought to be used here, is one which is known to our law. Markets overt, such as exist in England, are unknown here; nor is it usual in this country to grant to private parties the franchise or liberty of keeping or holding a fair or market, as is done in England. 2 Bl. Com. 37. Our statute in relation to the incorporation of cities and villages authorizes the legislative authorities of such municipal corporations to establish markets and market houses, and to provide for the regulation and use thereof. 1 Starr & C. Stat. p. 469. And it has been held that the power given to a municipal corporation to establish and regulate markets includes power to purchase a site, erect buildings, and provide rules for governing the same. *Caldwell v. Alton*, 33 Ill. 416, 75 Am. Dec. 282. But we are not aware that any class of markets in this country, not established by municipal authority, or by virtue of a market franchise granted by the state, has been held, merely because of the magnitude of the business carried on therein, to be impressed with a public use, so as to be held by the courts to be public markets, in that sense.

It is not claimed that the keeping or doing business in a market of this character is one of the employments which the common law declares to the public, nor is it pretended that it has been made so by statute. Ordinarily the adoption of new rules of public policy, or the application of existing rules to new subjects, is for the Legislature, and not for the courts. Accordingly, it may be held to be a general, though perhaps not an invariable, rule that the question whether a particular business, which has hitherto been deemed to be private, is public, and impressed with a public use, is for the Legislature. The doctrine on this subject is stated in *Ladd v. Southern C. P. & Mfg. Co.*, 53 Tex. 172, where a question very similar to the one under discussion was before the court, as follows: "We know of no authority, and none has been shown us, for saying that a business strictly *juris privati* will become *juris publici* merely by reason of its extent. If the magnitude of a particular business is such, and the persons affected by it are so numerous, that the interests of society demand that the rules and principles applicable to public employments should be applied to it, this would have to be done by the Legislature, (if not restrained from doing so by the Constitution,) before a demand for such use could be enforced by the courts." The view thus expressed would seem to be precisely applicable to the present case, and we are inclined to adopt it as a correct statement of the law, as it should be applied to the facts before us. We do not say that there may not be exceptions to the rule thus stated, but, if there are, they are not of such character as to be material here.

Apart from the consideration that the extension and application of even existing rules of law to subjects not heretofore within their

purview is legislative in its nature, the determination by the courts as to the precise point at which a mere private business reaches that stage of growth and expansion which is sufficient to render it *juris publici* would be surrounded with very great difficulties, and would present questions for which the courts, unaided by legislation, would be able to find no just or satisfactory criterion or test. But when the Legislature, acting upon a competent state of facts, has interposed and declared the business to be *juris publici*, all difficulty is removed.

The views here expressed do not conflict with what was decided in *Munn v. Illinois*, 94 U. S. 118, 24 L. ed. 77. The question raised and decided in that case was as to the constitutionality of the Act of the Legislature of this state, declaring certain grain elevators to be public warehouses, and prescribing rules for their management, and fixing maximum charges for the storage and handling of grain. There the legislative department had interposed and declared the public use, and the court, in holding the act constitutional, held merely that the legislative power had been properly exercised. This was the only question, having any relevancy here, presented in that case, or which the court undertook to decide, and the discussion of the evidence showing that the business carried on in said grain elevators was of such character that it had in fact become impressed with a public use was only for the purpose of showing that a condition of things existed which justified the Legislature in passing the statute then under consideration. The case of *New York & Chicago G. & S. Exch. v. Chicago Board of Trade*, 127 Ill. 188, 2 L. R. A. 411, is clearly distinguishable from the one now before us. There the board of trade had for a series of years voluntarily engaged in the business of compiling market quotations, showing the fluctuations of the prices of commodities bought and sold on the board, and of furnishing the same, for a consideration, by telegraph, to all members of the public who desired to obtain them. By this means, the business of buying and selling agricultural products throughout the entire country had been brought under the control of the market prices fixed and determined on said board. It was held that these quotations were property, and that the board, by its own act, had so far impressed upon them a public interest that it should be required, so long as it compiled and furnished them to any one, to furnish them to all, without discrimination. This conclusion was reached upon the theory that the board had, for a series of years, voluntarily and intentionally devoted its property to a use in which the public had an interest, and had, in effect, granted to the public an interest in that use; and that it must, therefore, so far as it dealt in that species of property at all, submit to be controlled by the public for the common good, to the extent of the interest it had thus created. The determining elements present in that case are wanting here. The business which is here sought to be subjected to a public use was, at its commencement, confessedly private, and private only; and the public use

is sought to be impressed upon it, not by virtue of any voluntary grant to the public, but simply because, by mere process of growth and expansion, the business has reached such magnitude as to affect public interests because of its magnitude alone. These facts would doubtless be sufficient to warrant the Legislature, in the exercise of its legislative discretion, in declaring a public use, and placing said business under legal control and supervision; but such power, in our opinion, does not rest with the courts.

The point is made that it was error for the court, on sustaining the defendant's motion to dissolve the injunction, to also enter a decree dismissing the bill for want of equity; the contention being that the bill should have been retained for final hearing on pleadings and proofs, according to the usual practice in chancery. We are of the opinion that the bill was properly dismissed. It was, in substance, at least as against the exchange, a bill for an injunction only. Its prayer, as against Rogers, having been granted by a prior decree, that portion of the relief sought is not to be considered, and, as against the exchange, nothing is prayed for but an injunction, except that the exchange be required to issue the certificate of membership formerly held by Rogers to the complainant. Under no possible view of the case, even if the bill had been retained for a further hearing, could this latter relief have been granted. The dissolution of the injunction was, in effect, a disposition of the entire case. Besides the bill, upon its face, as we think sufficiently appears from what has been said, is without merit; and, when that is the case, a motion to dissolve an injunction, the bill being in effect for an injunction only, has the same effect as a demurrer to the bill, and the court, on sustaining such motion, may properly dismiss the bill. *Titus v. Mabee*, 25 Ill. 257; *Weaver v. Poyer*, 70 Ill. 567; *Prout v. Lomer*, 79 Ill. 331. What we have said renders it unnecessary for us to consider the effect upon the status of the complainant of the fact, about which there seems to be no dispute, of its failure to record its certificate of incorporation until after the commencement of the present suit.

It is contended that the decree in favor of the defendant corporation, awarding damages on dissolution of the injunction, is not sustained by the evidence, and is therefore erroneous. We have duly considered the evidence applicable to that question, and are of the opinion that it supports the decree. The only damages proved are for solicitors' and counsel fees incurred in obtaining a dissolution of the injunction. It appears to us to be a fair conclusion, from all the evidence, that the sum awarded, viz., \$1,250, is no more than is fairly chargeable for the services rendered by solicitors and counsel in the mere matter of obtaining a dissolution of the injunction.

We find no material error in the record, and the judgment of the Appellate Court will be affirmed.

Magruder, J.: I do not concur in this decision.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

BANK OF EDGEFIELD, *Plff. in Err.*,
v.
FARMERS' CO-OPERATIVE MANU-
FACTURING CO.

(62 Fed. Rep. 96.)

1. A plea defectively verified may be verified in open court at the trial, under Ga. Code, § 3473, relating to amendments, and U. S. Rev. Stat., § 964, permitting amendment at any time of any defect in process or pleadings.
2. Dishonor of the first to mature of several notes given upon the same consideration, but not showing that fact upon their face is no notice to a subsequent indorsee for value before maturity of the other notes of the equities existing between the original parties, although he had notice of such dishonor.
3. The general commercial law as to notice to an indorsee of a note of the equities between the original parties prevails in the Federal courts when the rights of an indorsee whose residence is in a state different from that of the maker are to be determined, rather than any particular rule established in a state by its courts or statutes.
4. A bona fide holder of a note the consideration for which has failed in part as between the original parties is not limited by the fact that it was taken as collateral security, to recover only of the amount for which it was valid as between the original parties unless he had notice of the equities between them, but may recover at least the amount for which it was pledged.

(June 13, 1892.)

ERROR to the Circuit Court of the United States for the Northern District of Georgia to review a judgment awarding plaintiff a less amount than claimed in an action brought to recover the amount alleged to be due upon certain promissory notes. *Reversed.*

Before Pardee and McCormick, *Circuit Judges*, and Locke, *District Judge*.

Statement by **Pardee, Circuit Judge**:

The plaintiff in error filed a suit on the common-law side of the circuit court of the United States for the northern district of Georgia against the defendant in error, being an action upon three promissory notes, aggregating \$5,270. Each of said notes was made at Griffin, Ga., on the 28th September, 1889, by the defendant in error, payable to the order of Smith & Vaile Company, a corporation organized under the laws, and being a citizen, of the state of Ohio. These three notes were afterwards, and before due, indorsed by Smith & Vaile Company to D. A. Tompkins, a citizen of, and residing in, the state of North Carolina, who then, before the notes became due, indorsed them for value to the plaintiff in error, a citi-

zen of, and residing in the state of South Carolina. The defendant in error filed certain pleas setting up the failure of consideration, which said pleas were sworn to by W. P. Walker, president of the defendant company, before a justice of the peace for Spalding county, in the state of Georgia.

When the case was called for trial in the court below, plaintiff in error moved for judgment, because there was no issuable defense filed under oath, as provided by the statutes of the state of Georgia and rules of court, plaintiff contending that the affidavit to the plea, made before a justice of the peace, constituted no sworn defense in the circuit court of the United States. The court ruled (a) that the affidavit was sufficient; and (b) that if it was not sufficient the plea could be sworn to then in open court; and the plea was thereupon sworn to by W. E. H. Searcy, president of the defendant company, before W. C. Carter, deputy clerk of the circuit court of the United States for the northern district of Georgia. Plaintiff then renewed the motion for judgment, because there could be no affidavit to a plea after the first term of the court. The court overruled this motion, and declined to permit the plaintiff to take judgment without a jury. The defendant then filed an additional plea, which was also sworn to before the deputy clerk, setting forth that, when the loan was made by the Bank of Edgefield to D. A. Tompkins, upon the three notes as collateral, certain of the notes which had been given by defendant to Smith & Vaile Company, and which were among those deposited as collateral security by Tompkins, were then due and unpaid; and that this was notice to the Bank of Edgefield; and that, if anything was due to plaintiff, it was only the amount first loaned to Tompkins, being \$500.

The other facts in the case sufficiently appear from the assignments of error, as follows:

"(1) That the court erred in not granting a judgment for plaintiff, as requested by its attorneys, upon the ground that there was no issuable defense filed under oath by defendant.

"(2) Because the court erred in not granting judgment for plaintiff, as requested by its attorneys, after defendant had been allowed to swear to its pleas in open court at the time of the trial.

"(3) Because the court erred in permitting the introduction of the depositions of M. H. Mims, cashier of plaintiff, which were offered by defendant at the trial, and objected to by plaintiff in open court and in presence of the jury.

"(4) Because the court erred in permitting W. E. H. Searcy, president of the defendant company, to testify in the cause over the objection of the plaintiff made in open court in presence of the jury.

"(5) Because the court erred in not ruling out and excluding from the jury the depositions of said M. H. Mims and the testimony of W. E. H. Searcy, when the same was requested by

NOTE.—The above case makes a contribution to the law of commercial paper by deciding a question that has not often arisen as to the effect, as 18 L. R. A.

notice, of the dishonor of the first of several notes given for the same consideration.

attorney for plaintiff in open court and in presence of the jury.

"(6) Because the court erred in charging the jury as set forth in the transcript of the record.

"(7) Because the court erred in charging the jury as follows: 'Now, these notes are held by the Bank of Edgefield, and the proofs show exactly what that transaction was. We have the evidence of the cashier of the bank that these six notes—the three notes sued on, and the three notes for \$500 each, which were the first three to mature—were placed in August, 1890, in the Bank of Edgefield, and that some notes were given by Mr. Tompkins after that, the first of which were given on the 18th October. The three notes, however, were due at the time these notes were placed in the bank. In the opinion of the court, the dishonoring of the three notes, as it is called in law,—the failure to pay them when they were due,—was notice to the bank of all the equities existing between the machinery company, Smith & Valle Company, and the defendant corporation.'

"(8) Because the court erred in charging the jury as follows: 'So that being the case, in the opinion of the court, the bank would only be entitled to recover on these notes, under the evidence and the pleadings, the amount due by the defendant to Smith & Valle Company, which would be the amount as stated to you a while ago, the difference in the freight, and the interest which Mr. Searcy says was on the entire transaction up to the time they made the arrangement, at or about the time of the date of the letter.'

"(9) Because the court erred in charging the jury as follows: 'About the date of that letter which you have in evidence, 28th February, 1890, I believe, there was an adjustment of this matter between Tompkins, agent or representative of the establishment that sold the machinery and the president of the defendant corporation; there having been no evidence adduced at the trial to authorize or justify such charge.

"(10) Because the court erred in charging the jury as follows: 'The proof shows that these notes were given for the purchase of certain machinery, and that that machinery was not delivered; that it was not to be delivered, however, until the three five-hundred dollar notes were paid, and that these notes were not paid. The evidence is somewhat indefinite about that; it appearing from the evidence of W. E. H. Searcy, a witness for defendant, positively and without dispute, that neither of the said three five-hundred dollar notes were paid, the evidence not having in any wise been indefinite upon this point.

"(11) Because the court erred in charging the jury as follows: 'But Mr. Searcy stated they agreed he was to pay the interest on the entire transaction, and the difference in freight. I do not believe that the bank is entitled to recover any more than that. I think, however, they are entitled to recover that; there having been no evidence to warrant such a charge, and the same being illegal and misleading.

"(12) Because the court erred in refusing to charge the jury, when so requested by counsel for plaintiff, as follows: 'If you find, as is admitted by the plaintiff, that the three notes for \$500 each were past due when they were trans-

ferred by Tompkins to the plaintiff bank, along with the three notes sued on, then this is not notice to the bank of all the equities existing between the defendant company and Smith & Valle Company; nor was it evidence of a want or failure of consideration of the three notes not then due, and now sued upon. But you may consider the fact of the three \$500 notes being past due when the six notes were transferred to the plaintiff bank in determining from the evidence if that fact showed bad faith in the bank in taking the notes not due, and, if it did, then the plaintiff cannot recover anything. But if you find from the evidence that, when the bank took the six notes, it took the three notes sued on before due, in good faith and for a valuable consideration, to wit, as collateral security for debt of D. A. Tompkins, then the plaintiff is entitled to recover the full amount called for by the three notes sued on.'

"(13) Because the court erred in taking a wholly erroneous view of the real issues and merits of the cause, and in permitting the defendant to introduce evidence of the equities existing between the defendant and Smith & Valle Company, to whom the notes sued on were given, without there being any pleadings to justify the introduction of such evidence, and without there being any legal right on the part of the defendant to introduce testimony as to such equities; it not having been shown that the plaintiff took the three notes sued on without any knowledge of any failure of consideration or infirmity in the said notes, nor that plaintiff took said notes in bad faith."

Mr. Henry B. Tompkins for plaintiff in error.

Messrs. Hall & Hammond and Dis-
mukes & Mills for defendant in error.

Pardee, Circuit Judge, delivered the opinion of the court:

The first and second assignments of error are not well taken. The plea in this case was sworn to originally before one of the officers mentioned in section 3450 of the Georgia Code, and in accordance with the Georgia practice, which we are inclined to think was sufficient verification to the plea filed in the circuit court, but, whether this be so or not, when the plea was afterwards sworn to in open court at the time of the trial, by the direction of the court, we have no doubt the plea was sufficiently verified. Code Ga., § 3479 *et seq.*, is very liberal with regard to the allowance of the amendments, and sufficiently broad, in our opinion, to cover this case. And section 954 of the Revised Statutes of the United States provides that the court "may, at any time, permit either of the parties to amend any defect in process or pleadings, and upon such conditions as it shall in its discretion and by its rules prescribe."

The seventh assignment of error seems to be well taken. It is as follows: "(7) Because the court erred in charging the jury as follows: 'Now, these notes are held by the Bank of Edgefield, and the proofs show exactly what that transaction was: We have the evidence of the cashier of the bank that these six notes—the three notes sued on, and the three notes for \$500 each, which were the first three to

mature—were placed in August, 1890, in the Bank of Edgefield, and that some notes were given by Mr. Tompkins after that, the first of which were given on the 18th of October. The three notes, however, were due at the time these notes were placed in the bank. In the opinion of the court, the dishonoring of the three notes—as it is called in law, the failure to pay them when they were due—was notice to the bank of all the equities existing between the machinery company, Smith & Vaile Company, and the defendant corporation.”

There was nothing on the face of the notes to indicate that the three notes for \$500 each, which were past due when they, with the three notes sued on, were deposited as collateral security with the plaintiff, were for the same consideration, or referred in any way to the same transaction, upon which the three notes sued upon were any of them issued. There is no proof in the case tending to show that the plaintiff had any knowledge whatever of the transaction or contract between the defendant and Smith & Vaile Company, or that the six notes constituted or formed part of one transaction. “Where more than one note is executed upon the same consideration, they are not all to be regarded as dishonored when one is overdue and unpaid.” Daniel, Neg. Inst. § 787.

The precise question was before the supreme court of the state of Wisconsin in the case of *Boss v. Hewitt*, 15 Wis. 261. In that case the court said: “Upon the question whether the purchaser should be chargeable with notice of any defects in the consideration of the notes subsequently to become due by reason of the first being overdue at the time, no authority was cited by either counsel, and we have found none. The notes were all secured by one mortgage, and, if it had appeared on the face of the papers that they were all given for one consideration, upon one transaction, it might be urged, with considerable force, that, as the law charged the purchaser with notice of any defect in the consideration of the first note, it must also charge him with like notice that all were given for one consideration. But how that question should be decided, if it ever arises, can be then determined. But there was nothing on the face of the papers to show that the notes were all given for one consideration. It is true they bore the same date, and were secured by one mortgage. But it is frequently the case that parties, in giving securities, include debts arising out of many different transactions, as to some of which there might have been defenses not affecting the others; and we do not think that a purchaser of negotiable notes before maturity can be held chargeable with notice of any defect in their consideration from the mere fact that another note, secured by the same mortgage, was overdue, and had not been paid.”

Boss v. Hewitt was affirmed in *Kelley v. Whitney*, 45 Wis. 110, citing *National Bank of North America v. Kirby*, 108 Mass. 497, and *Cromwell v. Sac County*, 96 U. S. 51, 24 L. ed. 681. In *Cromwell v. Sac County* affirmed in *Indiana & I. Cent. R. Co. v. Sprague*, 103 U. S. 756-763, 26 L. ed. 554-557, and also in case of *Morgan v. United States*, 118 U. S. 476-502, 28 L. ed. 1044-1053, it is held that the fact 18 L. R. A.

that installments of interest are overdue and unpaid is not sufficient to affect the position of one taking bonds and subsequent coupons before maturity for value, as a bona fide holder.

The defendant in error contends that the rule given in the judge's charge was correct, because section 2786 of the Code of Georgia provides as follows: “If the holder receives it after it is due, its nonpayment at maturity is notice to him of dishonor, and he takes it subject to all the equities existing between the original parties thereto; and if there be several notes constituting one transaction, but due at different times, the fact that the one is overdue and unpaid shall be notice to the purchaser of all, and put him on his guard.” And he cites the case of *Harrell v. Broxton*, 78 Ga. 129, to the same purport.

The plaintiff in error contends that the question of notice of equities existing between original parties in the case of commercial paper is regulated and determined by the commercial law, and not by the rule or decisions in any particular state, relying upon *Smith v. Tyson*, 41 U. S. 16 Pet. 1, 10 L. ed. 865; *Oates v. First Nat. Bank of Montgomery*, 100 U. S. 239, 25 L. ed. 580; *Brooklyn City & N. R. Co. v. National Bank of Republic of New York*, 102 U. S. 14, 26 L. ed. 61; *Pana v. Bowler*, 107 U. S. 529-541, 27 L. ed. 424-429; *Burgess v. Seligman*, 107 U. S. 88, 27 L. ed. 865; *King v. Doane*, 189 U. S. 173, 35 L. ed. 87.

There is no doubt that the law of the place where the contract was made usually governs in the construction and enforcement thereof, and that the validity and effect of all writings or contracts are determined by the laws of the place where executed. The question presented here, however, is not with regard to the construction of the contract or its validity, but, rather, with regard to the rule of commercial law which affects subsequent holders in the matter of notice of prior equities. We are of the opinion that the general commercial law prevails, and not any particular rule or decision established in the state of Georgia either by the decisions of the supreme court of that state or by statute announcing a rule.

It has been settled in the courts of the United States since the leading case of *Goodman v. Simonds*, 61 U. S. 20 How. 343, 15 L. ed. 984, that one who acquires mercantile paper before maturity from another, who is apparently the owner, giving a consideration for it, obtains a good title, though he may know facts and circumstances that would cause him to suspect, or would cause one of ordinary prudence to suspect, that the person from whom he obtained it had no interest in or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained those facts. *Swift v. Smith*, 102 U. S. 442, 26 L. ed. 193; *King v. Doane*, 189 U. S. 166, 35 L. ed. 84. It follows that, although the three notes of the same date as those acquired by the plaintiff were past due, and that the plaintiff was informed of that fact, still that would not be notice that the three notes not yet due were in any wise tainted by defective consideration, or for any other cause.

The eighth assignment of error seems also to be well taken. It is as follows: “(8) Because the court erred in charging the jury as follows:

"So that being the case, in the opinion of the court, the bank would only be entitled to recover on these notes, under the evidence and the pleadings, the amount due by the defendant to Smith & Vaile Company, which would be the amount as stated to you a while ago, the difference in the freight, and the interest which Mr. Searcy says was on the entire transaction up to the time they made the arrangement, at or about the time of the date of the letter."

The proof in the case shows without dispute that the three promissory notes sued upon by plaintiff were held by it as collateral security to secure loans and discounts from time to time thereafter to D. A. Tompkins, whose total indebtedness to the plaintiff at the time suit was brought amounted to \$1,239.77. This evidence was produced by the defendant, and, as there is no evidence to the contrary, it is certainly binding upon the defendant. "When it appears that the bill or note was acquired by the holder as collateral security for a debt, and he is deemed entitled to recover upon it, he is still limited to the amount of the debt which it secures if there be a valid defense against his transferor, being regarded as, at all events, a bona fide holder, and entitled to stand upon a better footing only *pro tanto*. Thus the holder

could recover against an accommodation party no more than the consideration actually advanced; but, in the absence of proof, he will be deemed to have advanced the full amount of the paper." Daniel, Neg. Inst. § 892. To the same effect see *Stoddard v. Kimball*, 6 Cush. 469; *Chicopee v. Chapin*, 8 Met. 40; *Fisher v. Fisher*, 98 Mass. 303; *Union Nat. Bank v. Roberts*, 45 Wis. 378; *Dubuque First Nat. Bank v. West*, 52 Iowa, 684; *Hatcher v. Independence Nat. Bank of Philadelphia*, 70 Ga. 547, and cases there cited.

The charge of the court, based on the theory that the plaintiff was not a bona fide holder, limiting plaintiff's right to recover to the amounts due by the defendant to Smith & Vaile Company, was probably correct, if the theory upon which it was based had been the correct theory of the case; but, as we have shown in considering the seventh assignment of error, that theory was wrong, and it follows that the charge of the court limiting the plaintiff's right to recover an amount less than the indebtedness of Tompkins to plaintiff was erroneous. A consideration of the other assignments of error is unnecessary.

The judgment of the circuit court is reversed, with costs, and the cause is remanded, with instructions to order a new trial.

NORTH CAROLINA SUPREME COURT.

Samson EDWARDS, *Appt.*,

v.

Jennie CULBERTSON.

(.....N. C.....)

A woman who purchases land with money fraudulently obtained from a man by a promise to marry him and to hold such land in lieu of her right to dower under the marriage may be held to be a trustee on her refusal to marry him and the land charged with a lien for such money.

(November 22, 1892.)

APPEAL by plaintiff from a judgment of the Superior Court for Chatham County refusing to make a sum of money, with which it had charged defendant as trustee, a lien upon land which she had purchased with it. *Judgment in favor of appellant.*

The facts are stated in the opinion.

Mr. Thomas B. Womack, for appellant:

A trust is created when money is obtained from another by a fraud.

Wood v. Cherry, 73 N. C. 110.

When such money is invested in land, the land will be followed.

2 Lewin, Trusts, § 897, subsec. 10.

The expected marriage was a sufficient consideration, and so one calculated to deceive.

See Womack's Digest, 227-4, 1075, 1969.

In addition to the marriage, there was the surrender of marital rights, which, in the

event of marriage, equity would have enforced.

Womack's Digest, 1075.

Mr. John Manning for appellee.

Shepherd, Ch. J., delivered the opinion of the court:

According to the finding of the jury the defendant fraudulently obtained of the plaintiff the sum of \$275.25, for the purpose of purchasing the land described in the complaint, and that the fraud consisted in "falsely and fraudulently promising and pretending that, if the plaintiff would let her have the said sum of money for said purpose, she would marry him in a very short time, and that the land to be purchased with the said money should be in lieu of her right of dower which she would acquire" by the said marriage. Upon this verdict, his honor rendered a judgment in favor of the plaintiff for the recovery of the amount so fraudulently obtained, but refused to declare it a charge upon the land purchased by the defendant with the said money, the land still remaining in her hands. Were there nothing more than a mere promise to marry, it is plain that a violation of it would not entitle the plaintiff to any equitable relief, but we must infer from the verdict that the defendant did not intend to perform the promise at the time it was made, and that she intended it, as well as the additional agreement to hold the land in lieu of dower, simply as a trick or contrivance by

NOTE.—On the subject of resulting trusts, see also *Fink v. Umshied*, 2 L. R. A. 146, and *note*, 40 Kan. 271; *Hinton v. Pritchard*, 10 L. R. A. 401, and 18 L. R. A.

note, 107 N. C. 128; *Cook v. Patrick*, 11 L. R. A. 578, 135 Ill. 490.

which to cheat and defraud the plaintiff of his money. By submitting to the verdict and judgment, the defendant (even if he could successfully do so) is precluded from denying that she obtained the money under circumstances which the law denounces as fraudulent, and, this being so, it cannot be doubted that if the specific money had been retained by her and could have been identified, the plaintiff, in a proper action, could have recovered it. If this be true, why may not the money be traced into the land and declared to be a charge thereupon? This is a somewhat novel question in this state, but in view of well-settled equitable principles, as well as authorities in other jurisdictions, it is believed to be unattended with any very serious difficulty.

The only decision of this court to which we have been referred as bearing upon the question is that of *Campbell v. Drake*, 39 N. C. 94. The plaintiff filed a bill in equity against the heirs-at-law of one Farrow, praying that they be declared trustees of certain land purchased by their ancestor with money stolen by him of the plaintiff while in the employment of the latter as his clerk. The court said that it was "not at all like the cases of dealings with trust funds by trustees, executors, guardians, factors, and the like, in which the owner of the fund may elect to take either the money or that in which it was invested;" and it was accordingly held that the plaintiff was not entitled to the particular relief asked for. It was strongly intimated, however, by Ruffin, *Ch. J.*, in delivering the opinion, that the plaintiff might "have the land declared liable as a security for the money laid out for it." It was not stated upon what principle this could be done, but we apprehend that it was based upon the general proposition that, whenever a person has obtained the property of another by fraud, he is a trustee *ex maleficio* for the person so defrauded, for the purpose of recompense or indemnity. "One of the most common cases," remarks Judge Story, "in which a court of equity acts upon the ground of implied trusts *in invitum*, is when a party receives money which he cannot conscientiously withhold from another party." Story, *Eq. Jur.* § 1255. And he states it to be a general principle that "whenever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the original owner, or *cestui que trust*." *Id.* § 1258; Hill, *Trustees*, 222; *Whitley v. Foy*, 59 N. C. 34, 78 Am. Dec. 236; *Taylor v. Plumer*, 8 Maule & S. 562; *Knatchbull v. Hallett*, L. R. 18 Ch. Div. 696; *People v. City Bank of Rochester*, 96 N. Y. 32; *Central Nat. Bank of Baltimore v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693.

Mr. Pomeroy says: "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, or through any other circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity imposes a constructive trust on the property thus acquired in favor of the

one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein, and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer or in the hands of any subsequent holder, until a purchaser in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed '*ex maleficio*' or '*ex delicto*,' are practically without limit. The principle is applied whenever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer." Pom. *Eq. Jur.* 1053. A confidential relation is not necessary to establish such trust, and there is no good reason why the owner of property taken and converted by one who has no right to its possession should be less favorably situated in a court of equity, in respect to his remedy, (at least for the purpose of "recompense or indemnity.") than one who by an abuse of trust has been injured by the wrongful act of a trustee to whom the possession of trust property has been confided. "The beautiful character—pervading excellence, if one may say so—of equity jurisprudence," says Judge Story, "is that it varies its adjustments and proportions so as to meet the very form and pressure of each particular case in all its complex habitudes." The trusts of which we are speaking are not what is known as "technical trusts," and the ground of relief in such cases is, strictly speaking, fraud, and not trust. Equity declares the trust in order that it may lay its hand upon the thing and wrest it from the possession of the wrongdoer. This principle is distinctly recognized by our leading text-writers, and it is said by Mr. Bispham (*Eq.* 92) that "equity makes use of the machinery of a trust for the purpose of affording redress in cases of fraud." The principles above stated are illustrated by many decisions to be found in the reports of other states, and as our case may easily be assimilated to those in which money or other property has been stolen and converted, such cases must be recognized as pertinent authority in the present investigation. In *Newton v. Porter*, 69 N. Y. 133, it was held that the owner of negotiable securities, stolen and afterwards sold by the thief, may follow and claim the proceeds in the hands of the felonious taker or of his assignee with notice; and that this right continues and attaches to any securities or property in which the proceeds are invested, so long as they can be traced and identified. The law, it was said, "will raise a trust *in invitum* out of the transaction, in order that the substituted property may be subjected to the purposes of indemnity and recompense." Andrews, *J.*, said that "equity only stops the pursuit when the means of ascertainment fail, or the rights of bona fide purchasers for value, without notice of the trust, have intervened. The relief will be moulded and adapted to the circumstances of the cases, so as to protect the rights of the true owner." *Lane v. Dighton*, Ambl. 409; *Manvell v. Manvell*, 2 P. Wms. 679; *Lench v. Lench*, 10 Ves.

Jr. 511; Perry, Trusts, § 829; Story, Eq. Jur. § 1258. In *National Mahanov Bank v. Barry*, 125 Mass. 20, it was held that equity will charge land, paid for in part with the proceeds of stolen property, with a trust in favor of the owner of the property for the amount so used. In *Humphreys v. Butler*, 51 Ark. 851, the defendant, in paying for a house and lot purchased by him for \$400, wrongfully used \$149.52 belonging to the plaintiff, and of which he had obtained possession without her authority, knowledge, or consent. The court declared the defendant a trustee to the extent of the money of the plaintiff used by

him, and charged the same upon the property, and in default of its payment by a certain time decreed that the same be sold to satisfy the said lien. These and other authorities that could be cited abundantly sustain the intimation of *Chief Justice Ruffin*, to which we have referred, and we are therefore of the opinion that the money fraudulently obtained of the plaintiff may be followed into the land described in the complaint, and that the judgment of his honor should be so modified as to declare it to be a charge upon the same.

Modified.

ARKANSAS SUPREME COURT.

N. H. GUNN, *Appt.*,

v.

WHITE SEWING MACHINE CO.

(.....Ark.....)

A contract by which a resident of a state agrees with a foreign corporation to canvass certain territory for the sale of its sewing machines which the corporation thereby agrees to sell to him on credit and a bond given to secure payment to the corporation of any sum that may become due under such contract constitutes a part of the interstate commerce carried on by the sale of such sewing machines in accordance with said contract and therefore cannot be affected by a state statute prohibiting business within the state by a foreign corporation which has not complied with certain requirements such as filing a certificate to designate an agent on whom process may be served.

(*Cockrill, Ch. J., and Mansfield, J., dissent.*)

(December 8, 1892.)

A PPEAL by defendant from a judgment of the Circuit Court for Faulkner County in favor of plaintiff in an action brought to enforce the liability of defendant as surety upon a bond which had been given to plaintiff by one, Julian, in connection with a contract for the sale of plaintiff's machines. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. H. Harrod and E. A. Bolton, for appellant:

The legislation of a state will only be restrained when the exercise of the right conflicts with the perfect execution of a sovereign power delegated to the United States.

Dobbins v. Erie County, 41 U. S. 16 Pet. 435, 10 L. ed. 1022.

Even if a state were bound to accord to a company the right of acting in a corporate capacity within its limits, the state would undoubtedly retain the power of making reasonable regulations for the government of the company, and prescribing conditions to be complied with before the right may be claimed.

2 Morawetz, Priv. Corp. § 974.

Messrs. Sanders & Watkins for appellee.

NOTE.—For note on peddlers and drummers as related to interstate commerce, see *Re Spain* (N. C.) 14 L. R. A. 97.

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Battle, J., delivered the opinion of the court:

The White Sewing Machine Company was a corporation organized and doing business under the laws of the state of Ohio, and was engaged in the selling of sewing machines and other goods at Cleveland, in that state. A. I. Julian and N. H. Gunn were citizens of Faulkner county, in this state. On or about the 6th day of August, 1888, the sewing machine company entered into a contract with Julian, by which the company undertook and bound itself to sell sewing machines, and the component parts thereof, to Julian, at stipulated prices, on a credit, and Julian agreed to canvass Faulkner county, or cause it to be canvassed, "with horse and wagon, exclusively for the sale of the White sewing machines." Julian was to order the machines, or the component parts of the same, when he desired them to be sent to him. At the same time Julian, as principal, and Gunn, as surety, executed a bond to the sewing machine company, conditioned, among other things, that Julian would pay all sums of money that he would be owing to the company for sewing machines or otherwise. After this the company, pursuant to the terms of its contract, and on the faith of the bond executed to it, sold and shipped to Julian a large number of sewing machines and other property, and Julian became indebted to it on account thereof in a large sum of money. Julian failing to pay, the company brought this action on the bond against Gunn to recover the same, or a part thereof.

The only defense made by Gunn was the company had not, at the time the bond was executed, filed any certificate in the office of the secretary of the state of Arkansas, designating an agent upon whom process could be served, and its principal place of business in this state.

Evidence was, however, adduced at the trial tending to prove, among other things, the facts before stated, and that the machines and other property were sold by the company in Ohio, and shipped to Julian in this state. The court below held that these transactions were a part of the interstate commerce of the United States, and were not affected by the laws of this state, and rendered judgment in

favor of plaintiff against the defendant, and he appealed.

Appellant contends that the bond sued on is void under the Act of the General Assembly of April 4, 1887. That Act declares that before any foreign corporation shall begin to carry on business in this state it shall, by a certificate under the hand of the president and seal of such company, filed in the office of the secretary of state, designate an agent, who shall be a citizen of the state, upon whom process may be served, and also state therein its principal place of business in this state; and provided that, if any such corporation shall fail to file such certificate, all its contracts with citizens of this state shall be void as to the corporation, and shall not be enforced in any of the courts of this state in favor of the corporation.

It is conceded that the certificate required by that Act was not filed by the appellee until after the debt sued on matured. Was the bond void?

In *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 857, the court, speaking of a foreign corporation, said: "The recognition of its existence, even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states,—a comity which is never extended where the existence of the corporation or the exercise of its powers is prejudicial to their interests, or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows as a matter of course that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interests. The whole matter rests in their discretion."

But this right of the state cannot be so exercised as to interfere with the power of Congress to regulate interstate commerce. In *Paul v. Virginia* the corporation involved in litigation was an insurance company, and was not engaged in interstate commerce. In speaking of the power to regulate commerce, in that case, the court further said: "It is undoubtedly true, as stated by counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. . . . This state of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on. It is general, and includes a like commerce by individuals, partnerships, associations, and corporations."

In *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, the court, speaking of interstate commerce, said: "The power to regulate

that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed; that is, the conditions upon which it shall be conducted, to determine when it shall be free, and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety. While, with reference to some of them, which are local and limited in their nature or sphere of operation, the states may prescribe regulations until Congress intervenes and assumes control of them, yet, when they are national in their character, and require uniformity of regulation, affecting alike all the states, the power of Congress is exclusive. . . . Nor does it make any difference whether such commerce is carried on by individuals or by corporations."

In *Pembina Consol. S. Min. & M. Co. v. Pennsylvania*, 125 U. S. 181, 81 L. ed. 650, the court, after discussing this power at length, said: "The only limitation upon this power of the state to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the Federal government, is not to be restricted by state authority." *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Cooper Mfg. Co. v. Ferguson*, 118 U. S. 727, 28 L. ed. 1137.

In *Robbins v. Shelby County Tax. Dist.*, 120 U. S. 489, 30 L. ed. 694, the court said: "Certain principles have been already established by the decisions of this court which will conduct us to a satisfactory decision. Among those principles are the following: (1) The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation. . . . (2) Another established doctrine of this court is that, where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, as hereinafter mentioned, is repugnant to such freedom."

"Of the former class may be mentioned all that portion of commerce with foreign countries or between the states which consist in the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulations, and that Congress alone can prescribe." *Mobile County v. Kimball*, 102 U.

S. 691, 26 L. ed. 238; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442.

"Of the class of subjects local in their nature or intended as mere aids to commerce," on which it has been held that the authority of the states may be exerted for their regulation and management until Congress interferes and supercedes it, "may be mentioned harbor pilotage, buoys, beacons to guide mariners to the proper channels in which to direct their vessels," bridges over navigable streams, wharves, wharfage and quarantine. "State action upon such subjects," said the court in *Mobile County v. Kimball*, *supra*, "can constitute no interference with the commercial power of Congress, for, when that acts, the state authority is superseded. Inaction of Congress upon these subjects of local nature or operation, unlike its inaction upon matters affecting all the states, and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done in respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by state authority."

A few cases will serve to show the character of some of the statutes which have been held by the court to be unconstitutional because they interfere with the exclusive power of Congress to regulate interstate commerce, and thereby what constitutes, in part, the commerce over which such power extends. In *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547, a statute of the state of Louisiana which attempted to regulate the carriage of passengers upon railroads, steamboats, and other public conveyances, and which provided that no regulation of any companies engaged in that business should make any discrimination on account of race or color, was considered. "The case presented under the statute was that of a person of color, who took passage from New Orleans for Hermitage, both places being within the limits of the state of Louisiana, and was refused accommodations in the general cabin on account of color. In regard to this the court declared that, for the purposes of this case, we must treat the Act of Louisiana of February 23, 1869, as requiring those engaged in interstate commerce to give all persons traveling in that state, upon public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color."

We have nothing whatever to do with it as a regulation of internal commerce, or as affecting anything else than commerce among the states." And, speaking in reference to the right of the states, in certain classes of interstate commerce, to pass laws regulating them, the court said: "The line which separates the powers of the states from this exclusive power of Congress is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. . . . But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon 18 L. R. A.

the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without, or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage."

In *Robbins v. Shelby County Tax. Dist.*, 120 U. S. 489, 30 L. ed. 694, the taxing district of Shelby county, Tenn., which includes the city of Memphis, acting under the authority of a statute of that state attempted to impose a license tax upon a drummer for soliciting, within that district, the sale of goods for a firm in Cincinnati, which he represented; but the court decided that such a soliciting of business constituted a part of interstate commerce, and that the statute of Tennessee imposing a tax upon such business was in conflict with the commerce clause of the Constitution of the United States, and was therefore void.

In *McCall v. California*, 186 U. S. 104, 34 L. ed. 392, the plaintiff in error was convicted of violating an order of the city and county of San Francisco, in the state of California, which made it a misdemeanor for any one to act as an agent of a railroad company without having first paid the sum of \$25 as a license fee. He was an agent in said city and county for the New York, Lake Erie & Western Railroad Company, a corporation having its principal place of business in the city of Chicago, and which operated a continuous line of road between Chicago and New York. As such agent his duties consisted in soliciting passenger traffic in that city and county over the road he represented. He did not sell tickets for his company; neither did he receive nor pay out money on account of it. His sole offense consisted in soliciting passengers to go over his company's road, without having paid the license tax imposed upon him by said order as a condition precedent to his right to act as such agent in said county. The court held that the license fee as to such agency was a tax upon interstate commerce, and in that respect was unconstitutional. The court, speaking of the agency and tax, said: "The object and effect of his soliciting agency were to swell the volume of the business of the road. It was one of the means by which the company sought to increase, and doubtless did increase, its interstate passenger traffic. It was not incidentally or remotely connected with the business of the road, but was a direct method of increasing that business. The tax upon it, therefore, was, according to the principles established by the decisions of this court, a tax upon a means or an occupation of carrying on interstate commerce, pure and simple."

In this case the contract between the corporation and Julian, and the bond sued on, were executed in this state, and were business transacted in Arkansas. But no sales or indebtedness were created by them. The

contract was only an agreement to sell, and the bond was a condition upon which the corporation agreed to sell and a means adopted to secure the indebtedness to be contracted by sales, and both constituted a contract. They were made a foundation of a future trade between a corporation of one state and a citizen of another, and were a direct method devised to increase the business of the former, and, as to them, served as a basis of interstate commerce. Relying on them, the corporation sold the machines and other property, and shipped them from the state of Ohio, its place of manufacture and business, to Julian, in Arkansas; the place of sales being in Ohio. Until they ceased, according to their terms or by agreement of the parties to be of any force, they were an inducement to, and entered into, every sale, and formed a part of it. According to the principles firmly established by numerous decisions of the Supreme Court of the United States, they, (the bond and contract,) and the sales and shipment of the machinery and other property, were a part of the interstate commerce of the United States, which Congress has the exclusive right to regulate, and were and could not be affected by the Act of April 4, 1887.

Judgment affirmed.

Cockrill, Ch. J., dissenting:

A corporation created under the laws of one state has no right to recognition in another state. It is a privilege to be enjoyed only through comity. Having the absolute power of excluding it from its jurisdiction, the state may, of course, impose such conditions upon the privilege of doing business in its limits as it may think expedient. This doctrine went without qualification for more than three fourths of a century after the adoption of the Constitution of the United States, when the Supreme Court of the United States ingrafted upon it an exception in favor of foreign corporations which were agencies of commerce. The exception was first adverted to in *Paul v. Virginia*, 75 U. S. 8 Wall. 168. 19 L. ed. 357. But that was confessedly *obiter*, and established nothing. It has been said by judges delivering the opinions of the court that the exception was first established in *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1. 24 L. ed. 708, in 1877. See *Horn Silver Min. Co. v. New York*, 143 U. S. 805, 314, 36 L. ed. 164, 167; *Pembina Consol. S. Min. & M. Co. v. Pennsylvania*, 125 U. S. 181, 185, 31 L. ed. 650, 652. But *Chief Justice* Waite, who delivered the opinion in that case, seems not to have been aware that he was deciding the question, for, after quoting the *obiter* in *Paul v. Virginia* above mentioned, he says, "the questions thus suggested need not be considered now," and gives as a reason for it the fact that the court had placed the invalidity of the state statute under consideration upon the ground that it conflicted with the legislation of Congress. The question has since been adjudicated in several cases. I am aware of no case in which it has been ruled that the exception applies to a foreign corporation which is

not itself an agency of commerce. There are *dicta* which may go further, but there are also expressions of the courts so pointed as to indicate that the exception is limited to such corporations as are agencies of commerce,—as carriers of freight, passengers, or communications. Thus, in *Pembina Consol. S. Min. & M. Co. v. Pennsylvania*, *supra*, Judge Field, who first gave expression to the exception, in speaking of the case of *Pensacola Teleg. Co. v. Western U. Teleg. Co.*, *supra*, said it was there held that the telegraph, as an agency of commerce and intercommunication, came under the controlling power of Congress and could not be excluded by a state from transacting its business within its limits. And again, in the same case, he says the exception extends only to a foreign corporation in the employ of the Federal government, "or where its business is strictly commerce." The same language is quoted with approval through Judge Lamar in *McCall v. California*, 136 U. S. 112, 34 L. ed. 898. In *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, Judge Bradley, after saying that a state could not restrict the right of a foreign corporation where "the principal object of its organization" was "the business of carrying on interstate commerce," said: "The case is entirely different from that of . . . manufacturing corporations, and all other corporations whose business is of a local and domestic nature."

Conceding that the extreme doctrine of *Robbins v. Shelby County Tax Dist.*, 120 U. S. 489, 30 L. ed. 694, must be extended to foreign corporations, the conclusion does not follow that such a corporation, engaged in interstate trade,—as selling merchandise,—can gain a domicile in a state in violation of its statutes, merely to gain a vantage ground for the sale of its goods. A manufacturing corporation is connected with commerce, for if it cannot sell, its output is worthless. Many manufacturing corporations would suspend operations if their sales were limited to the state creating them. They are, then, in a measure connected with interstate commerce. But the business connection with commerce must be direct in order to work an inhibition of state action. It is not sufficient that the business is remotely or incidentally connected with interstate or foreign commerce. State legislation which operates upon natural persons and corporate agencies of commerce is not invalidated by the commerce clause of the Constitution, unless it directly affects commerce. *Sherlock v. Alling*, 93 U. S. 99, 102, 23 L. ed. 819, 820; *Smith v. Alabama*, 124 U. S. 474, 31 L. ed. 511. The rule as to corporate business cannot be more rigid against the state's right of regulation or prohibition. In *Pembina Consol. S. Min. & M. Co. v. Pennsylvania*, *supra*, state legislation was upheld restricting the privilege of a foreign mining company from maintaining an office in Pennsylvania notwithstanding the maintenance of the office in that state afforded the corporation the opportunity for the sale of its foreign products. So in *Horn Silver Min. Co. v. New York*, 143 U. S. 805, 36 L. ed. 164.

Following the decisions of the Supreme

Court of the United States, the only question in this case open to serious consideration, in my judgment, is, Did the White Sewing Machine Company do business in this state? Or, to put the question as *Judge Field* does in the case of *Horn Silver Min. Co. v. New York, supra*, Did the company do business as a corporation in this state? If so, it must submit to any condition the state sees fit to impose upon it. Any other rule would bind the hands of the state authorities, only to subject the public to all the corporate abuses now known or hereafter to be devised. The statement of such a doctrine is startling. This case does not stand upon a single casual transaction in Arkansas followed by contracts for sales of merchandise which were consummated in Ohio. Nor was the contract which the corporation entered into with Julian, for whom the appellant was surety, simply an agreement to sell merchandise. If those were the only facts in the case, it might be gravely doubted whether the corporation had done business in Arkansas, within the meaning of our Constitution and statute. It has been ruled by the Supreme Court of the United States that a foreign corporation does not, by doing a single act of business in one state, with no purpose of doing other acts there, come within the prohibition of a constitution and statute which are substantially like our own. *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1187. See *Scruggs v. Scottish-American Mortg. Co.* 54 Ark. 566. And a merchant in Ohio who fills orders for merchandise received from a customer in Arkansas, cannot be said to be doing business in the latter state. If neither one nor the other constitutes carrying on business in Arkansas, it is difficult to see how the two together could make out the case. If they do not no question under the commerce clause of the Constitution is presented, and the discussion of it by the court is *obiter*. But the record shows the following state of facts in this case: The White Sewing Machine Company, an Ohio corporation, maintained a resident agent at Little Rock, in this state. The proof does not show that the agent held or sold any machines or other merchandise for the company. He traveled over the state, and in the name of the company sold to individuals the exclusive right to vend its merchandise in a limited territory. The consideration for this exclusive privilege was a contract on the part of the vendee, binding himself to sell no other sewing machine, and to canvass the territory assigned to him in the interest of the White machine. The company also bound itself to sell the vendee White sewing machines upon terms fixed by the contract. As a part of this contract, the vendee was also required to enter into bond to the company, with a surety, for the faithful payment of whatever indebtedness might be incurred by them to the corporation under the contract named, or by any other means, whether the same should arise out of the purchase and sale or lease of sewing machines, or the consignment of property or merchandise, or the failure to redeliver or account for the same to the corporation, or for indebtedness arising in any manner whatever.

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A great number of such contracts were entered into before the corporation complied with the statute. After the one in suit was executed, the corporation complied with the law by filing a certificate designating the agent before mentioned as the person upon whom service might be had, and Little Rock as its principal place of business in Arkansas. The business continued as before. Julian signed one of these contracts and bond, with the appellant as surety, and purchased machines, as set out in my Brother Battle's opinion. The suit is to recover upon the bond thus executed. I understand that it is upon the uncontroverted facts above stated that the court concludes that the corporation carried on business in Arkansas. The ruling that it carried on business, within the meaning of the statute, is expressly announced. The evidence does not show simply the case of a drummer soliciting contracts for purchase of merchandise, to be consummated in Ohio, as was the case of *Robbins v. Shelby County Tax. Dist.*, 120 U. S. 489, 30 L. ed. 694. It shows that the intention of the foreign corporation to gain a domicile in Arkansas, and to carry on its business of selling, leasing, and consigning machines there through local agents, as it was authorized to do in the state of Ohio. To ascertain whether the corporation did business in Arkansas, we are not required to limit our inquiry to the transaction with which the defendant alone is concerned. If it was carrying on a business in Arkansas before and after the transaction with the defendant, it was competent for him to show that his transaction was of the general class; and when it is proved that the corporation has done acts here manifesting the intent to gain a domicile for the purpose of transacting its business, that is the beginning of its business here, and the contracts which manifest that intention are avoided by the statute. The instant the business is entered upon, the prohibition of the statute attaches, without waiting to see what the corporation will do next. Suppose the corporation had entered into a contract to hire an office in Arkansas, with the avowed purpose of establishing a domicile here. That would be sufficient proof of the beginning of business here, and, as the statute prohibits it from beginning business here until it complies with the law, it could not enforce the contract. The fact that the transaction in suit, if isolated from the others, would show one connected transaction of interstate commerce, and nothing more, will not take the case out of the statute, for when it is once established that the corporation is exercising its functions in a foreign state, as distinguished from the performance of mere commercial acts to be consummated in another state, it becomes subject to state regulation. *Horn Silver Min. Co. v. New York, supra*; *Baker v. State*, 44 Ark. 134. That the acts of the corporation in this case are not mere commercial transactions of the character indicated, seems apparent. The sales by the corporation of exclusive territory within which the vendees might sell White sewing machines, and the covenant on their part that they would sell none other, are contracts executed and to be performed in

Arkansas, and, if connected with interstate commerce, it is remotely. The terms of the contracts show that they relate not only to domestic commerce, but to transactions having no connection with commerce at all; and the contract of suretyship, like the contract of insurance and indemnity, is not the subject of commerce. These matters were not transactions of interstate commerce, but were business transacted in the state independently of commerce. According to the decisions above cited, they rendered the corporation amenable to state regulation.

The defendant's cause might be rested here, but I think it may be fortified still further. If the foreign corporation were strictly an agency of commerce, entering the state for the purpose of carrying on the business of interstate commerce, I think it should be held that the regulation is not a restriction upon commerce. What is the regulation? It is that the foreign corporation doing business in this state shall make known its place of business here, and designate the agent upon whom service shall be had. No license fee or tax is demanded of the corporation. Not even a fee for defraying the expenses of the regulation is required. The regulation, then, is nothing more than that the corporation doing business here shall consent to be found here, and shall designate the officer upon whom service shall be had, and where he may be found. In theory the domicile of a corporation is only in the state where it is created, and the general rule, in the absence of legislation, is that it can be found nowhere else. But when it sends its agents into a foreign state to transact its business it is really as much represented by them there as in the state of its creation. It is competent for the Legislature of the foreign state to enact that personal service may be had on the corporation by service on agents in its borders who transact the company's business there. The corporation doing business thereafter in the foreign state is presumed to assent to that rule. *American Casualty I. Co. v. Lea*, (Ark.) 20 S. W. Rep. 416. But it was found often inconvenient for the creditor of the corporation to prove the agency, and so, to make the matter simpler, some of the states enacted that some particular state official should be authorized to receive service for the corporation. That is the law in this state as to insurance companies. As to others, it requires the corporation to designate a person who shall be its agent to receive service. That is fairer to the corporation than to com-

pel it to run the risk of having judgment rendered against it by service on some one of a number of persons transacting business for it, who may not have the interest of the corporation at heart enough to notify it of the pendency of the suit. It is better for the creditor, because he is relieved of doubt as to the proper person upon whom to get service. To enforce the regulation, the penalty of avoiding the contract for its violation is imposed. That the regulation is reasonable, and within the power of the state, has never been doubted. *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222; *Cooper Mfg. Co. v. Ferguson*, *supra*. "Legislation in a great variety of ways may affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the Constitution; and it may be said generally that the legislation of a state, not directly against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operation of commerce, is of obligatory force upon citizens within its territorial jurisdiction whether on land or water, or engaged in commerce, foreign or interstate." *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819; *Nashville, O. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 30 L. ed. 352; *Little Rock & Ft. S. R. Co. v. Hanniford*, 49 Ark. 291. This legislation is not directed against commerce or any of its regulations, but relates only to the right of the citizen to sue in the jurisdiction where the cause of action arises, and imposes upon the corporation only the duty of submitting to that jurisdiction. The domestic corporation is required to show by record where its principal place of business is, and the law specifies that service may be had on its officers. "It does not lie in any foreign corporation to complain that it is subjected to the same law as the domestic corporation." *Horn Silver Min. Co. v. New York*, *supra*. When a state no longer possesses the power to compel every corporation doing business within its jurisdiction, whether exclusively engaged in interstate or foreign commerce or not, to give publicity to its affairs in so simple a matter as making known its officers and place of business there will remain but little of value in its reserved rights. I think the judgment should be reversed, and the complaint dismissed.

Mansfield, J.:

I concur with the chief justice in dissenting to the grounds stated in his opinion.

INDIANA SUPREME COURT.

John R. McAFEE, *Appt.*,

v.

Julia E. REYNOLDS.

(.....Ind.....)

1. A judgment creditor may maintain

a suit in equity to have the lien of his judgment declared paramount to the title of the purchaser at a sale by the administrator of the judgment debtor, where such sale was made without mention of the judgment, since a motion would not remove the obstruction to the enforcement of the judgment, and a sale upon

NOTE.—The decision that a valid cause of action may be lost by mere lapse of time pending a suit to enforce it is a striking exception to the general 18 L. R. A.

rule. The peculiar character of the action which rests on a mere statutory right limited as to time furnishes the explanation. A direct precedent is

execution would leave such purchaser's claim undetermined.

2. The expiration of the time during which a judgment continues to be a lien on land pending an action to have its existence established and to enforce it against a title inferior to it but which would be a cloud on the title of an execution purchaser, although not entirely defeating the action will deprive plaintiff of the right to have the lien enforced since the court cannot extend its life beyond the statutory period.

(September 23, 1891.)

APPEAL by defendant from a judgment of the Circuit Court for White County in favor of plaintiff in an action brought to have plaintiff's judgment lien upon certain real estate declared paramount to defendant's title thereto. *Affirmed in part. Reversed in part.*

The facts are stated in the opinion.

Mr. R. P. Davidson, for appellant:

The duration of the lien of a judgment upon lands is, in this state, prescribed by statute and the statute is controlling.

Applegate v. Edwards, 45 Ind. 329; *Brown v. Wuskoff*, 118 Ind. 569; *Mahoney v. Neff*, 124 Ind. 380.

Other states have statutes in similar or precisely the same terms, and the courts are uniform in their holdings, (save in one state).

Freeman's note to Bank of Missouri v. Wells, 51 Am. Dec. 163.

The lien can continue no longer than the statute declares.

Albee v. Curtis, 77 Iowa, 644.

The lapse of time annihilates it.

Hendershott v. Ping, 24 Iowa, 184; *Tucker v. Shude*, 25 Ohio St. 355.

The time cannot be extended by the issuance or levy of an execution.

Albee v. Curtis, *supra*; *Lakin v. McCormick*, 81 Iowa, 545; *Polk County v. Nelson*, 75 Iowa, 648; *Rogers v. Druffel*, 46 Cal. 654; *Eby v. Foster*, 61 Cal. 287; *Freeman, Judgments*, 8d ed. § 395.

The execution plaintiff takes the risk of delay.

Shanklin v. Sims, 8 West. Rep. 867, 110 Ind. 143.

A sale on execution after expiration of the statutory time confers no title.

Pierce v. Fuller, 86 Hun, 179; *Payson v. Rhyne*, 82 N. C. 149; *Freeman, Judgments*, § 394a; 1 *Freeman, Executions*, § 205.

It is not within the power of a court of equity to renew or extend the lien, and if it expire pending suit the power of the court is gone.

Hutcheson v. Grubbs, 80 Va. 251 (see note on this case, 20 Cent. L. J. 463); *Sutton v. McKenney*, 82 Va. 46; *Dabney v. Shelton*, 82 Va. 349; *Straus v. Bodeker*, 13 Va. L. J. 855.

So inflexible are these statutes that even

though process be prevented by war there can be no relaxation.

Smart v. Mason, 2 Heisk. 228.

Nor because a homestead right stood in the way.

Anderson v. Kulgo, 81 Ga. 699.

There can be no exceptions other than those expressly allowed by the statute.

Reilly v. Clark, 81 W. Va. 571; *Straus v. Bodeker*, *supra*.

Newell v. Dart, 28 Minn. 248, was a suit by creditors' bill to enforce the lien of a judgment against lands. The lien expired pending the suit, and it was held that the power of the court was at an end. That case was reaffirmed in *Spencer v. Harg*, 55 Minn. 231.

The statute was precisely as our own.

In *Boyle v. Maroney*, 73 Iowa, 70, the suit for a like purpose was commenced in 1873, three years after Francis obtained his judgment and lien, but was not determined until 1886—after the ten years had elapsed. The court below decreed a revivor of the lien, but this decision was reversed on appeal, the lien having expired *sub judice*.

The statute gave the appellee her remedy.

Decker v. Gilbert, 80 Ind. 107.

Where there was a plain remedy the court had no equitable jurisdiction further than to order an execution, and could not foreclose the lien of the judgment after the manner of a mortgage.

House Mach. Co. v. Miner, 28 Kan. 441.

Messrs. Jay H. Adams and John B. Sherwood, for appellee:

The question is not whether the lien of a judgment upon real estate may be prolonged beyond the statutory period fixed for such liens, but, whether the rights and liens existing and held and enjoyed by the plaintiff at the time of bringing suit, shall be adjudged and enforced as of the date of the commencement of the action.

The rights of the plaintiff must be determined as they existed at the commencement of this suit. The fact that ten years, exclusive of the time the plaintiff was restrained from prosecuting her remedy upon the judgment by the death of the judgment defendant, has expired since the commencement of this suit, is no bar to her right to recover.

The judgment debtor having died, and the title to the real estate having passed to another, the proper proceeding to enforce the lien of the judgment was an action against the purchaser to declare the lien of the judgment, and for an order of sale of the land to discharge the lien.

Decker v. Gilbert, 80 Ind. 107.

If a person goes into court seasonably to enforce a right, such right will be protected, declared and enforced as the same existed and was enforceable at the commencement of the action.

Caswell v. Kemp, 41 Hun, 484.

found in *Newell v. Dart*, 28 Minn. 248, which is quoted in the appellant's brief and also cited in the opinion. The case of *Boyle v. Maroney*, 73 Iowa, 70, which is also quoted, is less nearly in point as it was not the lien of plaintiff's judgment which expired pending that suit but the lien of a defendant's judgment who had purchased the land on ex-

ecution sale and who had taken no steps at the time the lien expired to preserve or revive it. On setting aside the execution sale, the appellate court held that the lien could not be reinstated as against the plaintiff, who was another judgment creditor.

Elliott, J., delivered the opinion of the court:

On the 19th day of June, 1877, Robert J. Brown was the owner of the real estate involved in this controversy, and on that day Earhart and others obtained judgment against him. This judgment became a lien upon the real estate, and has never been paid or satisfied. Brown died on the 6th day of November, 1877. By proper assignments, the appellee became the owner of the judgment. James M. Brown was appointed the administrator of the estate of Robert J. Brown, deceased, on the 3d day of December, 1877, and on the 30th day of July, 1878, petitioned for an order to sell the land to pay the debts of his intestate. Joseph Kious became the successor of James M. Brown, and filed a supplemental petition for an order for the sale of the property, and an order was made as prayed. Neither the appellee nor any other lienholder was a party to the proceedings, except in so far as the notice given by publication made under the law then in force may have constituted them parties. The real estate was sold pursuant to the order to the appellant on the 1st day of October, 1877. The purchase money was paid by him, and a deed was executed and approved. Under this deed, the grantee entered into possession. The estate of Robert J. Brown was insolvent. The only mention of liens in the proceedings on the petition was made in the decree approving and confirming the deed executed by the administrator, and the mention there made is not of the judgment of the appellee, but of a judgment owned by John P. Carr. The present action was begun on the 24th day of February, 1888. The conclusions of law stated by the court read thus: "(1) The rights of the plaintiff must be determined as they existed at the commencement of this suit. The fact that ten years, exclusive of the time the plaintiff was restrained from prosecuting her remedy upon the judgment by the death of the judgment defendant, has expired since the commencement of this suit is no bar to his right to recover. (2) The sale of the land by the administrator was made to the defendant subject to the lien of the plaintiff's judgment. So much of the decree confirming the deed to the defendant as adjudged that he take the land free of liens and incumbrances is void as to the plaintiff. There is nothing in the petition to sell, the appraisement, the order of sale, or the report of sale that authorizes any such decree. (3) The plaintiff is entitled to the relief prayed for in his complaint, with costs."

It is obvious that the right of the plaintiff created by her judgment was not divested by the decree directing the sale of the lands, nor is it contended by appellant's counsel that the lien was extinguished. It is also evident that the time the hands of the judgment creditor were tied by the statutory provision restraining proceedings to enforce a judgment for the period of one year after the death of the debtor cannot be justly considered in computing the time during which the lien continues in force. *Jones v. Detchon*, 91 Ind. 154. This, we understand, is conceded by appellant's counsel. The contention of appellant's counsel is, in effect, that the lien of the judgment having expired on the 4th day of July, 1888, after that time no decree could be rendered declaratory of its existence and providing for its enforcement. The appellee's counsel assert that "the question is not whether the lien of a judgment upon real estate may be prolonged beyond the statutory period fixed for such liens, but whether the rights and liens existing and held by the plaintiff at the time of bringing suit shall be adjudged and enforced as of the date of the commencement of action." This statement of the respective positions of counsel exhibit the principal question in the case. The land had passed into the hands of a third person, the purchaser at the administrator's sale, and hence the judgment creditor had a right to bring a suit to have his lien declared and freed from the claim asserted by the purchaser under the administrator's deed. *Decker v. Gilbert*, 80 Ind. 107; *Faulkner v. Larrabee*, 76 Ind. 154. The claim of the appellant was an obstruction to the enforcement of the judgment lien, and the creditor had a right to ask that the obstruction be removed so as to enable her to realize the benefit of her judgment. *Quart v. Abbett*, 102 Ind. 238, 53 Am. Rep. 662. Under the old procedure, *scire facias* was the appropriate procedure, where the rights of a third person intervened. 1 Freeman, Executions, 81. But, where such a proceeding would not give adequate relief, the assistance of equity was properly invoked. In such a case as this it is evident that a mere motion for leave to issue an execution would not secure adequate relief, since a sale upon execution would still leave the claim of the appellant undetermined; so that if it were conceded that the remedy by motion exists where the rights of a third person, based upon a claim of title created by a decree in judicial proceedings, have intervened, and where the judgment debtor has died, still that remedy would not be adequate, inasmuch as the order would not fully remove the obstruction created by the sale under the decree. The rule is that where there is some remedy at law, but not an adequate one,—that is, one that will adjudicate the entire controversy and grant full relief,—equity will assume jurisdiction. *Watson v. Sutherland*, 72 U. S. 5 Wall. 74, 18 L. ed. 580; *Denny v. Denny*, 113 Ind. 22, 12 West. Rep. 200; *Bishop v. Moorman*, 98 Ind. 1, 49 Am. Rep. 731, and authorities cited. Whatever view is taken of the case, the result is that the conclusion must be that the suit is an appropriate one, and there was no mistake in electing the remedy.

What we have said establishes the initial proposition involved, inasmuch as it proves that the plaintiff stated a cause of action when she began her suit. If she is to be entirely defeated, it must be for the reason that the efflux of time has destroyed her right. Ordinarily, a plaintiff will succeed if, at the time he sues, a complete cause of action exists in him. This is a general rule to which there are few exceptions. The cases wherein the plaintiff by his own acts

devests himself of a right of action constitute the most numerous class of exceptions; but there is here no element which makes that class of cases even remotely analogous, since no act was done by the plaintiff after suit which released or impaired her rights. If the right of action which existed in the plaintiff when she began her action has been destroyed, it must be because the law so operates as to take it from her. There is no express enactment divesting the cause of action, and no event has occurred changing the position of the parties. The only thing that can be said to have affected the case in any way is the lapse of time. If this can be assigned a retrospective effect, then there is plausibility and force in the contention that the right of action was wholly swept away; if not, then the contention is foundationless. If the lapse of time, without any fault of a plaintiff or any act of his, can destroy a cause of action, then it is in the power of a defendant, by prolonging litigation, to destroy a meritorious cause of action, and this is a result not to be reached without strong and cogent reasons. If a cause of action exists when a suit is begun, the plaintiff has a substantive right, and where there is a right there is a remedy. Where there is a right and a corresponding remedy, and steps have been taken to vindicate the right, a plaintiff has done all that the law requires of him, and he cannot be turned out of court, because delay, attributable to no fault of his, renders the right asserted by him ineffective. It seems clear to us, on principle, that the appellee did not lose her cause of action because of the lapse of time, and that the time which intervened between the bringing of the suit and the decision cannot so operate as to defeat her suit. What its effect is upon the measure of relief is quite another question, and one that will be considered further on. It may, however, be here said appropriately that the right to sue is one thing, and the quantity or degree of relief quite another thing. The difficult question here is not as to the existence of a right of action at the time the complaint was filed, but the difficult question is as to the measure of relief the plaintiff was entitled to at the time the decree was entered. The difficulty is created by the fact, for fact it is, that at the time the decree was pronounced the judgment of the plaintiff had ceased to have any force as a lien. The proposition of appellant that the lien of a judgment, as fixed by the statute, cannot be prolonged by the courts, is indisputably correct. *Wells v. Bower*, 126 Ind. 115; *Shanklin v. Sims*, 110 Ind. 143, 8 West. Rep. 867; *Brown v. Wuskoff*, 118 Ind. 569; *Applegate v. Edwards*, 45 Ind. 829; *Albee v. Curtis*, 77 Iowa, 644; *Hutcheson v. Grubbs*, 80 Va. 251; *Boyle v. Maroney*, 73 Iowa, 70; *Spencer v. Haug*, 55 Minn. 231; *Newell v. Dart*, 28 Minn. 248.

A judgment lien is the creature of statute, owing its life and force entirely to legislation. It has, indeed, been said that a judgment is a charge on land, but not in strictness a lien. *Shirk v. Thomas*, 121 Ind. 147; *Johnson v. Hess*, 126 Ind. 298-311, 9 L. R. A. 18 L. R. A.

471; *Brunsdon v. Allard*, 2 El. & El. 19; *Ex parte Foster*, 2 Story, 131.

A party who secures a judgment obtains such a charge upon land as the statute gives, and nothing more, for it is clear that he can acquire only what the statute creating the rights vests in him. Our statute declares that the lien shall continue for ten years, and "no longer;" thus definitely and positively limiting the duration of the lien. As no court is above the law, and as all courts must enforce the law as it is written, it necessarily results that a lien created and limited by statute cannot be extended beyond the period fixed by the law-makers. A party may possess a right to have a lien declared and established, and yet have no right to a decree extending its life beyond the statutory period. It is this right which the appellee possessed when she began her suit, and not a right to have a new lien created, nor an existing one prolonged beyond the limit fixed by the law. Courts cannot create a judgment lien on land, nor can they fix its duration, since that is the prerogative of the Legislature. No authority for making a judgment a lien on land, or for designating its incidents, can be found in the common law, since at common law a judgment was not a general lien upon that species of property. There was, it is true, a right to make a judgment available to a limited extent; but, as said by Marshall, *Ch. J.*, in the case of *United States v. Morrison*, 29 U. S. 4 Pet. 124, 7 L. ed. 804. "The lien is the consequence of the right to take out an *eligit*."

We are satisfied that the trial court did not err in adjudging that the appellee had a right of action at the time her suit was commenced, but we cannot escape the conclusion that it erred in holding that she was entitled to a decree ordering the land sold, and placing the lien above the title of the appellant. This was erroneous, for the reason that it assumed to give vitality to a lien which, by positive and inexorable law, was lifeless. The conclusions of law, and the decretal orders based on them, show that the trial court affirmed that the appellee had a right to have the land sold to discharge the statutory lien, and that the only right of the appellant was to the surplus remaining after the satisfaction of the judgment. The theory of the court that the lien could be prolonged directly or indirectly was erroneous, for, when the lien perished by operation of law, it could not be revived, nor could a new lien be created. The utmost that the appellee was entitled to was, as we have shown, a decree declaring that when her suit was brought she had a lien prior to the title of the appellee. When the court went beyond this, it erred, inasmuch as in so doing it prolonged the lien beyond the time of its legal life. The record fully enables us to ascertain and declare the justice of the case, and hence it is our right and our duty to render such a judgment as will secure to each party his just rights. This is a general power resident in all high appellate tribunals, and it has been often exercised in cases such as this, where the facts are not in dispute, and all the material mat-

ters appear upon the face of the record. *Parker v. Hubble*, 75 Ind. 580; *Buchanan v. Milligan*, 108 Ind. 433, 6 West. Rep. 915; *Western Union Teleg. Co. v. Brown*, 108 Ind. 539-544, 5 West. Rep. 661; *Bartholomew v. Pierson*, 112 Ind. 430, 11 West. Rep. 848; *Brown v. Jones*, 118 Ind. 46, 11 West. Rep. 31², and cases cited page 50, 118 Ind.; *Sinker v. Green*, 118 Ind. 264, 12 West. Rep. 912; *Murdock v. Cox*, 118 Ind. 266; *Security Co. v. Arbuckle*, 119 Ind. 69; *Louisville, N. A. & C. R. Co. v. Etzler*, 119 Ind. 89-44; *Roberts v. Lindley*, 121 Ind. 56, and cases cited page 59, 121 Ind.; *Lapham v. Dreisvogt*, 36 Mo. App. 275; *Duck v. Peeler*, 74 Tex. 268; *Clark v. Sonnenschein*, L. R. 25 Q. B. Div. 226; *Luthe v. Luthe*, 12 Colo. 421; *Athens Foundry & Mach. Works v. Bain*, 77 Ga. 72; *McKenzie v. Peck*, 74 Wis. 208. The power, as the authorities declared, is one that should be freely exercised where its exercise will put an end to litigation and yield justice. To accomplish this, it is always proper to so

mould the form of the mandate as that the trial court may carry into effect, by the appropriate record entries, the judgment of the appellate tribunal.

The mandate of this court is that the judgment of the trial court be in part affirmed and in part reversed; that the costs of the case in the court below, up to the entry of the special finding be taxed against the appellant; that subsequent costs in that court be taxed in equal proportion against the respective parties; that the costs in this court be divided and taxed in like manner; and that the case be remanded, with instructions to enter a decree in accordance with this opinion, by eliminating so much of the decree as adjudges a sale of the land, prolongs the lien, and limits the right of the appellant to the surplus, and by entering the proper judgment for costs against the respective parties, as herein indicated.

Rehearing denied.

ILLINOIS SUPREME COURT.

PULLMAN'S PALACE CAR CO., *Appt.*,

v.

William LAACK.

(.....Ill.....)

1. Only where the evidence by whomsoever introduced with all fair and legitimate inferences thereupon is so insufficient to sustain a verdict for the plaintiff that the court must set it aside if rendered will the court be justified in directing a verdict for the defendant.
2. Failure to provide a stopcock in the pipe connecting an oil tank with burners used for firing a brick kiln may be found by the jury to be negligence notwithstanding there is a shut-off at each of the burners and one on the tank where the tube adjacent to each burner is by reason of its construction liable to crack and allow the oil to escape, which in such case would ignite and render approach to the burner impossible because of the heat, and the stop in the tank could not be turned without a mechanical appliance, while in case the flow of the oil was not stopped a conflagration and explosion of the tank was probable.
3. A master must notify a servant of increased danger to which he is exposed by reason of any omission to supply usual and ordinary means to prevent accident whereby the hazard to the servant is increased if the change is not known to the servant or so open and visible that by the exercise of ordinary care it will be seen and known.
4. A master cannot delegate to another, even though it be a fellow servant, the duty of notifying his servant of increased danger so as to absolve himself from liability for failure to communicate it.

NOTE.—The above case illustrates the application of the doctrine of proximate cause to a case in which there is negligence both of servant and of master or fellow servant.

For note on this question, see *Lutz v. Atlantic & P. R. Co.* (N. M.) 16 L. R. A. 519.
18 L. R. A.

5. Persons who under a license from the master put new burners in a brick kiln for the purpose of testing their merits are in the position of vice-principals so far as relates to making such apparatus suitable and safe for the employes or giving notice of increased danger.

6. A servant is not to be held guilty of negligence in returning to protect his master's property after he has reached a place of safety because some unforeseen cause intervenes, which, concurring with the master's negligence, produces an injury which reasonable and prudent foresight could not have anticipated.

7. The continued flow of burning oil which would have been at once checked except for the master's negligent failure to provide the usual facilities for cutting off the supply will render him liable in case of injury resulting therefrom to a servant although the injury would not have happened if a fellow servant had not also been negligent in failing to cut off the supply by the use of the less adequate facilities that did exist.

(October 31, 1892.)

APPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

Statement by Shope, J.:

This was an action on the case by appellee against appellant, to recover for personal injury alleged to have been received through the negligence of appellant. For several years before the accident, appellant had been engaged in burning brick, and appellee worked as its servant in that business. In 1887 appellant commenced burning brick with crude oil for fuel, and appellee, before his injury, had

assisted in burning several kilns of brick by the new method. In May, 1888, shortly after the kiln was fired, the injury occurred. The kiln then being burned was 70 or 80 feet long and about 80 feet wide; there were 18 or 20 arches running through from side to side. Around the kiln, a little way from it, near the ground, two pipes were laid side by side, each about two inches in diameter. One of these pipes carried steam, and the other oil for fuel. Opposite the end of each arch, two short pipes, three fourths of an inch in diameter, extended towards the arch, one connected with the oil pipe, and the other the steam pipe. The short steam pipe was about two feet and a half long; the small oil pipe perhaps a foot long. On the end of the steam pipe, at each arch, was placed what was known as the "burner." In the small oil pipes there was a check valve or stopcock, near the main oil pipe, and the connection was made between this pipe and the burner by a rubber tube connecting the short pipe with the burner. The purpose for which the rubber was used was to permit expansion and contraction of the small steam pipe; in other words, so as to make the pipe containing the oil flexible. The burner was by this means extended, not into, but as near, the arch as possible, and the oil injected into the arch by the action of the steam through the burner. On a side track, 20 feet or more away from the kiln, common railroad oil tanks were run on their trucks, and the oil carried therefrom by means of a two-inch pipe, and emptied into the oil pipe surrounding the kiln. Prior to the time of the accident, but one tank had been used at a time, and the supply pipe from the tank was fitted with a check valve near its entrance into the feed pipe, or the pipe encircling the kiln. Each of the small pipes extending from the steam and feed pipes were supplied with a stopcock near the feed pipe, so that both steam and oil could be shut off from any individual burner. There was also a check valve on the tank, by closing which the flow of oil from the tank could be shut off. This valve was so arranged that it could not be turned by hand, but necessarily required the use of a wrench or tongs.

In the afternoon before the accident, the kiln being in condition to fire, Williams, the kiln foreman, was ordered by appellant, through its superintendent, to cut the feed pipe in the middle of the kiln on each side, and stop the ends, which was done. Prior to this, there had been in use what was known as the Brown burner. They were directed to attach the Brown burner to one half of the feed pipe or the pipe encircling one half the kiln, which appellee and the gang of men with him, under the direction of the steam fitter of appellant, did. By the cutting of the oil pipe, the circulation of oil around the kiln was impossible, and, to supply the other end, another tank was run upon the side track, and attached, by a new supply pipe, with the other half of the feed pipe, so as to furnish oil to run the other burners to be thereto attached. The purpose was to test the relative merits of the Brown burner, and another called the Cannon burner, to see which would consume the greater amount of oil in producing the requisite continued heat. The attachment between the ad-

ditional tank and the pipe surrounding the half of the kiln at which the Cannon burners were to be tested, including putting on the burners, was made by "Mr. Cannon and his men," possibly assisted by Mr. Williams, kiln foreman, and perhaps other fellow workmen about the kiln. Cannon had been a gas fitter, was familiar with the work, but neither he nor the men under him were in the employ of appellant. In making connection between the tank and the feed pipe encircling the half of the kiln at which the Cannon burners were put, no stopcock or valve was put in where the supply pipe from the tank joined the feed pipe, so that the oil running to the Cannon burners could be shut off only at two points,—at the tank and at the small stopcocks where the small burner pipes joined the feed pipe. At the other end, the supply pipe formerly in use was put in, which was supplied with the check valve near the feed pipe. This arrangement of the pipe to which the Cannon burners were attached was made by Cannon, and, as before said, possibly with the knowledge of the foreman; but appellee, nor the gang of men with whom he worked had no notice that the stopcock at the joining of the supply and feed pipes had been omitted. The rubber pipe leading to the burner, from the heat and action of the oil, was soon destroyed, and would break or crack off, permitting the oil to escape, and the oil, being highly inflammable, would catch fire from the heat of the arch, and prevent the closing of the small check valve in the pipe leading to the burner; and in such case the stopcock at the junction of the supply and feed pipes had always been used, and, by shutting off the oil there, a conflagration was prevented. This condition of things was known to appellee, and it had supplied rubber tubing in considerable quantities to take the place of such as might be destroyed in that way. It is shown that the breaking of the rubber and escape of the oil was frequent, the rubber lasting sometimes during the burning of a kiln, and sometimes not.

The kiln was fired in the evening. Appellee and the gang of men under him were in charge of the end of the kiln to which the old or Brown burners were fixed, and Williams and another shift of men in charge of the other end, until about 12 o'clock midnight, when Williams and his gang retired, and appellee and two helpers took charge of the entire kiln. About 4 o'clock in the morning appellee was on a ladder at the side of the kiln, observing the top, when a rubber hose connecting with one of the Cannon burners burst, and the oil immediately took fire, and, extending, so covered the small stopcock that it was impossible to close it. He ran immediately to the place where the supply pipe joined the feed pipe, expecting to find the stopcock where it had always previously been found, but found none. He called to the other employés, and went himself about 200 feet and turned in the fire alarm, and immediately returned to the end of the kiln where the fire was spreading. The fire was spreading rapidly, was very hot, and, fearing an explosion of the oil in the tank, appellee determined to disconnect the tank from the supply pipe and get it away from the

fire. For this purpose he directed one of the men to shut off the tank; that is, to close the valve between the tank and the supply pipe. One of the men went on to the tank for that purpose and again got off. Appellee inquired if the valve had been closed, and one of the men replied that it had. He again inquired, and, upon being assured that it had been closed, he went under the tank and disconnected the feed pipe from the tank, when the oil from the tank flowed over him and saturated his clothing, which instantly caught fire from the burning oil spreading from the feed pipe. Appellee was seriously injured. It appears that the man who went upon the tank to close the valve endeavored to do so with his hands. Finding that impossible, he ran to get a wrench; but upon his return the flames were sweeping over the tank and drove him away.

The negligence charged in the declaration, in the first count, was the neglect of appellant to furnish proper and safe connections between the tank and the brick kiln, and that appellant negligently and improperly provided and used a connection made of rubber, which was unsuitable and improper for such purposes; that the rubber became heated, and cracked and broke, permitted the oil to escape, which took fire, etc. The second count alleged the use of crude oil was dangerous and hazardous; that plaintiff was in appellant's employ as assistant to the foreman, and his employment necessarily brought him near to the tanks, kilns, etc.; and it became and was the duty of appellant to exercise a high degree of care and diligence in providing proper and safe appliances around the brick kiln and oil tank, and proper connections, etc., and also to provide a safety check, or some suitable device, to stop the flow of oil in case of accident, etc., so as to insure the safety of its employes; yet appellant did not do so, but carelessly, negligently and improperly provided a connection made of rubber, which, on becoming heated, vulcanized and broke, and the oil thereby escaped, and, not having provided suitable and proper appliances by which the flow of the oil could be checked, the flames from the kiln communicated with the oil, resulting, etc. After the plaintiff rested his case, the defendant moved the court to direct the verdict for it, which the court denied. At the close of the case defendant asked the court to instruct the jury that the evidence did not sustain the plaintiff's cause of action, and to return a verdict for the defendant, which was also refused. The jury found for appellee and assessed his damages at \$4,000. The judgment thereon was affirmed by the appellate court, and the case is brought here by the further appeal of the defendant below.

Messrs. J. S. Runnells and William Barry for appellant.

Mr. E. Furthmann for appellee.

Shope, J., delivered the opinion of the court:

At the close of appellee's case in chief, appellant moved the court to instruct the jury to return a verdict for the defendant, and, this being denied, again, at the close of the case, 18 L. R. A.

asked, and the court refused, an instruction directing the jury to find for the defendant. This ruling of the court is assigned as error, and forms the chief ground of complaint in this court. If there is, in the record, evidence upon which a verdict for plaintiff may be sustained, the court committed no error in not taking the case from the jury. It is only where the evidence, with all fair and legitimate inferences thereupon, is so insufficient to sustain a verdict for the plaintiff that the court must set it aside if rendered, that the court will be justified in directing a verdict for the defendant. *Simmons v. Chicago & T. R. Co.* 110 Ill. 846; *Chicago, R. I. & P. R. Co. v. Lewis*, 109 Ill. 120; *Goodrich v. Lincoln*, 93 Ill. 860; *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607; *Lake Shore & M. S. R. Co. v. Johnsen*, 135 Ill. 641; *Purdy v. Hall*, 134 Ill. 298.

It is immaterial upon which side the evidence is introduced; if there is evidence which fairly tends to support the plaintiff's case, it must be submitted to the jury. If, therefore, there was any evidence tending to sustain the issues in plaintiff's behalf, the error is not well assigned in this court. The weight and degree of credit to be given to evidence falls within the province of the jury. And when their finding of fact has been approved by the trial court, and its judgment affirmed in the appellate court, the only question raised in this court by an instruction seeking to take the case from the jury is. Was there any evidence fairly tending to establish a right of recovery by the plaintiff? If there was, the finding of the trial and appellate court is conclusive as to its sufficiency to support the verdict.

It is, however, urged that the omission to put in a stopcock in the supply pipe was not negligence, even if appellant can be held responsible therefor, and, no other act of negligence being averred or proved, the plaintiff wholly failed to prove a case entitling him to recover. It is clear that the fact that the rubber used to carry the oil from the feed pipe to the burner was liable at any time to open and permit oil to escape, and that oil thus escaping was liable to ignite from the arch, was known not only to the persons engaged in burning the kiln, but to the superintendent and officers of appellant. It had frequently happened, and it was known, that the action of the oil and heat upon the rubber was such that it was very soon destroyed, and would crack open or break off. The company kept on hand a large supply of rubber to meet this condition. The manner of connecting the burner with the feed pipe was: The feed pipe opposite the arches was fitted with a short three-fourths inch pipe extending towards the arch, in which was fitted a stopcock. Over the end of this short pipe the rubber tubing was forced, and the other end in like manner attached to the burner. The rubber tubing was about 18 inches in length, and, when completed, it was about 80 inches from the feed pipe to the end of the burner next to the kiln. The effect of the breaking of the rubber might be the discharge of a stream of oil to its full capacity, practically under the stopcock, as the evidence tended to show was done by the breaking in this case. The effect testified to would be

likely to occur. The oil being highly inflammable, and igniting, would prevent the use of the small stopcock to prevent the flow of oil. The evidence tended to show that, without negligence on the part of appellee or his fellow servants, it became, for the reason stated, immediately impossible to stop the flow of oil at that place; that he immediately went to the supply pipe, where a stopcock had always been before inserted, and found none; and that this was the first notice he, or, so far as shown, his fellow workmen then assisting him at the kiln, had that no valve had been put into the supply pipe.

But it is said, two ways of stopping the flow of oil having been provided, it was not negligence not to supply the third. The question as to whether it was or was not negligence was a question of fact which has been found adversely to appellant's contention. The jury were justified by the evidence in finding that the check valve in the three-fourths inch pipe, as could readily have been foreseen might be the case, was rendered immediately useless by the spread of the burning oil. There was evidence tending to show that the valve on the tank was not relied upon in an emergency, as when it became necessary to quickly stop the flow of oil. It was used when the supply pipe was to be attached or disconnected, or the car moved. It is conceded that, from its construction, it could not be turned by hand. Counsel for appellant say, in speaking of it: "It was evidently so arranged that it required some kind of wrench to turn it." No notice was given appellee, or any of his fellow workmen in the same gang or shift, of the omission of the stopcock from the supply pipe, so as to enable him or them to have appliances ready to shut off the oil from the tank, if it became necessary. When Wagner and others of the fellow workmen were called to assist in moving the tank, he jumped upon it, and endeavored to turn the valve with his hand, and found it impossible. He went immediately for a wrench, but upon his return was driven away by the flames. Notice to Williams, foreman at the kiln, or to others who might be regarded as fellow servants of appellee, was not notice to appellee. If, by reason of the omission to supply the usual and ordinary means to prevent accident, the hazard to its servants was increased, and the change in appliances was not known to the servants, or so open and visible that they, by the exercise of ordinary care, would see and know of it, the legal duty rested upon the master to notify them of the increased danger to which they were thereby exposed; and, it being a duty owed by the master to the servant, it could not delegate it to another, even though a fellow servant of appellee, and absolve itself from liability for the injury resulting in consequence of the failure to communicate knowledge to appellee of the increased hazard. *Chicago, M. & St. P. R. Co. v. Ross*, 113 U. S. 377, 28 L. ed. 787; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Thomp. Neg.* 972; *Whart. Neg.* § 211; 4 Am. & Eng. Encyclop. Law, 59, note 3.

It is also insisted that a change in the appliances, by means of which it is alleged the injury was caused, although not known to appellee, having been made by his fellow serv-

ants, the negligence, if any, was that of his fellow servants, and he cannot therefore recover. This question, like the preceding, was one of fact. Whether the persons who put in the appliances to which the Cannon burners were attached were fellow servants of appellee in performing that work, under the rules defining who are fellow servants, was a question of fact. *Indianapolis & St. L. R. Co. v. Morgenstern*, 106 Ill. 216; *Chicago & N. W. R. Co. v. Morando*, 98 Ill. 802. There is ample evidence from which the jury might have found that they were put in by Mr. Cannon and men in his employ (none of whom were in the employ of the appellant), under a license from appellant, for the sole purpose of testing the relative merits of the two burners in the consumption of oil in producing the requisite heat to burn a kiln of brick. If so, they were not fellow servants of a common master with appellee, or engaged in the same line of employment, or so associated with him as to fall within the definition of "fellow servants," as held by this court in the foregoing and numerous other cases. Where the negligent act is a direct result of the exercise of power conferred by the master, in the performance of a duty devolving by law upon him, the master is liable. *Chicago & A. R. Co. v. May*, 108 Ill. 288; *North Chicago Roll. Mill Co. v. Johnson*, 114 Ill. 57.

If, therefore, it be said that they were fellow servants of appellee, or that fellow servants of appellee in the work of burning brick, and operating the appliances furnished by the master at the kiln, assisted in putting in such appliances, they would not be fellow servants of appellee in respect of the particular work done by them. That the master, although not held to guarantee the absolute perfection and suitability of the machinery and appliances furnished the servants, is, nevertheless, bound to provide that which is safe and suitable for carrying on the business in which the servant is engaged, and is held to the employment of every precaution which a reasonably prudent man would exercise under like circumstances, is well established. Arising by implication from the contract of employment, as well as from reasons of public policy and natural justice, the duty rests upon the master—whether a corporation or a natural person—not to expose the servant, in the discharge of his duty, to perils and dangers against which the master may guard by the exercise of reasonable care. *Fairbank v. Haentzsch*, 78 Ill. 286; *Pennsylvania Co. v. Lynch*, 90 Ill. 333; *Missouri Furnaces Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425. Hence the rule is that the master must, either personally or by his agent if an individual, and by its agents if a corporation, exercise reasonable and proper care, taking into consideration the nature of the business, and the instrumentalities employed, to provide, and keep in suitable repair and condition, safe and suitable machinery and appliances, adequately sufficient for use by the servant in and about the business in which it is to be used by him. And if a servant is injured in consequence of a neglect of such duty, or a negligent discharge of it, he being in the exercise of ordinary care, for his own safety, the master is liable. *Cases supra*; *Chicago & A. R. Co. v. Platt*, 89 Ill. 141; *Columbus, C. & I. R. Co. v.*

Troesch, 68 Ill. 545, 18 Am. Rep. 578; *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 858; Wood, Mast. & S. § 826 *et seq.*; Beach, Contrib. Neg. 123; *Hough v. Texas & P. R. Co.* 100 U. S. 218, 25 L. ed. 612. It necessarily follows that, in the discharge of the duty resting upon and owing by the master to the servant, the acts of the person authorized by the master to perform the duty are the acts of the master. The liability of the master does not depend upon who performs the duty, but upon the existence of the duty itself, which the master must perform, and he cannot, by delegating it to another, absolve himself from liability for its nonperformance. As a general rule, the servant assumes the natural and ordinary risks of the business in which he engages, and is held to impliedly contract that the master shall not be liable for injuries consequent upon the negligence of a fellow servant in the employment of whom the master has exercised proper care; but he does not assume or contract to waive liability of the master for his own negligence, whether committed in person or by an agent authorized by the master to perform a duty resting upon him. In such case, the master being under contract duty to perform, the servant may, without sufficient appearing or being shown to put him upon notice to the contrary, rely upon the due and reasonable performance of the duty. The law will not permit the master to evade the duty which it has cast upon him, by shifting it upon another. In this case the master licensed Cannon, who was in no wise connected with the work which appellee was employed to do, to put in his burners. This required a new supply pipe connecting another tank of oil with one half of the feed pipe. It was put in for the convenience of the master or his licensee, and the master was bound to see to it that it was suitable and safe, or give notice to appellee so that he might quit the employment, if unwilling to assume the increased risk occasioned by the insufficient manner of its construction. The persons thus discharging the duty of the master were vice-principals, and their negligence was the negligence of the master.

But it is said, also, that upon the facts shown, appellee was guilty of such contributory negligence as to bar recovery. It is urged—*First*, that it was gross negligence for him to go under the tank, and uncouple the supply pipe, whereby the oil poured over him; and, *second*, that, having been in a place of safety when he went to turn on the fire alarm, it was negligence for him to return to the place of known danger.

In respect to the first, it will only be necessary to say that whether the doctrine of comparative negligence, as defined in *Galena & C. U. R. Co. v. Jacobs*, 20 Ill. 478, and subsequent cases, has still a place in the jurisprudence of this state, and whether the later case of *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 858, and other cases since decided, have not placed that doctrine upon a basis where it has become simply another form of stating the common-law rule of contributory negligence, need not be here discussed, for the reason that it can have no application to cases like this, where the plaintiff is found to be in the exercise of ordinary care. The question was fairly submitted whether the plaintiff was, in uncoupling the

supply pipe, in the exercise of ordinary care for his own safety; the jury have found that he was, upon ample evidence to sustain the finding. This is conclusive of the question of the right of recovery, if his injury was the result of the defendant's negligence. *Calumet Iron & Steel Co. v. Martin*, *supra*; *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 586; *Abend v. Terre Haute & I. R. Co.* 111 Ill. 203, 53 Am. Rep. 616; Whart. Neg. § 884 *et seq.*; Shearm. & Redf. Neg. §§ 25, 36, 37.

In respect of the second point, we are referred to numerous cases holding that, because of the sacredness with which human life is regarded by the law, negligence will not be attributable to him who impulsively rushes into known danger to save it; but that rule does not apply to one who goes voluntarily into such danger to save property, whether his own or another's. The authorities are not uniform upon the last proposition, but its determination here is wholly unimportant. When appellee returned from sending the fire alarm, there was nothing, save the possible explosion of the oil tank, that menaced him with personal danger. He undertook to move the tank out of the way of the fire, and undoubtedly would have succeeded, without injury to himself, had the valve upon the tank been closed when he uncoupled the supply pipe from it. It was his duty to make all exertion possible, consistent with his personal safety, to rescue the master's property, and prevent the further spread of the conflagration. He was required to judge of the danger from the condition of affairs as they then existed, and act with promptness, and as prudence dictated; and if, at the time he returned and endeavored to perform his duty, reasonable and prudent men, under all existing circumstances, would have apprehended no personal danger, he is not to be held guilty of negligence in returning, because some unforeseen cause intervened, which concurring with the master's negligence, produced the injury, which reasonable and prudent foresight could not have anticipated. Whether there was in fact danger from explosion from the tank is unimportant. It did not explode, and the injury did not result from that, nor from any danger to appellee's person, real or apparent, that the utmost prudence could have reasonably apprehended, when he returned to the place of injury.

But it is urged that the injury resulting as a consequence of the negligence of a fellow servant, in not closing the valve upon the tank, no recovery against appellant can be justified. It is said—*First*, that the negligence of the fellow servant intervening as an efficient cause of the injury, the negligence of the master, if any is attributable, became the remote, and not the proximate, cause; and, *second*, that the master not being liable for injury inflicted in consequence of the negligence of a fellow servant, if the injury would not have resulted but for such intervening and negligence of the servant, the master is not liable. The fallacy of the first position lies in its assumption of the fact that the negligence of the fellow servant was, in and of itself, a new and efficient cause of the injury. Whether the negligence of the defendant was the proximate cause of the injury was a question of fact, also, to be deter-

mined by the jury, under proper instructions from the court. We held in *Fent v. Toledo, P. & W. R. Co.* 59 Ill. 849, 14 Am. Rep. 13, approving *Toledo, P. & W. R. Co. v. Pindar*, 53 Ill. 451, 5 Am. Rep. 57, that whether the alleged negligence was the proximate cause of the injury was, in each case, a question of fact, and expressly repudiated the contrary rule as laid down in *Ryan v. New York Cent. R. Co.* 85 N. Y. 210, as in the teeth of almost numberless decisions, and as unsupported by reason. In the subsequent case of *Toledo, W. & W. R. Co. v. Muthersbaugh*, 71 Ill. 572, the same was again held. We said in the *Fent Case* that, so far as the case turned upon the issue of remote or proximate cause, the jury should be instructed that, "if the loss is a natural consequence of its alleged carelessness, which might have been foreseen by any reasonable person," the defendant is responsible, but is not to be held responsible for injuries which could not have been foreseen or expected, as the result of the negligence. This is not to be understood as requiring that the particular result might have been foreseen; for, if the consequences follow in unbroken sequence, from the wrong to the injury, without any intervening efficient cause, it is sufficient if, at the time of the negligence, the wrongdoer might, by the exercise of ordinary care, have foreseen that some injury might result from his negligence. *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 74, 619, 48 Am. Rep. 134; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 163, and cases collected; 4 Am. & Eng. Encyclop. Law, p. 42; *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481, 10 L. R. A. 696; *Louisiana Mut. Ins. Co. v. Tweed*, 74 U. S. 7 Wall. 44, 19 L. ed. 65; *Miller v. St. Louis, I. M. & S. R. Co.* 90 Mo. 889; *Kellogg v. Chicago & N. W. R. Co.* 26 Wis. 223; *Smith v. London & S. W. R. Co. L. R. 6 C. P. 21*; *Bevan*, Neg. 80, 81. Thus, in the *Keifer Case*, *supra*, it could not be foreseen that the particular injury might follow the placing of the tank upon an insufficient support. It might have fallen and injured no one, or a person other than appellee's intestate. It was held sufficient that the support was so insufficient that injury might result, from the falling of the tank in consequence, to some one.

If the wrong of appellant put in motion the destructive agency, and the result is directly attributable thereto, and there was no intervention of a new force or power of itself sufficient to stand as the cause of the mischief, the negligence of appellant must be considered the proximate cause of the injury, if it could have been foreseen, by the exercise of ordinary care, that injury might or would result from the negligence. "An intervening efficient cause is a new and independent force, which breaks the causal connection between the original wrong and the injury, and itself becomes the direct and immediate—that is, the proximate—cause of an injury." *Bishop, Noncont. Law*, §§ 42, 885, 886. And the test is, "Was it a new and independent force, acting in and of itself in causing the injury and superseding the original wrong complained of, so as to make it remote in the chain of causation?" It must be manifest, from this definition, that the

negligence of the fellow servants, whether it be treated as creating a condition merely, or as a cause, was not such an intervening efficient cause as to break causal connection between the negligence of appellant and the injury. The destructive agency set in motion by the negligence of appellant increased in extent by the flow of burning oil, igniting whatever was in its way that was combustible. This followed as a natural and inevitable sequence, and, coming in contact with the oil upon appellant's clothing, ignition followed as a natural result. It therefore required the combined negligence of appellant and the fellow servant to produce the consequences resulting in appellee's injury. It is well settled that where the injury is the result of the negligence of the defendant and that of a third person, or of the defendant, and an inevitable accident or an inanimate thing has contributed with the negligence of the defendant to cause the injury, the plaintiff may recover, if the negligence of the defendant was an efficient cause of the injury. 3 *Thomp. Neg.* p. 1085, § 8; *Bishop, Noncont. Law*, §§ 89, 450, 452; *Shearm. & Redf. Neg.* § 31 *et seq.*; *Cartersville v. Cook*, 129 Ill. 152; *Consolidated Ice Mach. Co. v. Keifer*, *supra*, and cases cited. In such case, the negligence of two independent persons resulting in injury to the third, where neither is sufficient within itself, both are to be treated, in combination, as the proximate cause of the injury. It is clear that the negligence of the fellow servant, in and of itself, could not have produced the injurious results suffered by appellee. The negligence of appellant and the fellow servant were therefore concurrent causes, and, combined, were the proximate cause of the injury. An efficient cause is simply the "working cause," or that cause which produces effects or results. *Webster, Dict.* And a proximate cause is that which stands next in causation to the effect, not necessarily in time or space, but in causal relation.

The modification of instructions complained of were in harmony with the view here expressed, and were not erroneous. The court modified the twenty-first and other instructions asked by the defendant, and thereby said to the jury, in effect, that, if they believed from the evidence that the injury resulted wholly from the negligence of the fellow servant as the immediate cause of the injury, the defendant was not liable. This modification raises the second proposition, and, in effect, presents the question of whether, where the negligence of the servant necessarily entered into or intervened to produce the injurious result, the master is liable. It would seem to follow, as a result of the doctrine, that, although the servant impliedly agrees that the master shall not be liable for the negligence of fellow servants, he does not agree to take any risk or waive liability of the master for his own negligence; that the servant may recover, although the injury is the combined effect of the negligence of the master and fellow servant. It is a familiar principle that where the negligence of two are, in combination, the proximate cause of an injury, either or both may be held responsible for the consequences resulting from their combined negligence. *Cartersville v.*

Cook, supra; Consolidated Ice Mach. Co. v. Keifer, supra; Wabash, St. L. & P. R. Co. v. Shacklet, 105 Ill. 884, 44 Am. Rep. 791; *Union R. & T. Co. v. Shacklet*, 119 Ill. 232; 2 Thomp. Neg. p. 1085, § 8, and cases cited; Cooley, Torts, 1st ed. 684; Nil. Rem. 178; Whart. Neg. § 778; 1 Shearm. & Redf. Neg. § 122.

Mr. Bishop after stating that the rule of law is "that a person contributing to a tort, whether his fellow contributors are men, natural or other forces, or things, is responsible for the whole, the same as though he had done all without help," subject to the limitation that the person injured shall receive his damages but once (Noncont. Law, §§ 518, 519), proceeds (§ 684), that, within the doctrine thus explained, "a master whose negligence contributed to the injury of a servant is, if the servant's negligence did not contribute also, liable for the entire injury, though some other force, for which the former is not responsible, —for example, the negligence of a fellow servant,—likewise contributed;" and cites in support *Crutchfield v. Richmond & D. R. Co.* 76 N. C. 820; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Paulmier v. Erie R. Co.* 34 N. J. L. 151; *Stringham v. Stewart*, 100 N. Y. 516; *Baltimore & O. R. Co. v. McKensie*, 81 Va. 71. See also Thomp. Neg. p. 981, § 10; *Booth v. Bos-*

ton & A. R. Co. 73 N. Y. 88, 29 Am. Rep. 37; *Cayzer v. Taylor*, 10 Gray, 274, 69 Am. Dec. 817.

These authorities fully sustain the position that, where the negligence of the master is combined with the negligence of a fellow servant in producing the injurious result, and neither is the efficient cause alone, the master as well as the fellow servant is liable. No case to which we have been referred, or of which we are aware, has gone so far as to hold that, where the negligence of the master contributes to the injury, the servant may not recover. The doctrine of contributory negligence is confined to the negligence of the party injured, and it is such negligence only, concurring with the negligence complained of, that will defeat the right of action. The modification of defendant's instructions had the effect of making them conform to the rules and principles herein held, and was not, therefore, in our judgment, erroneous, nor was it error for the court to refuse the instruction in effect taking the case from the jury.

While the case is extremely close upon its facts, the jury were correctly instructed, and we find no error for which the judgment should be reversed. It is accordingly affirmed.

CALIFORNIA SUPREME COURT.

J. B. COWDEN, *Appt.*,

v.

PACIFIC COAST STEAMSHIP CO., *Resp.*

(.....Cal.....)

1. The admiralty and maritime jurisdiction of the United States courts extends to controversies arising out of contracts for the shipment of merchandise upon the high seas between ports of the same state.
2. Mere discrimination in freight rates by a common carrier against a shipper was not a wrong for which the common law gave a remedy so as to come within the clause in the United States Statute, (Rev. Stat. § 711,) conferring jurisdiction over maritime cases upon United States courts to the exclusion of state courts, which saves to suitors in all cases "the right of a common-law remedy, where the common-law is competent to give it."

(May 6, 1892.)

A PPEAL by plaintiff from a judgment of the Superior Court for San Diego County in favor of defendant in an action brought to recover damages alleged to have been caused to plaintiff by reason of discriminations in freight charges against him upon shipments of merchandise upon defendant's steamships. *Affirmed.*

The facts are stated in the opinion.

NOTE.—On the question of the right of a carrier at common law to discriminate between its patrons, as to which there is some conflict of authority, see *Louisville & St. L. Consol. R. Co. v. Wilson* (Ind.) ante, 105.
18 L. R. A.

Mr. L. L. Boone, for appellant:

A carrier by vessel upon the high seas between ports within the United States is subject to the same duties and liabilities which attach to the capacity of common carrier as a carrier by land, except so far as the common law has been modified by statute.

King v. Shepherd, 3 Story, 849; *New Jersey Steam Nav. Co. v. Merchants Bank*, 47 U. S. 6 How. 428, 12 L. ed. 344; *Pearson v. Duane*, 71 U. S. 4 Wall. 615, 18 L. ed. 450; *Elliot v. Russell*, 10 Johns. 1, 6 Am. Dec. 306; *Menacho v. Ward*, 27 Fed. Rep. 529; *Bennett v. Peninsular & O. S. B. Co.* 6 C. B. 448.

Under the common law a carrier's rates must not only be reasonable, but equal when the conditions are substantially the same.

Scofield v. Lake Shore & M. S. R. Co. 48 Ohio St. 571, 54 Am. Rep. 846; *Samuels v. Louisville & N. R. Co.* 81 Fed. Rep. 57; *Bayles v. Kansas Pac. R. Co.* 5 L. R. A. 480, 13 Colo. 181; *Root v. Long Island R. Co.* 4 L. R. A. 331, 114 N. Y. 300, 11 Am. St. Rep. 643; *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 667, 28 L. ed. 231; *Ragan v. Aiken*, 9 Lea, 609, 42 Am. Rep. 686; *Chicago & N. W. R. Co. v. People*, 56 Ill. 365, 8 Am. Rep. 690; *Chicago & A. R. Co. v. People*, 67 Ill. 11, 16 Am. Rep. 599; *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 407, 18 Am. Dec. 457; *McDuffee v. Portland & R. R. Co.* 52 N. H. 430, 13 Am. Rep. 72; *Audenried v. Philadelphia & R. R. Co.* 66 Pa. 870, 8 Am. Rep. 195; *Shipper v. Pennsylvania R. Co.* 47 Pa. 338; *Sandford v. Catawissa, W. & E. R. Co.* 24 Pa. 378, 64 Am. Dec. 687; *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188, 2 Am. Rep. 31; *Railroad Comrs. v. Portland & O. Cent. R. Co.* 63

Me. 289, 18 Am. Rep. 208; *St. Louis, A. & T. H. R. Co. v. Hill*, 14 Ill. App. 578; *Dinmore v. St. Louis, O. & L. R. Co.* 2 Fed. Rep. 465; *Hays v. Pennsylvania R. Co.* 12 Fed. Rep. 809; *Vincent v. Chicago & A. R. Co.* 49 Ill. 33; *State v. McNeal*, 48 N. J. L. 407; *Erie & N. E. R. Co. v. Casey*, 26 Pa. 287; *Kinsley v. Buffalo, N. Y. & P. R. Co.* 87 Fed. Rep. 181; 1 Wood, Railway Law, 563-565.

The vessel, having been engaged in business wholly between termini in this state, and the whole transaction having been begun and finished here, was engaged in neither foreign nor interstate commerce, so far as its duties to the public as carrier were concerned. It was a proper subject of state legislation.

See 1 Kent, Com. 12th ed. 489, note; *Munn v. Illinois*, 94 U. S. 185, 24 L. ed. 87; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 177, 24 L. ed. 97; *Chicago, B. & Q. R. Co. v. Outts*, 94 U. S. 163, 24 L. ed. 95.

The states may regulate commerce in those matters which are of local concern, in the absence of action by Congress, although such regulation may indirectly or incidentally affect foreign or interstate commerce.

Smith v. Alabama, 124 U. S. 465, 31 L. ed. 506; *Ouachita & M. R. Packet Co. v. Aiken*, 121 U. S. 444, 30 L. ed. 976; *Miller v. New York*, 109 U. S. 885, 27 L. ed. 971; *Parkersburg & O. River Transp. Co. v. Parkersburg*, 107 U. S. 691, 27 L. ed. 584; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442; *Cincinnati, P. B. S. & P. Packet Co. v. Catlettsburg*, 105 U. S. 559, 26 L. ed. 1169; *Chicago & N. W. R. Co. v. Fuller*, 84 U. S. 17 Wall. 560, 21 L. ed. 710; *Cooley v. Philadelphia*, 53 U. S. 12 How. 299, 13 L. ed. 998; *License Cases*, 46 U. S. 5 How. 504, 12 L. ed. 256; *Sherlock v. Aving*, 93 U. S. 99, 23 L. ed. 819.

Messrs. Luce & McDonald, for respondent:

This action arises from a maritime contract solely, and courts of admiralty alone have jurisdiction thereof.

U. S. Rev. Stat. § 711; *Desty*, Federal Procedure, 57, 60, 61; *New Jersey Steam Nav. Co. v. Merchants Bank*, 47 U. S. 6 How. 844, 12 L. ed. 465; *Morewood v. Enequist*, 64 U. S. 23 How. 491, 16 L. ed. 516; *The Yankee v. Gallagher*, McAllister, 487; *Steele v. Thatcher*, 1 Ware, 487; *Banta v. McNeil*, 5 Ben. 84; *Church v. Shelton*, 2 Curt. 271; *The Spartan*, 1 Ware, 149; *New England Marine Ins. Co. v. Dunham*, 78 U. S. 11 Wall. 1, 20 L. ed. 90; *Bark San Fernando v. Jackson*, 12 Fed. Rep. 841; *The Fishhire*, 11 Fed. Rep. 743; *Lord v. Goodall, M. & P. S. Co.* 102 U. S. 543, 26 L. ed. 225; *Carpenter v. The Emma Johnson*, 1 Cliff. 633.

The simple fact of there being a discrimination did not give a cause of action at common law.

Express Companies v. R. R. Companies, 3 Am. & Eng. R. R. Cas. 602; *Fitchburg R. Co. v. Gage*, 12 Gray, 393; *Sargent v. Boston & L. R. Corp.* 115 Mass. 416; *Johnson v. Pensacola & P. R. Co.* 16 Fla. 623, 26 Am. Rep. 781; *Menacho v. Ward*, 27 Fed. Rep. 529, and notes; *Ex parte Benson*, 18 S. C. 86, 44 Am. Rep. 564; *New Jersey Steam Nav. Co. v. Merchants Bank*, 47 U. S. 6 How. 844, 12 L. ed. 465; 18 L. R. A.

Michigan Cent. R. Co. v. Hale, 6 Mich. 843; *Audenried v. Philadelphia & R. R. Co.* 68 Pa. 870, 8 Am. Rep. 195; *Bankard v. Baltimore & O. R. Co.* 34 Md. 197, 6 Am. Rep. 321; *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188; *Hersh v. Northern Cent. R. Co.* 74 Pa. 181; *Chicago & A. R. Co. v. People*, 67 Ill. 11, 16 Am. Rep. 599; *McNees v. Missouri Pac. R. Co.* 22 Mo. App. 224.

Garoutte, J., delivered the opinion of the court:

This is an action brought by plaintiff to recover damages of defendant for a discrimination in freight rates. A demurrer to the complaint was interposed upon the ground that the court had no jurisdiction of the subject-matter of the action, and that no cause of action was stated. The demurrer was sustained, and the ruling of the court in this regard is the only matter before us for review.

The complaint substantially alleges that the defendant is a common carrier of freight, by vessel, between San Francisco and San Diego, via the Pacific ocean; that between certain dates plaintiff, as a merchant of San Diego, paid to defendant, according to its regular schedule of rates, large sums of money as charges for freight; that defendant charged a second merchant 12½ per cent less for freight of the same character and quantity than it did plaintiff; that said charges were a discrimination against plaintiff, and, though often requested so to do, defendant refused to allow plaintiff such reduced rates, whereby he has been damaged in the sum of \$1,674.14. The amount sought to be recovered as damages is the difference between the freight charges made to plaintiff and those made to the more favored merchant. It would seem to be entirely immaterial, to the extent, at least, of the consideration of the merits of this appeal, whether the present action is one of contract or of tort. From either standpoint it arises from a maritime contract solely, and courts of admiralty alone have jurisdiction, unless the cause comes within the reservation found in section 711 of the Revised Statutes of the United States: "The jurisdiction vested in the courts of the United States, in the cases and proceedings hereafter mentioned, shall be exclusive of the courts of these several states; . . . (3) Of all civil cases of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it." There can be no question but that the voyage of a carrier made upon the high seas, even though the ports of departure and destination are in the same state, is under the exclusive control and regulation of Congress. It is only the internal commerce and navigation of a state that is under the control and regulation of the state. As was said in *Carpenter v. The Emma Johnson*, 1 Cliff. 638: "Great mischief would inevitably result from any rule denying admiralty jurisdiction in all cases where the place of the departure of the vessel and the place of her destination are both within the same state, when any part of the voyage is upon the high seas, for every navigator knows that in many such cases nearly the whole voyage is out of the limits of the state." See

Lord v. Goodall, N. & P. S. S. Co. 102 U. S. 544, 26 L. ed. 226; *Pacific Coast S. S. Co. v. Railroad Comrs.* 18 Fed. Rep. 10.

It follows from the foregoing authorities that plaintiff has no standing in the courts of this state, unless his rights are reserved to him under the reservation of the Revised Statutes previously quoted. In other words, has he a cause of action at common law against the defendant, under the facts of his complaint? The gist of the complaint is that for the same quantity and character of freight plaintiff was charged a sum 12½ per cent greater for transportation from the same point than the other merchant. Respondent insists that at common law the right of action was based upon the rate charged being unreasonable and excessive in itself, and that a mere discrimination, as disclosed in this case, gave no cause of action; that no wrong was committed if the charge was reasonable for the service, and, there being no wrong, no remedy was demanded. Appellant insists that at common law it is the duty of the carrier to "receive and carry goods for all persons alike, and that the rates must not only be reasonable, but equal, when the conditions are substantially the same." It will thus be seen that the merits of this appeal will be concluded by a determination as to what is the common law upon this question; and that is a matter of some difficulty of solution, owing to the divergent views expressed upon the subject by the various courts of this country. This divergence of opinion among the courts has undoubtedly been caused to some extent by the fact that for more than fifty years the courts of England have had no occasion to expound the common law upon this subject; common carriers, especially railway companies, having been placed entirely under the control of the statute law. In this country, to some extent, there is a lack of direct authority upon the question, owing to the fact that constitutional and legislative provisions are common in nearly all the states of this Union, prohibiting common carriers from practicing discrimination in their rates of toll. And, while these statutory and constitutional provisions have been regarded and incidentally declared to be reiterations of the common law by many courts of this country, sound authority upon which to base such declarations is wanting in the books. The fundamental and statute law of the various states upon this subject appears to have been founded upon the principles embodied in the early acts of parliament pertaining to the conduct and control of railways as common carriers, rather than upon the common law of England. Indeed, we have been able to obtain but few direct adjudications from English courts upon this question, owing to the fact that it would seem the business of inland common carriers in that country was not a matter of great concern until railroads were operated; and, immediately subsequent to that great epoch in the world's progress, statutory enactments followed, entirely taking away from the courts the necessity of any further application of the common-law rights and remedies. If the common law were as appellant here contends it to be, there would have been no necessity for parliament to have enacted these stringent "equality clauses," as

they were termed. It appears that this principle of equality of charges arose from the necessity of the times, a necessity created by the operation of railroads, which swallowed up and destroyed all other common carrier systems of England, and thereby created a monopoly of the business, and a power for wrong that at once demanded the restrictions of legislative enactments. This conclusion is fully borne out by the language of *Mr. Justice Blackburn* in *Great Western R. Co. v. Sutton*, L. R. 4 H. L. 288, wherein he said: "I think it appears from the preamble of the 90th section of the Railways Clauses Consolidation Act (1845) that the Legislature was of opinion that the changed state of things arising from the general use of railways made it expedient to impose an obligation on railway companies acting as carriers beyond what is imposed on a carrier at common law. And, if this be borne in mind, I think the construction of the proviso for equality is clear, and is that the defendants may, subject to the limitations in their special acts, charge what they think fit, but not more to one person than they, during the same time, charge to others under the same circumstances. And I think it follows from this that if the defendants do charge more to one person than they, during the same time, charge to others, the charge is, by virtue of the statute, extortionate. And I think the rights and remedies of a person made to pay a charge beyond the limit of equality imposed by the statute on railway companies, acting as carriers, on their line, must be precisely the same as those of a person made to pay a charge beyond the limit imposed by the common law on ordinary carriers as being more than was reasonable. The mode of establishing that the demand is extortionate differs in the two cases. Where it is sought to prove that the charge is unreasonable, and therefore extortionate, the fact that another was charged less is only material as evidence for the jury tending to prove that the reasonable charge was the smaller one. When it is sought to show that the charge is extortionate, as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances."

It is not the purpose of the court to review the authorities of this country upon the question under discussion. For the reasons previously suggested, the matter was only indirectly involved in the great majority of them, and, as authority upon the subject, they are weakened to that extent. The case of *Scotfield v. Lake Shore & M. S. R. Co.*, 43 Ohio St. 571, 54 Am. Rep. 848, is the leading case in the United States supporting appellant's contention, and it is upon this case that appellant says "he has pinned his faith and hung his hope." The case of *Johnson v. Pensacola & P. R. Co.*, 16 Fla. 623, 26 Am. Rep. 731, is the leading case in this country holding to the contrary view, and the opinion of the learned judge in the *Scotfield Case* does not appear to overrule the doctrine there declared, but would seem to look to the statute law of

Ohio for support, rather than to the common law. It says, in speaking of the Florida case: "Reliance is placed on the doctrine that discrimination is not necessarily unlawful, and that all the freighter is entitled to is a reasonable rate, not necessarily equal to all, and, in the absence of any statute to the contrary, we are not inclined to question the correctness of these decisions." The facts in the Florida case appear to be practically identical with the facts of this case. Florida had no statutory law upon the subject of the regulation of common carriers, and hence, as here, the merits of the case rested upon the determination as to what was the common law upon the subject. In this case the ancient, as well as the modern authorities are ably reviewed, and the court says: "Our conclusions are that, as against a common or public carrier, every person has the same right; that in all cases, where his common duty controls, he cannot refuse A. and accommodate B.; that all, the entire public, have the right to the same carriage for a reasonable price, and at a reasonable charge for the service performed; that the commonness of the duty to carry for all does not involve a commonness or equality of compensation or charge; that all a shipper can ask of a common carrier is that for the service performed he shall charge no more than a reasonable sum to him; that whether the carrier charges another more or less than the price charged a particular individual may be a matter of evidence in determining whether a charge is too much or too little for the service performed; and that the difference between the charges cannot be the measure of damages in any case, unless it is established by proof that the smaller charge is the true, reasonable charge, in view of the transportation furnished, and that the higher charge is excessive to that degree." The court also says: "In the last edition of Story on Bailments we find the rule of the common law thus stated: 'At common law a common carrier of goods is not under any obligation to treat all customers equally. He is bound to accept and carry for all upon being paid a reasonable compensation. But the fact that he charges less for one than for another is only evidence to show that a particular charge is unreasonable,—nothing more. There is nothing in the common law to hinder a carrier from carrying for favored individuals at any unreasonably low rate, or even gratis.'"

By reason of the variance which exists in the

views of the courts of this country as to what is the common law upon this subject, it would seem that the adjudications of the common-law courts of England upon such a matter should have pre-eminent and controlling weight with the courts of the various states. In the case of *Great Western R. Co. v. Sutton*, to which reference has already been made, *Mr. Justice Blackburn*, in a very luminous opinion, addressed in part directly to this question, said: "At common law a person holding himself out as a common carrier of goods was not under any obligation to treat all customers equally. The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession, (unless he had some reasonable excuse for not doing so,) on being paid a reasonable compensation for so doing; and, if the carrier refused to accept such goods, an action lay against him for so refusing; and, if the customer, in order to induce the carrier to perform the duty, paid, under protest, a larger sum than was reasonable, he might recover back the surplus beyond what the carrier was entitled to receive, in an action for money had and received, as being money extorted from him. But the fact that the carrier charged others less, though it was evidence to show that the charge was unreasonable, was no more than evidence tending that way. There was nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even gratis. All that the law required was that he should not charge any more than was reasonable." The learned justice in his opinion clearly indicates that the prime object of the railway equality clauses enacted by parliament was to cover the exact case of injury by discrimination in freights, such as is claimed by plaintiff in this record. During the progress of the argument in *Bazendale v. Eastern Counties R. Co.*, 4 C. B. N. S. 78, *Justice Byles* said: "I know no common-law reason why a carrier may not charge less than what is reasonable to one person, or even carry him free of all charge." For the foregoing reasons the court concludes that the complaint is deficient in not stating that the charge to plaintiff was unreasonable; and that the allegation of discrimination or inequality is not the equivalent of an allegation of an excessive charge.

Let the judgment be affirmed.

We concur: **McFarland, J.; Paterson, J.; Harrison, J.**

WEST VIRGINIA SUPREME COURT OF APPEALS.

STATE of West Virginia

v.

Allen HARRISON, *Plff. in Err.*

(..... W. Va.)

*1. A mere separation of a jury will not

*Headnotes by BRANXON, J.

entitle the person to a new trial; but where there has been an improper separation of the jury during the trial, if the verdict is against the prisoner, he is entitled to the benefit of the presumption that such separation has been prejudicial to him, and the burden of proof is upon the state to show beyond a reasonable doubt that the prisoner has suffered no injury by reason of

NOTE.—*Irresistible impulse as an excuse for crime.*

Upon this question there is an irreconcilable conflict in the authorities. The theory that there can

be an irresistible impulse which will excuse from responsibility for crime one who is able to distinguish right from wrong, is expressly rejected in

13 L. R. A.

the separation. If the prosecution fails to do this, the verdict will be set aside.

2. The same rule should be applied to all cases of misconduct or irregularity by the jury during the trial which are of such a character as to raise a presumption that the prisoner was prejudiced thereby.

3. The testimony of jurors may be received to disprove or explain any such separation, misconduct, or irregularity; but their testimony will not be received to show by what motive they were actuated, or that any admitted fact, misconduct, or irregularity had no influence or effect upon their minds in producing the verdict. In any case, where proper at all, the testimony of jurors should be received with great caution.

4. Mere business conversation by a juror with another person, entirely foreign to the case on trial, in the presence and hearing of the sheriff and the other jurors, will not avoid the verdict.

5. A new trial will not be granted in a criminal case for matter that is a principal cause of challenge to a juror, which existed before he was elected and sworn as a juror, but which was unknown to the prisoner until after the verdict, and which could not have been discovered by the exercise of ordinary diligence, unless it appear from the whole case that the prisoner suffered injustice from the fact that such juror served in the case. In determining this court should look only to the evidence touching such cause of challenge; not to the evidence on the trial as to the prisoner's guilt.

6. To set aside a verdict because of an opinion entertained by a juror before

he was sworn, it ought to appear that such opinion was not merely unsubstantial and hypothetical, but such as would have excluded him from the jury had it been known before he was sworn.

7. A motion for continuance is addressed to the sound discretion of the court, under all the circumstances of the case; and, though an appellate court will supervise the action of an inferior court on such motion, it will not reverse the judgment on that ground, unless such action was plainly erroneous.

8. Where a continuance is asked to procure the evidence of a witness not resident in the state, the affidavit should state not only the bona fide belief that such evidence can be procured, but the grounds of such belief, in order that the court may see that the belief is not merely a hope, but a well-founded, reasonable expectation, that it will be procured.

9. A court must see reasonable ground to doubt the sanity of a person about to be tried for felony before impaneling a jury to inquire as to his sanity. The court may inspect and examine the prisoner, consider his action and demeanor, read affidavits, inquire of physicians and others touching his mental condition. The decision of the trial court will have a very weighty, if not conclusive, influence in the appellate court, and will not be reversed, if at all, unless it very manifestly appears that the decision was wrong, or that the court abused the discretion lodged with it by the statute.

10. A person partially insane is yet responsible for a criminal act if at the time of the act he knows right from wrong, and knows the nature and character of the particular act and its consequences, and knows that it is wrong,

Reg. v. Haynes, 1 *Post.* & *F.* 606; *Reg. v. Burton*, 3 *Post.* & *F.* 772; *Reg. v. Barton*, 3 *Cox. C. C.* 275; *Reg. v. Stokes*, 3 *Car. & K.* 185; *Reg. v. Pate*, cited in 1 *Bennett & H. Lead. Cas.* 96; *United States v. Holmes*, 1 *Chff.* 98; *People v. Hoin*, 62 *Cal.* 120, 45 *Am. Rep.* 641; *Fogarty v. State*, 80 *Ga.* 460; *State v. Nixon*, 32 *Kan.* 235; *State v. Mowry*, 87 *Kan.* 389; *State v. Yarbrough*, 39 *Kan.* 581; *Spencer v. State*, 69 *Md.* 23; *Graves v. State*, 45 *N. J. L.* 847; *State v. Brandon*, 53 *N. C.* 463; *State v. Potts*, 100 *N. C.* 437; *People v. Coleman*, 1 *N. Y. Crim. Rep.* 1; *People v. Walz*, 60 *How. Pr.* 204; *Flanagan v. People*, 52 *N. Y.* 467, 11 *Am. Rep.* 731; *Walker v. People*, 88 *N. Y.* 81; *People v. Carpenter*, 102 *N. Y.* 238; *People v. Montgomery*, 13 *Abb. Pr. N. S.* 207; *State v. Alexander*, 30 *S. C.* 74; *State v. Leveille*, 84 *S. C.* 120.

A request to charge that "if some controlling disease was in truth the acting power within the prisoner which he could not resist, or if he had not sufficient use of his reason to control the passions which prompted the act complained of he was not responsible," was held to have been properly refused in *Anderson v. State*, 42 *Ga.* 9; *State v. Coleman*, 27 *La. Ann.* 691; *Flanagan v. People*, and *People v. Carpenter*, *supra*.

In *Choice v. State*, 31 *Ga.* 424, it was held that reasonability depends upon the possession of will,—not the power over it; and an instruction based on ability to distinguish between right and wrong as to the particular act committed, was held to properly express the law.

In *United States v. Young*, 25 *Fed. Rep.* 710, the court said that a man may be driven to a desperate and homicidal act by morbid impulse, but that the cases in which the defendant is wholly irresponsible are rare, the difficulty in the way of applying the test very great, and that the court was compelled to adhere to the "right and wrong" test until something better was devised. A similar opinion was

expressed in *State v. Bundy*, 24 *S. C.* 439, 58 *Am. Rep.* 203.

In his charge to the jury in *Huntington's Case*, who was tried for forgery in New York, in 1858, *Capron, J.*, said that the theory might be preferable that insanity might exist and the subject be totally incapable of controlling his actions, while his knowing and reasoning powers suffered no noticable lesion, but that until the proper authorities sanctioned it, he could not regard it. *Huntington's Trial*, p. 447.

In *United States v. Faulkner*, 35 *Fed. Rep.* 720, the jury were instructed that they were to decide whether the accused had mind enough to know that it was wrong, and will enough to withhold from putting obscene matter in the mails, but instructed them that he was responsible if he knew what he was doing and that it was wrong.

In *State v. Scott*, 41 *Minn.* 865, it was held that an irresistible impulse to commit a crime in the mind of one conscious of its nature and quality, or that it was wrong, could not be allowed as a defense, under *Minn. Pen. Code*, § 21; "a morbid propensity to commit prohibited acts existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of such acts forms no defense to a prosecution therefor."

In *Com. v. Rogers*, 7 *Met.* 500, 41 *Am. Dec.* 458, 1 *Bennett & H. Lead. Cas.* 87, *Shaw, Ch. J.*, said that one who in committing a homicide acted from an irresistible and uncontrollable impulse, and with a mind diseased to such a degree that for the time it overwhelmed the reason, conscience, and judgment is not responsible. This is a leading case on the subject, but it is very doubtful how far the chief justice intended to go in the matter."

It has been cited both for and against the theory that irresistible impulse excuses. In *Cunningham v. State*, 56 *Miss.* 206, 21 *Am. Rep.* 360, it was held to

and is hurtful to another, and deserves punishment. In such case no mere irresistible impulse to do the act will exempt him from criminal responsibility for such act.

(October 1, 1892.)

ERROR to the Circuit Court for Cabell County to review a judgment convicting defendant of murder. *Affirmed.*

The facts are stated in the opinion.

Messrs. Marcum, Peyton & Marcum, for plaintiff in error:

The affidavit of W. H. Harrison showed that at the time the case was called for trial the mind of the prisoner, Allen Harrison, was in such a condition as to render him incapable of consulting with his attorneys or any one else, touching his case; that he was not in condition of mind to communicate with his counsel or to render them any assistance whatever in preparing for or conducting his defense; that his mind had been in that condition for some time prior to that day and ever since the commission of alleged offense; that he regarded the said Allen Harrison as wholly incapable of imparting such information to his counsel, relative to his case, as would enable them intelligently to prepare for his defense.

This being a fact it was plainly the duty of the court to suspend the trial until a jury was impaneled to inquire into the sanity of the prisoner.

W. Va. Code, chap. 159, § 10; also, *Gruber v. State*, 3 W. Va. 699.

The affidavit of W. H. Harrison, filed in

support of the prisoner's motion for continuance, states that one Dr. J. E. Erwin was a material and necessary witness for the prisoner in his defense; that the prisoner could prove facts by the said Erwin that could not be proved by any other witness known to him; that the said Erwin had been, for a long time, the attending physician of the prisoner; that said Erwin had told the affiant that the mind of the prisoner was diseased and unsound; had told him the name of the disease and the cause thereof; that said Erwin was not a resident of this state and could not be served with subpoena or other process; that when affiant last heard of him, he was living in Tennessee; that the prisoner could not safely go into the trial of his case in the absence of the said Erwin; that by the next term of the court he could have the said Erwin present, or procure his deposition in the case.

Upon the face of the affidavit the prisoner showed himself entitled to a continuance.

We are more impressed with the soundness of these views on account of the fact that but six days elapsed from the time of the commission of the alleged offense, until the prisoner was forced into a trial of the case.

See W. Va. Code, chap. 159, § 1; also, *State v. Betsall*, 11 W. Va. 726.

The right and wrong test is not the only test of criminal responsibility.

The later decisions and authorities couple with the right and wrong test the power of choosing between the two, and the power of the will over the actions.

Parsons v. State, 81 Ala. 577, 60 Am. Rep.

be equivalent to the "right and wrong" test, and that a person is responsible for an act committed under a mental condition which perfectly perceives the true relations of the party, and recognizes all the obligations thereby imposed, but which is unable to control the will.

A person laboring under partial insanity, who still understands the nature and character of his acts and its consequences, has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that if he does it he will do wrong and receive punishment, and possesses withal a will sufficient to restrain the impulse that may arise from a diseased mind, is responsible for such act. *Dejarnette v. Com.* 75 Va. 367.

In Missouri there has not been absolute uniformity in regard to this subject. In *Baldwin v. State*, 12 Mo. 223, it was held that a person who, at the time of committing an alleged criminal act, had not possession of reason sufficient to know that it was wrong, or impelled by an insane impulse, had not the power to refrain from the commission of it, is not responsible.

In *State v. Handley*, 46 Mo. 414, it was said that if a person was so insane as not to know right from wrong, and that the act he was committing was wrong, and was so far deprived of his will as not to possess the power of choosing between right and wrong in regard to the act, he was not responsible, unless the insanity was the immediate result of intoxicating liquors or narcotics.

An instruction that if the defendant was at the time of committing a homicide incapable of distinguishing right from wrong, or of exercising control or will power over his actions, or was unconscious at times of the nature of the crime he was about to commit, he was not responsible, was held in *State v. Erb*, 74 Mo. 199, to have been properly 18 L. R. A.

refused; while an instruction that to be irresponsible, his mental faculties must have been so deranged as to render him incapable of knowing the right from the wrong of the act properly expressed the law. This was followed in *State v. Kotovsky*, 74 Mo. 247, two of the five judges holding that one knowing the right from the wrong might in consequence of mental derangement be incapable of exercising the will, and therefore not responsible.

And in *State v. Pagels*, 92 Mo. 300, it was said that an uncontrollable impulse to commit a crime, springing from an insane delusion, is not an excuse for crime.

The contrary doctrine.

In some jurisdictions the test of responsibility for a criminal act is the power to distinguish right from wrong in regard to that act and the power to choose whether to do it or not. *State v. Windsor*, 5 Harr. (Del.) 512; *State v. Brown*, 1 Houst. Cr. Rep. 539; *Walker v. State*, 103 Ind. 502; *Com. v. Haskell*, 2 Brewster, 491. The last is not a criminal case.

Insanity whether general or partial, to excuse from crime, must exist to such a degree as to have controlled the will of its subject, and have taken from him the freedom of moral action. *Com. v. Mosler*, 4 Pa. 264; *Ortwein v. Com.* 76 Pa. 414, 18 Am. Rep. 420.

Moral insanity is not a defense unless it exists to such an extent as to subjugate the intellect, control the will, and render it impossible for the person to do otherwise than yield thereto. *Taylor v. Com.* 109 Pa. 282.

In *Com. v. Mosler*, *supra*, it is said: There is a moral or homicidal insanity consisting of an irresistible inclination to kill or commit some other particular offense. The doctrine which acknowledges this mania is dangerous and can be recognized only in the clearest cases. It should be

193; 1 Whart. Crim. Law, 9th ed. §§ 83, 43, 45; 1 Bishop, Crim. Law, 7th ed. § 886 et seq.; 1 Greenl. Ev. § 872; 1 Stevens, Crim. Law, § 168.

An act to be criminal must be willful. If therefore the prisoner Harrison had no will power; if his mind was so diseased as to render his will power incapable of either directing or controlling his actions, then the killing of Bettie Adams by him was not willful and therefore not criminal.

The juror who was permitted to separate himself from the others stated that he saw no one while absent from the jury and had no conversation about the trial.

These statements made by a juror upon this subject were improper and can have no weight in determining defendant's right to a new trial.

State v. Robinson, 20 W. Va. 718, 43 Am. Rep. 799.

The evidence shows that R. A. Goodwin, a member of the jury, while on the jury trying the case had a conversation with Doolittle and Biggs in the office of the St. Nicholas Hotel; that a deed was examined and acknowledged by said Goodwin; that this conversation took place anywhere from eight to ten feet from the sheriff having jury in charge, and that it lasted some time, although the sheriff was in the room with them, but did not hear conversation nor examine deed. Each of these witnesses said that nothing was mentioned about the case of Harrison.

This explanation is not sufficient to rebut presumption of prejudice and destroy prisoner's right to a new trial on this account.

shown to have been habitual or to have shown itself in more than one instance. To establish it as a justification, its contemporaneous existence, or the existence of an habitual tendency, amounting to second nature, must be shown. See also *Coyle v. Com.* 100 Pa. 573, 45 Am. Rep. 397.

If the prisoner was actuated by an irresistible impulse to kill, and was utterly unable to control his will or subjugate his intellect, and was not actuated by anger, jealousy, revenge, and kindred evil passions, he is entitled to an acquittal. *Com. v. Freth*, 3 Phila. 106; *Brown v. Com.* 78 Pa. 125; *Sayres v. Com.* 88 Pa. 261.

The true test of responsibility is whether the accused had sufficient reason to know right from wrong, and whether or not he had sufficient power of control to govern his actions. *Graham v. Com.* 18 B. Mon. 587; *Smith v. Com.* 1 Duv. 234. In the latter case *Robertson, J.*, said that moral insanity was as well known as intellectual, and constituted an excuse for crime.

In *Kriel v. Com.*, 5 Bush, 362, it is held that one who commits an otherwise criminal act is responsible unless laboring under such a state of mental aberration and disease as to deprive him of a knowledge of right and wrong, or if he has this knowledge, to take from him the moral power to resist his morbid inclination to its perpetration.

Moral insanity arising from the subjugation of the intellect by a morbid impulse or propensity, or from an overwhelming and destruction of the faculties of the mind to the extent of rendering the party incapable of governing his actions, is an excuse for crime; but it must exist in such violence as to render it impossible for him to do otherwise than yield to its promptings. *Scott v. Com.* 4 Met. (Ky.) 227, 88 Am. Dec. 461.

In Ohio it has been held that the proper test of responsibility is, whether the accused was a free 18 L. R. A.

Com. v. Wormley, 8 Gratt. 712.

Mr. Alfred Caldwell, Atty-Gen., for the State:

Unless good cause for a continuance was offered, it was the duty of the circuit court to try the accused at the term the indictment was found.

Code, chap. 159, § 1.

The refusal of a continuance is certainly not plainly erroneous, and it must be to make it a cause of reversal.

Buster v. Holland, 27 W. Va. 511; *State v. Betts*, 11 W. Va. 708; *Davis v. Walker*, 7 W. Va. 447; *Dimmay v. Wheeling & E. G. R. Co.* 27 W. Va. 82; *Wilson v. Wheeling*, 19 W. Va. 323; *Wilson v. Kochlein*, 1 W. Va. 145; *Tompkins v. Burgess*, 2 W. Va. 187.

The instructions for the state were unobjectionable.

State v. Cain, 20 W. Va. 679; *State v. Robinson*, Id. 718, 43 Am. Rep. 799; *State v. Douglass*, 28 W. Va. 297; *State v. Welch*, 36 W. Va.

As to the separation of the jury, the facts in evidence probably made it necessary for the state to show that no prejudice to the accused could arise therefrom and consequently no new trial should have been granted on that account. This showing was made by the state very fully.

State v. Robinson, supra.

As to the objections made in relation to the juror, Philip Ward, the record discloses such satisfactory denials, explanations and corroborating evidence to that given by Ward that, under the authorities, it is clear that such objections are not good ground for setting aside

moral agent in committing the act, whether he was at the time capable of judging whether it was right or wrong, and whether he knew it was an offense against the laws of God and man. *Clark v. State*, 12 Ohio, 483, 40 Am. Dec. 481; *Blackburn v. State*, 23 Ohio St. 146.

In *Farrer v. State*, 3 Ohio St. 54, *Corwin, J.*, in a dictum said that every correct definition of sanity, either expressly or by necessary construction, must suppose freedom of will to avoid a wrong, no less than the power to distinguish between the wrong and the right.

A person moved to commit a criminal act by an insane impulse controlling his will and judgment is not responsible therefor. *Stevens v. State*, 31 Ind. 485.

Insanity may not only affect the understanding but control the power of volition, and an instruction which limits the question of insanity to the understanding is objectionable. *Bradley v. State*, 31 Ind. 402.

One urged to the commission of a criminal act by an insane impulse so strong as to overcome his will and judgment, so powerful that he was unable to resist it even though knowing it to be wrong and a violation of law, is not responsible, whether the impulse arose from mental or physical causes or both, unless voluntarily induced by himself. *Sawyer v. State*, 35 Ind. 80.

One who commits a criminal act, moved thereto by an insane impulse controlling his will and judgment, and too powerful for him to resist, arising from causes not voluntarily induced by himself, is not responsible. *Grubb v. State*, 117 Ind. 277.

In *State v. Bartlett*, 43 N. H. 224, 80 Am. Dec. 154, the charge to the jury, not discussed on appeal, was that if the mind of the accused was in a diseased and unsound state to so high a degree that for the time being it overwhelmed the reason, con-

the verdict, coming as they do, after a protracted and expensive trial.

State v. Strauder, 11 W. Va. 745, 27 Am. Rep. 606; *State v. McDonald*, 9 W. Va. 456; *Bank of the Ohio Valley v. Lockwood*, 18 W. Va. 893, 81 Am. Rep. 768; *State v. Greer*, 22 W. Va. 802.

Brannon, J., delivered the opinion of the court:

On the 14th day of April, 1892, Allen Harrison was sentenced to death by the circuit court of Cabell county for the murder of Bettie Adams, and he comes to this court for relief from that sentence. Should the verdict be set aside because of separation of the jury? Between 12 and 1 o'clock at night a juror rose from his bed, and went to the water closet of the hotel where the jury boarded, to answer a call of nature. The deputy sheriff in charge of the jury unlocked the door of the room wherein the juror slept, and went with him into the hall leading to the closet, and saw that no one was in the hall, and saw that the door of the closet was open, and saw no one in the closet, and says no one was in it, though there was a portion of the closet—the two apartments containing the bowls—which he could not see from where he stood; and the juror walked down the hall 40 or 50 feet to the closet, the sheriff returning to bed, but listening, and the juror remained absent from four to eight

minutes, and returned to the room. There were some rooms along the hall towards the closet, occupied perhaps by others, one by the high sheriff. Without regard to the statements of the juror, it does not in any manner appear that this juror mingled with, saw, talked, or had any sort of communication, with any person while absent. The facts that it was at the dead hours of the night, that the hall was clear of persons, and that the apartment to which the juror went was not like the public rooms of an hotel, but a water closet, render it highly improbable that the juror met or conversed with any one. In all the Virginia and West Virginia cases where verdicts have been set aside on account of separation of the jury, it appeared that the juror during the separation mingled and talked with other persons, or had ready opportunity to do so. I hardly think that where it safely appears that the juror has no communication, nor opportunity for it, the mere separation, if we can call it "separation" in a legal sense, would vitiate a verdict. But if we can read and credit the statement of the juror in question, then the fact that he had no intercourse, or opportunity for it, with any other person, will not depend simply on the probability arising from the facts above stated; for he states that he neither spoke to nor saw any one while so absent. That we can consider the juror's statement is shown by the syllabus and opinion in *State v. Cartwright*, 20 W.

science and judgment, and that in committing the act, he acted from an irresistible and uncontrollable impulse, he was not responsible.

In *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533, it is said that if one accused of a criminal act knows it to be wrong, he is equally irresponsible whether his will is overcome and his hand used by the irresistible impulse of his own mental disease, or by the irresistible power of another person. If his mental, moral, and bodily strength is subjugated and pressed to an involuntary service, it is immaterial whether it is done by his disease, or by another man, or any other force set in operation without any fault on his part.

In *State v. Jones*, 50 N. H. 399, 9 Am. Rep. 242, it was held that it was a question for the jury whether every insane impulse was always irresistible, and whether in the particular instance the insane impulse might have been resisted.

Effect of disease to create irresistible impulse.

That an act is punishable if committed by one under an irresistible impulse, whose mental faculties are in a sound normal condition, is held in *Boeswell v. State*, 63 Ala. 307, 35 Am. Rep. 20.

One who with no mental disorder, commits a criminal act from overmastering anger, jealousy, or revenge, is responsible therefor. *Williams v. State*, 50 Ark. 511; *Bolling v. State*, 54 Ark. 598; *Smith v. State*, 55 Ark. 259; *Gueltig v. State*, 63 Ind. 94, 32 Am. Rep. 99; *Sanders v. State*, 94 Ind. 147; *Goodwin v. State*, 96 Ind. 550; *Plake v. State*, 121 Ind. 433; *People v. Finley*, 38 Mich. 482; *People v. Mortimer*, 48 Mich. 37; *People v. Durfee*, 63 Mich. 437; *State v. Stickley*, 41 Iowa, 232.

One who commits an alleged crime, knowing it to be wrong, is responsible unless he has so far lost the power to choose that his free agency was at the time destroyed, and the crime was so connected with a disease of the mind as to be the product of it solely. *Parsons v. State*, 81 Ala. 577, 30 Am. Rep. 183.

To be a subject of punishment, one must have
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mind and capacity to judge of the nature and consequences of the act committed, that it is wrong and criminal, and will properly expose him to punishment, and he must not be overcome by an irresistible impulse arising from disease. *State v. Johnson*, 40 Conn. 136.

To render one responsible for a criminal act, the one committing it must be so insane at the time as not to have sufficient soundness of mind and reason to distinguish right from wrong in regard to the act, and to understand its nature and consequences, and not have sufficient mental power to apply it to his own case, and thereby not have the ability to control himself, and to choose by an effort of the will whether he would do the act or not. *State v. West*, 1 Houst. Crim. Rep. 371.

In *Cole's Trial*, 7 Abb. Pr. N. S. 321, the jury, having been instructed that an insane impulse leaving the mind incapable of exertion, and holding the person incapable of exercising his mind freed from responsibility, but that no impulse could excuse when there was a consciousness that one is committing a crime against the laws of his country, found the prisoner sane the moment before and the moment after the criminal act, but being in doubt of his sanity at the exact moment, were directed to acquit.

In *People v. Klein*, 1 Edm. Sel. Cas. 13, *Edmonds, J.*, charged the jury that if some controlling disease was in truth the acting power within the prisoner which he could not resist, or if he had not a sufficient use of his reason to control the passions which prompted the act complained of, he was not responsible, but that it must not be a mere impulse of passion, an idle, frantic humor, or unaccountable mode of action, but an absolute dispossession of the free and natural agency of the human mind, and that the moral as well as the intellectual faculties might be so disordered by disease as to deprive the mind of its controlling and directing power.

A similar charge was given by the same judge in *People v. Divine*, 1 Edm. Sel. Cas. 594, and by Hoff-

Va. 82, and instances in Virginia cases therein cited, (page 43,) which are binding on us, in which affidavits of jurors were received. We cannot read that portion of the affidavit wherein the juror states that he did not go to the closet for any improper purpose connected with the trial, and that his absence had no influence upon his verdict, but we can read its statement that he met with no one, saw no one, talked with no one. There is no showing in the slightest degree to the contrary; and if we give this affidavit any weight, corroborated and rendered probably true by the other circumstances spoken of, we must be satisfied that its statements are true. Would it not be a stigma and reproach upon the administration of criminal law to reverse a solemn trial for such a cause, we being confident that the prisoner suffered no harm from the occurrence? Separation merely does not necessarily annul a verdict; it does so only *prima facie*.

Two Virginia cases are spoken of as holding that separation *per se* annuls the verdict,—*McCaull's Case*, 1 Va. Cas. 371; *Overbe's Case*, 1 Rob. (Va.) 356. Perhaps I may add *Wormley's Case*, 8 Gratt. 712, though Judge Rives, in *Philips' Case*, 19 Gratt. 541, says, perhaps correctly, that it is not to be interpreted as so holding. In none of these cases is there any reasoning by the court, except in *McCaull's Case*, and in it Judge Nelson, after saying that the one view of the subject was that the law required the jury to be kept entirely inaccessible,

so that communication with them would be impossible, and the other view was that mere separation, unless it be proved that there has been some conversation or tampering with a member of the jury, shall not vitiate a verdict, and there must be proof to work this effect, disclaims a decision of the general principle, saying the court was not called on to decide between the two views, and would decide only whether the separation in that particular case should overthrow the verdict. But later and well-considered cases hold that mere separation will not *per se* impair a verdict. *State v. Cartright*, 20 W. Va. 82; *State v. Robinson*, Id. 718, 48 Am. Rep. 799; *Thompson's Case*, 8 Gratt. 637; *Philips' Case*, 19 Gratt. 485; *McCarters' Case*, 11 Leigh, 633. Even in the old *Thomas Case*, 2 Va. Cas. 479, the doctrine that separation *per se* is fatal to the verdict is repelled, and, what is pointedly applicable to this case, it was held that "the bare possibility of tampering with the jury is not sufficient to set aside a verdict;" and Judge Dade said: "But we think we have shown that in this case there was a bare possibility of such consequence, and we do not think ourselves justified, on account of a remote possibility, to obstruct the justice of the country in a case where we cannot doubt that the prisoner has received no injury." So we may say in this case that the possibility of any communication of the juror with a soul is very remote, it being almost absolutely certain that he had not, and we are confident the de-

man, R., in *MacFarland's Case*, 8 Abb. Pr. N. S. 57. The later decisions in New York, however, have been opposed to this. See *Flanagan v. People*, 52 N. Y. 467; *People v. Carpenter*, 102 N. Y. 238.

One who commits a criminal act when suffering from mental disease which dethroned his reason and judgment with reference to that act, and destroyed his power to comprehend its nature and consequences, and, overpowering his will irresistibly forced him to its commission, is not responsible, but is responsible if the act results from passion overthrowing the reason. *State v. Felter*, 25 Iowa, 67; *State v. Mewherter*, 48 Iowa, 83.

A man with reason sufficient to discriminate between right and wrong, whose will to do the right is not overcome by some real delusion in reference to the object upon which the act is committed, so as to irresistibly and uncontrollably force him to commit it, is responsible. *Fouts v. State*, 4 G. Greene, 500.

In *Leache v. State*, 22 Tex. App. 379, 58 Am. Rep. 668, the court while holding that the instruction to which exception was taken was broad enough to include irresistible impulse as an excuse for crime, disapproved of allowing it as an excuse unless resulting from mental disease.

If the will power is not overthrown by disease, and there is sufficient mental capacity to know right from wrong, there is criminal responsibility. *Conway v. State*, 118 Ind. 432.

Impulse obliterating sense of right and wrong.

When there is an uncontrollable impulse to do a criminal act so great as to deprive a person of the ability to distinguish right from wrong in regard to that act, the person is held to be irresponsible. *Wright v. State*, 4 Neb. 407; *Hart v. State*, 14 Neb. 572; *Burgo v. State*, 26 Neb. 630; *People v. Sprague*, 2 Park. Crim. Rep. 43. (But see other New York cases *supra*.)

In Texas, *Rogers v. Com.*, 7 Met. 500, 41 Am. Dec. 458, has been followed and it is held that where one 18 L. R. A.

who commits a criminal act is afflicted with unsoundness of mind to such a degree as to create an uncontrollable impulse to do the act charged by overriding the reason and judgment, and obliterating the sense of right and wrong, and depriving the accused of the power of choosing between right and wrong as to the particular act done, he is not responsible. *King v. State*, 9 Tex. App. 515. See *Warren v. State*, 9 Tex. App. 619.

In *Fisher v. People*, 23 Ill. 233, it was held that before a jury can render a verdict of acquittal because of moral insanity, they must be satisfied that the accused was acting under an uncontrollable impulse, a frenzy which rendered him unable to control his actions or direct his movements.

But later Illinois cases state more guardedly that unsoundness of mind of such a degree as to create an uncontrollable impulse to do the act charged, by overriding the reason and judgment and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them, is an excuse for crime. *Hopps v. People*, 81 Ill. 335, 63 Am. Dec. 231; *Dunn v. People*, 109 Ill. 635; *Dacey v. People*, 116 Ill. 555.

The cases which require that the sense of right and wrong must be obliterated in order to allow the defense of irresistible impulse practically agree with the old doctrine making the knowledge of right and wrong the test rather than with those which recognize the theory of moral insanity or irresistible impulse.

Kleptomania.

Kleptomania is a recognized symptom of mania to which the attention of the jury should be specially called, when the evidence tends to sustain such defense. *Looney v. State*, 10 Tex. App. 520, 38 Am. Rep. 646.

Kleptomania is a species of insanity which will render its subject morally irresponsible for the crime of theft. *Harris v. State*, 18 Tex. App. 297.

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fendant suffered no harm from the occurrence.

The rule to be deduced from these cases is that a mere separation of the jury will not entitle the person to a new trial; but where there has been an improper separation he is entitled to the benefit of the presumption that it was prejudicial, and the burden is on the state to show beyond reasonable doubt that he suffered no injury. *State v. Robinson* and *State v. Curtright*, *supra*. This rule is an ample safeguard over the purity of a jury trial. Any other rule, would, as Judge Thompson said in *Thompson's Case*, *supra*, in these days, when criminal trials and adjournments in them are so numerous and protracted, result in frequent miscarriages in trials, and delay and defeat the ends of justice, when there is not the slightest presumption or probability, or even possibility, of injustice to the prisoner. It clearly appears that in this case he suffered no harm. While we must at all times guard the rights of the accused, we must not be so technical in procedure as to overturn fair trials for mere shadows, thus bringing criminal justice into endless delay and public derision.

Another occurrence relied upon to annul the verdict is this: The sheriff in charge of the jury had it in a public room of the hotel, and allowed a juror to converse with two persons, one a notary, touching the execution of a deed. The sheriff and a deputy were present, within 8 to 10 feet of the juror, when he met these persons and signed the deed. He saw the deed. The evidence of these two persons, the sheriff, and the juror shows clearly that nothing whatever touching the trial took place, and there was no conversation about anything save the mere signing and acknowledging the deed, which occupied three to five minutes, including the drafting of the certificate of acknowledgment. The other jurors were right at hand. There was no low conversation. Every one could see the deed spread out on the table, and hear the conversation. This is no separation of the jury. The sheriffs were present, and other members of the jury also, and this juror was in charge of the officers. While it is reprehensible in a sheriff in charge of a jury to allow conversation or transaction of business between jurors and other persons, yet this instance does not constitute misconduct in a juror in a legal sense, such as to impair the verdict. We might almost as well say that conversation at table between jurors and waiters, the sheriff being present, though 10 or 15 feet away, and not hearing such conversation, would impair the verdict. In *Kennedy's Case*, 2 Va. Cas. 510, one of the jurors called to a friend from the window to send a message to his family, and to get his watch, though the sheriff did not hear the conversation, and it was held not cause for setting aside the verdict. So in *Thomas' Case*, *supra*, a juror, in presence of the sheriff, but separate from the other jurors, called to a neighbor, and sent a message to his family, and it was held not sufficient to affect the verdict. *Wormley's Case*, 8 Gratt. 712, cited to support this objection, does not do so, for there the sheriff left the room several times, remaining out from five to ten minutes each time, leaving three persons in the room with the jury, who conversed

freely and drank spirits with the jury, but had no conversation as to the trial, while here the sheriffs were present in the room.

Should the verdict be set aside because Ward, one of the jurors, said before he was put on the jury that if the jury should return a verdict that Harrison was insane the jury ought to be hung, and that Harrison ought to be hung? In the first place, we do not know but that the opinion of the juror so expressed was a merely hypothetical, unsubstantial opinion based on mere rumor, and not such as to have disqualified him had it been known when he was questioned on his *voir dire*, for the mere fact that a juror has expressed an opinion does not necessarily disqualify him. *State v. Schnelle*, 24 W. Va. 787, and *State v. Baker*, 38 W. Va. 819. The Virginia general court very long ago held that declarations by jurors that the prisoner was doomed to the penitentiary, and that he ought to be hung, would not call for a new trial; the court saying that it did not appear the juror had a deliberate opinion. *Smith's and Kennedy's Cases*, 2 Va. Cas. 6, 510. Likely the juror in this case was giving vent to mere idle declarations, not real opinion. But, in the second place, it is settled by many cases that a new trial will not be granted for matter that is principal cause of challenge, which existed before the juror was sworn, but which was unknown to the prisoner until after the verdict, unless it appears from the whole case that the prisoner suffered injustice from the fact that the juror served in the case. *Greer's Case*, 22 W. Va. 802; *State v. Strauder*, 11 W. Va. 745, 27 Am. Rep. 606; *State v. McDonald*, 9 W. Va. 456, and Virginia cases there cited. In *Greer's Case* the juror said the prisoner ought to be hung, but it was no cause for a new trial. And, in the third place, the juror denies that he made any such statement. There is nothing to show that the prisoner suffered injustice from the presence of Ward on the jury, and the circuit court judge was of opinion that he had not; and, under the many cases holding the doctrine above stated, we must hold this no cause for setting aside the verdict.

Did the court err in refusing to continue the case? An affidavit made by the prisoner's father stated that Dr. Erwin had been a long time the attending physician of the prisoner, and that Erwin had told affiant that the prisoner's mind was disordered and unbalanced; that he told him what function of the brain was disordered, and the cause of the disorder; and that Erwin lived in Tennessee, and affiant regarded his testimony as material, and did not know of any witness by whom the same facts could be shown; that Erwin removed from Cabell county five years before that time, and affiant did not know of his whereabouts, but that his whereabouts could be ascertained. The affidavit while stating that affiant did not know of any witness by whom the same facts stated by Erwin could be proven, does not state that affiant had made inquiry to learn whether he could do so or not. He certainly knew what physicians had attended his son. The range of inquiry was confined to a few physicians in the neighborhood. Erwin had been absent five years, and no place in Tennessee is named as his residence, and his whereabouts

are unknown. Was there any certainty of ever getting his deposition?

In *Wilhelm v. State*, 72 Ill. 483, and *Dacey v. People*, 116 Ill. 556, it was held that, where a continuance is asked because of the absence of a nonresident witness, the affidavit must state, not only the party's belief that his attendance can be procured, but also the grounds of such belief, so that the court may see whether there is a reasonable ground for the expectation that his evidence can be procured; and without such statement the affidavit is defective. It is different from a resident witness. It was also held that a continuance will not be granted where the evidence is only cumulative, unless it be shown there will be conflict of evidence. Furthermore, a physician who treated the prisoner for masturbation, and stated that in his opinion the prisoner was affected with a form of insanity called "melancholia," was introduced as a witness for the defense, and the father and many others gave evidence for the prisoner upon the only defense made by the prisoner,—that of insanity,—and there was on both sides a large volume of evidence upon that question; and all this enables us to say that the question of the prisoner's sanity was fully, fairly, and elaborately presented to the jury, and that the evidence of the witness Erwin, if attainable, would have been only additional or cumulative; and we cannot see with any certainty that its absence was detrimental, or could have been detrimental, to the prisoner's cause; and therefore we have under this head only to apply the rule of law, well settled in this court, that a motion for continuance is addressed to the sound discretion of the court, under all the circumstances of the case; and though an appellate court will supervise the action of an inferior court, and reverse it when it has ruled a party into trial when he was entitled to a continuance, yet it will not reverse on that ground, unless such action was plainly erroneous. The judge presiding sees all the surroundings of the trial, and can better than we decide whether the design of the motion for a continuance is delay, or whether a continuance is really essential to a fair and proper trial. It is not without force to add that the statute (Code, chap. 159, § 1) commands a trial at the same term at which the indictment is found, unless good cause be shown for continuance. *Flott v. Com.* 12 Gratt. 576; *Hewitt's Case*, 17 Gratt. 627; *Betsall's Case*, 11 W. Va. 703; *Davis v. Walker*, 7 W. Va. 447; *Buster v. Holland*, 27 W. Va. 511.

Did the court err in failing to impanel a jury, before trial of the prisoner's guilt, to inquire as to his sanity when called to trial? Code, chap. 159, §§ 9, 10, provide that no one while insane shall be tried for crime, and that, if the court see reasonable ground to doubt his sanity, the trial shall be suspended until a jury inquire of his sanity. That feature of the statute which forbids a trial while the party is insane is only declaratory of the common law, as was held of a similar statute in *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216, for Blackstone says: "If a man in his sound memory commit a capital offense, and before arraignment for it becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and

caution that he ought." 4 Bl. Com. 24; 1 Hale, P. C. 34; 2 Bishop, Crim. Proc. § 666; 1 Chitty, Crim. Law, 761. While at common law, in capital cases, it was the more usual course, when it appeared that the sanity of the accused was doubtful, to inquire touching it by a jury, yet inspection of the accused by the judge without a jury was allowable. 2 Bishop, Crim. Proc. § 666; 1 Hawk. P. C. 8, note; 1 Hale, P. C. 83; *Freeman v. People*, *supra*; *Bonds v. State*, Mart. & Y. 142, 17 Am. Dec. 795. But our statute has in the latter respect changed the common law by requiring, when the court sees reasonable ground to doubt the sanity of the accused, that the question of his sanity shall be tested by a jury.

Next comes the question whether, upon a mere suggestion of present insanity, or even when it is supported by affidavit, the judge is compelled to order a jury, even when he is satisfied that the accused is feigning insanity to avoid trial, or is competent to make a proper defense. At common law, I think, the jury inquest was simply to inform the conscience of the court. The case of *Webber v. Com.*, 119 Pa. 223, was upon a statute providing that, "if any person, upon arraignment, be found a lunatic by a jury lawfully impaneled for the purpose," he should be kept until capable of trial, thus granting him a jury upon the question of his sanity; and it was held that such inquiry by a jury could only be had when the judge has doubts respecting the sanity; that such inquest may be had, at the discretion of the judge, for the purpose of informing his conscience whether the trial ought to proceed, but that the defendant is not, as a matter of legal right, entitled to such jury; and that the question of sanity, both at the date of the offense and trial, was before the jury on the trial of the main issue, and, after a conviction finding that he was and is sane, the appellate court would not inquire whether the discretion of the inferior court was properly exercised in refusing a jury for a preliminary inquiry as to sanity. The court said that neither the suggestion of the prisoner or his counsel nor affidavits could alone suffice to create the doubt necessary to ordering a jury; that they are necessarily addressed to the court, as there is no other tribunal to entertain them, and it is the court which must be affected by considerations supposed to produce the doubt which must precede the inquiry; that a personal inspection of the prisoner, public or private, inquiry from physicians and those around the accused, might be resorted to,—all these and others may contribute to create doubt in the mind of the judge, and for that reason all might be resorted to; and if after all had transpired, the judge has no doubt of the prisoner's sanity, he is neither bound, nor ought he, to order a jury. It is his judicial conscience alone that is to be satisfied. So it was held to be a matter of sound discretion with the judge in *Jones v. State*, 18 Ala. 157, and *State v. Arnold*, 12 Iowa, 488, and that the inquiry should not be allowed if, from all the circumstances, the court had no ground to doubt the prisoner's sanity. *Guagando v. State*, 41 Tex. 626, is to the contrary. From the letter of our statute, and the reason and public policy pertinent to the subject, the decision of the judge must

have a very weighty, if not decisive, influence; though, in case of abuse of discretion, I should think it remediable. The judge saw the prisoner face to face, and scanned his countenance, his demeanor and actions, and saw all the surroundings of the trial, as we cannot see them, and was far more competent to say whether the prisoner was in a state of mind fit to undergo a trial, or was simply seeking delay, than are we. Who was better able to pass on the question? There was no showing of his insanity beyond the affidavit of his father that he was not mentally in a condition to undergo trial, and it did not allege his insanity, though I make no point as to this. We cannot on appeal overrule the circuit judge on this matter. We do not see that he abused the discretion lodged with him by the statute. We see only the affidavit of the prisoner's father against the judge's action, and see nothing of the important evidence present to the judge, and moving him to his action.

Is there error in giving, at the state's instance, the following instruction: "The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the prisoner, at the time of firing the shot or shots which caused the death of Bettie Adams, was capable of knowing the nature and consequences of his act, and, if he did know, then that he knew he was doing wrong, and that so knowing he fired the shot or shots at the deceased with the willful, deliberate, and premeditated purpose of killing her, they will find the prisoner guilty of murder in the first degree." The criticism upon it is that it makes the test of criminal accountability turn on the capacity to know right from wrong, and a knowledge that the accused knew the particular act was wrong,—a principle propounded by early decisions; whereas, the modern law does not make this the only test, but couples with the "right and wrong" test the power of choosing between the two, and the power of the will over the actions; that, though the accused had capacity to know right from wrong, and knew the particular act was wrong, and knew the nature and consequences of that act, yet, if, by reason of mental disease, he had not the power to choose between the right and wrong, and had not power to resist doing the act, he would not be responsible. Even if this theory be granted, the above instruction is not bad; for, in addition to its requiring for conviction that the accused must have been able to know the nature and consequence of the act, and that he was doing wrong in committing it, the instruction also requires that the act was willful, deliberate, and premeditated. If willful, his will must have entered into his act; if deliberate and premeditated, it was the result of reason and reflection, of will and thought concurring, not of irresistible impulse. To do a willful, deliberate, and premeditated act one must have reasoning powers, and the power to exercise the will to refrain from the act or to commit it; not a mere momentary impulse. Defendant's instruction 7 told the jury that "a premeditated design or purpose is one resulting from thought and reflection. A design conceived, and afterwards so deliberately considered as to become resolved and fixed in the mind, is

regarded by law as premeditated." So in requiring the act to be willful, deliberate, and premeditated, it logically required will power and capacity to exercise it and to avoid the act. But its theory is wrong for reasons below given.

Is there error in refusing instruction 17: "That, in order to constitute a crime, a man must have intelligence and capacity enough to have a criminal intent and purpose, and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts." If we concede it to be correct, then we say that, as the court in defendant's instruction 15 told the jury definitely that insanity was a full legal defense, and gave instructions 16 and 18, they gave the prisoner the benefit of the principle of the instruction as effectually as if that instruction had been given, and the prisoner suffered no harm from its refusal. The instruction is obscure in meaning.

Is there error in refusing instruction 21: "The court instructs the jury that a man may have reason and intelligence sufficient to enable him to distinguish and know the difference between right and wrong. He may know that the act he is about to commit is wrong; and yet, if from defect, weakness, or disease of the mind, he is incapable of controlling his acts and of resisting the impulse to commit the act, then the act, however great a crime it may be, is not a willful act, and therefore not criminal. Therefore, if the jury believe that, although the prisoner, Allen Harrison, at the time of the commission of the alleged crime, knew it was wrong, yet if the jury believe and are satisfied from the evidence in this case that his will power was so impaired by disease or otherwise as to render him incapable of controlling his acts or resisting the impulse so to do, then the killing of Bettie Adams under such circumstances was not the willful act of the prisoner, and he should not be held criminally responsible therefor." This instruction requires us to say whether it proposes a proper legal test of criminal responsibility. It is based upon the theory above mentioned, that, though a person have capacity to know right from wrong, and to know that the particular act is wrong, yet if he has not will power to avoid the act, if he is instigated to it by uncontrollable impulse, he is not criminally liable; and that the "right and wrong" test is not the proper test, as it excludes the effect of uncontrollable impulse. It is conceded that this instruction is not good under the criminal law as stated in the earlier text-books and decisions, but it is claimed that it is sustained by the later and better decisions and text writers. *Lords Coke* and *Hale* wrote that to exonerate from crime on account of insanity a man must be totally deprived of memory and understanding; and *Justice Tracy*, on *Arnold's Trial* in 1724, (16 St. Trials, 695,) said he must be one totally deprived of memory and understanding, and doth not know what he is doing, no more than an infant, a brute, or wild beast. These statements are not recognized in their full!

ness in later years, yet in modern cases the courts have generally stated the question of responsibility to be whether, at the time the prisoner committed the act, he had mental capacity to know right from wrong, and comprehend his relations to others, and to understand the nature and consequence of the particular act, and that the act was morally wrong, or what is the same, whether he was conscious of doing wrong. 1 Bish. Crim. Law, § 475. This is the "right and wrong" test, as commonly called. It has had for a long time, and has to-day, the sanction of the most eminent legal authority, those best acquainted with the real and practical demands of the daily administration of justice, as best suited to it, all things considered, and as at once the safest rule for the protection of human life and the preservation of those charged with crime. In 1843, in answer to questions propounded by the house of lords as to crimes committed by persons afflicted with insane delusions in respect to one or more particular persons or subjects, and what were proper questions to be submitted to a jury in such case, and in what terms the question should be left to the jury as to the prisoner's state of mind at the time of the act, the judges of England laid down these principles: "That a person laboring under partial delusions only is nevertheless punishable 'if he knew at the time of committing such crime he was acting contrary to law;' and 'that the jury ought to be told in all cases that every man is presumed to be sane, and to possess sufficient reason to be responsible for his crimes, until the contrary be proved to their satisfaction; that to establish the defense of insanity it must be clearly proved that at the time of committing the act the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been whether the accused, at the time of doing the act, knew the difference between right and wrong, which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged." 1 Russ. Crimes, 19; 2 Greenl. Ev § 373, and *note*.

These answers of the judges are based on the "right and wrong" test, and, though sometimes criticised, they have prevailed in England since 1843. They do not recognize the doctrine of irresistible impulse as an independent element of test. In New York, in 1847, in *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216, these answers of the English judges were recited as the law as it should be given to the jury, and it was said that in murder trials, where insanity is the defense, "the inquiry is always to be brought down to the single question of a capacity to discriminate between right and wrong at the time when the act was committed." In *Flanagan v. People*, 52 N. Y. 467, 11 Am. Rep. 781, the law was again affirmed as set forth by the English judges, and 18 L. R. A.

the doctrine of uncontrollable impulse, as co-existent with a perception of the moral quality of the acts done, was rejected as a "new element;" the court saying: "We are asked to introduce a new element into the rule of criminal responsibility in cases of alleged insanity, and to hold that the power of choosing right from wrong is as essential to legal responsibility as the capacity of distinguishing it, and that the absence of the former is consistent with the presence of the latter. The argument is on the theory that there is a form of insanity in which the faculties are so disordered and deranged that a man, though he perceives the moral quality of his acts, is unable to control them, and is urged by some mysterious pressure to the commission of the act, the consequences of which he anticipates, but cannot avoid. Whatever medical or scientific authority there may be for this view, it has not been accepted by courts of law. The vagueness and uncertainty of the inquiry which would be opened, and the manifest danger of introducing the limitation claimed into the rule of responsibility, in cases of crime, may well cause courts to pause before assenting to it. Indulgence in evil passions weakens the restraining power of the will and conscience, and the rule suggested would be the cover for the commission of crime and its justification. The doctrine that a criminal act may be excused upon the notion of an irresistible impulse to commit it, where the offender has the ability to discover his legal and moral duty in respect to it, has no place in the law. Rolfe, B., in *Rogers v. Allunt*, where, on a trial for poisoning, the defendant was alleged to have acted under some moral influence which he could not resist, said: "Every crime was committed under an influence of such a description; and the object of the law was to compel people to control this influence." The New York court laid down the law to be that "the test of responsibility is the capacity of defendant to distinguish between right and wrong at the time of and in respect to the act complained of," and that "the law does not recognize a form of insanity in which the capacity of distinguishing right from wrong exists without the power of choosing between them." Later, in *People v. Carpenter*, 102 N. Y. 238, this doctrine is again held. In 1889 the South Carolina supreme court held that "mere irresistible impulse to commit murder by reason of mental derangement at the time of the act is not a defense, as long as the accused knew that the act he was committing was a crime morally, and punishable by law." *State v. Alexander*, 30 S. C. 74. In the debate in the house of lords upon the answers of the fourteen judges of England to the questions propounded by the house of lords, Lord Brougham said that if the perpetrator knew what he was doing; if he had taken the precaution to accomplish his purpose; if he knew, at the time of doing the desperate act, that it was forbidden by law,—that was his test of sanity, and he cared not what judge had given another test, he should go to his grave believing it was the real, sound, and consistent test. I fully concur with Lord Brougham. In *Reg. v. Barton*, 8 Cox, C. C. 275, that great jurist, Baron Parke, said the single question was

whether, at the time of the act, the prisoner knew the nature and character of the deed, and, if so, whether he knew he was doing wrong; and further said that he concurred with the view previously taken by *Baron Rolfe* that the excuse of an irresistible impulse, coexisting with the full possession of the reasoning powers, if allowed as a defense, might be urged in justification of every crime, for every man might be said not to commit crime except under the influence of some irresistible impulse; that something more than this was necessary to justify acquittal on the ground of insanity; and it would be for the jury to say whether the impulse under which the prisoner had committed the deed was one which altogether deprived him of knowledge that he was doing wrong. In *United States v. Holmes*, 1 Cliff. 93, *Mr. Justice Clifford* pointedly rejected the "irresistible impulse" test, after a review of the cases. He said that it had been suggested that the rule in the state courts was different from the English rule, but that his examination had led him to the conclusion that the great majority of the well-considered cases followed the English judges; and on another page he says all the well considered cases in both countries since 1848 followed their answers. He said that, in case of partial insanity, it is a question for the jury to determine, under all the evidence, whether the degree of insanity is sufficient to constitute a valid defense; "and if it appears that the mind of the accused is merely clouded and weakened, but is not incapable of reasoning and judging between right and wrong in respect to his own particular act, that he still understands the nature and character of the act and its consequences, and has a knowledge that it is wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and deserve punishment, then the law, on that state of facts, properly regards the accused as a moral agent, responsible for his criminal acts, and punishable for the crime; and to admit, in such a case, that the defense may be set up successfully that he was impelled to the commission of the act by any uncontrollable or irresistible impulse, would be to overlook and disregard the test or criterion of responsibility for criminal acts which the law itself establishes in such a case, and to allow that defense in justification of every crime known to the law."

Courts have to ask themselves what is meant by that insanity which excuses from crime because of incapacity to entertain criminal intent. The infinite and intricate phases of disorders of the mind are interesting, and their study necessary in that noble science which gives relief in the most distressing and saddest of human ailments, and which in our days, unlike the days of Shakespeare, can "minister to a mind diseased, pluck from the memory a rooted sorrow, raze out the written troubles of the brain." But the law is not a metaphysical or theoretical science; it must follow principles suitable to the practical wants of men in organized society by protecting it against heinous crime. *Mr. Justice Curtis*, in *United States v. McGlue*, 1 Curt. C. C. 9, adopted the "right and wrong" test as the test which the law ap-

plied, and said these were the questions for the jury: "Did the prisoner understand the nature of the act when he stabbed Mr. Johnson? Did he know he was doing wrong, and would deserve punishment? Or, to apply them more nearly to this case, did the prisoner know that he was killing Mr. Johnson; that to do so was criminal and deserving punishment? If so, he had the criminal intent necessary to convict him of murder, and cannot be acquitted on the ground of insanity." The "irresistible impulse" test has been pointedly rejected also in *Missouri in State v. Pagels*, 93 Mo. 800, the court saying: "It will be a bad day for this state when uncontrollable impulse shall dictate a rule of action to our courts." It has been specifically rejected twice in Kansas,—*State v. Nixson*, 32 Kan. 205; *State v. Mourry*, 87 Kan. 369; and in North Carolina in *State v. Brandon*, 53 N. C. 468. See 4 Am. & Eng. Encyclop. Law, 718. *Mr. Bishop* does not regard this test as adopted, for in 1 Crim. Law, § 475; he says the "right and wrong" test is the one generally applied by the courts; and in section 478 he says that it is understood in science, and sometimes recognized in courts, though judges are slow to yield on the point, that the mental and physical machine may slip the control of the owner, and so a man may be conscious of what he is doing, and yet his criminal character and consequences, while yet he is impelled onward by a power irresistible. But he says this is not the rule of the courts. In Illinois, in two cases, it is held as to the defense of irresistible impulse that it must proceed from an unsound mind affected with insanity "to such a degree as to create an uncontrollable impulse to do the act by overriding his reason and judgment." *Hopps v. People*, 81 Ill. 891, 88 Am. Dec. 231; *Dacey v. People*, 116 Ill. 555. In other words, the party, because of insanity, knew not the wrong of the act. The California supreme court, in *People v. Hoin*, 63 Cal. 120, 45 Am. Dec. 651, held that an irresistible impulse to commit a criminal act "does not absolve the actor, if at the time, and in respect to the act, he had the power to distinguish between right and wrong." In Maine, an instruction based substantially upon it was held to have been properly rejected. *State v. Lawrence*, 57 Me. 577, 581. And the cases are almost without number which, while not passing on the "irresistible impulse" test, expressly yet logically exclude it, because they lay down the "right and wrong" test above stated. See note to *State v. Marler*, 3 Ala. 43, 36 Am. Dec. 407; note to *Guiteau's Case*, 10 Fed. Rep. 195. The "right and wrong" test was approved in the *Guiteau Case*. In a few states the "irresistible impulse" test is upheld. See notes just cited.

The case of *Parsons v. State*, 91 Ala. 577, 60 Am. Rep. 193, is cited to us as one of the best-considered cases supporting this rule, holding that, though there be a capacity to distinguish between right and wrong, as applied to the particular act, still the party is not responsible if by reason of duress of mental disease he has so far lost the power to choose between right and wrong as not to avoid doing the act, so that his free agency was at the time destroyed, and at the same time the crime was so connected with such mental disease, in re-

lation of cause and effect, as to have been the product or offspring of it solely. A dissenting opinion of great ability was filed to that decision, and it overruled a decision to the reverse in Alabama in *Boswell's Case*, 63 Ala. 807. So, also, *Smith v. Com.* 1 Duv. 224. So, also, held the Indiana court in *Stevens v. State*, 81 Ind. 485. The opinion in the last case plants this decision on the opinion of *Chief Justice Shaw* in *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458. It struck me that the opinion of *Chief Justice Shaw* not only did not support this view, but supported the "right and wrong" test; and I find that *Mr. Justice Clifford* concurs in this view by citing *Chief Justice Shaw's* opinion in support of the "right and wrong" test in *United States v. Holmes*, *supra*. *Chief Justice Shaw* said, as to cases of partial insanity, the rule of law "is this: A man is not to be excused from responsibility if he has capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he is then doing; a knowledge and consciousness that the act is wrong and criminal, and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him, and that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty. On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences; if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong, and receive punishment,—such partial insanity is not sufficient to exempt him from responsibility for criminal acts." The words, "mental power sufficient to apply that knowledge to his own case," mean only capacity to apply his knowledge of right and wrong to the particular act so as to know whether it is wrong. The judge did not mention will power. I cannot see how the eminent *Chief Justice Shaw* can be quoted on this statement of the rule, as favoring the "irresistible impulse" test. The eminent *Chief Justice Dillon* is quoted as approving this test in *State v. Fetter*, 25 Iowa, 67, whereas his opinion will not do so. He did say the "right and wrong" test should not be applied too strictly in all cases. He admitted that the cases of authority recognized that a party was responsible if he knew the act was wrong, but said that if it should, by the observation and concurrent testimony of medical men, come to be definitely established as true that there is a diseased condition of mind in which, though the person knows abstractly that his act is wrong, yet from insane impulse, proceeding from an insane mind, he is driven to the act irresistibly, then the law must be modified. This is purely hypothetical or conditional; an admission that such then was not the law. And in the actual decision he held as proper, and not erroneous, an instruction based on the "right and wrong" test, and said: "With reference to the 'right and wrong' test referred to in the instructions, it will be seen that the court does not adopt this criterion as a general one; that

is, it does not say that, if the defendant has capacity to distinguish between right and wrong generally, he is criminally responsible. But it held that if at the time and with respect to the act about to be committed the defendant had not reason enough to discriminate between right and wrong with reference to that act, and had not reason enough to know the nature of the crime, and did not know that he was doing wrong in committing it, he is not criminally punishable. The court, in substance, held that if the defendant's reason was so far gone or overwhelmed that his perception of right or wrong with respect to the contemplated act was destroyed; if he did not rationally comprehend the character of the act he was about to commit,—he should be acquitted. The instruction as given finds full support in the judgments of courts the most respectable. *Freeman v. People*, 4 Denio, 27, 47 Am. Dec. 216, approved in *Willis v. People*, 82 N. Y. 715; *State v. Brandon*, 58 N. C. 463; *Com. v. Mosler*, 4 Pa. 264; *McNaghton's Case*, 10 Clark & F. 210; *Oxford's Case*, 9 Car. & P. 525." He thus quotes the very cases holding the "right and wrong" test. How this case of *State v. Fetter* can be cited to sustain the "irresistible impulse" test, I am unable to see. And in the later case of *State v. Meagher*, 46 Iowa, 88, the court held that to justify acquittal for uncontrollable propensity the insanity "must be such as to destroy the power to comprehend rationally the nature and consequences of his act, and overpower his will." Several cases cited in note in 86 Am. Dec. 407, as on the side of the "irresistible impulse" test are not on its side, but against it, some of them, *Ortwein v. Com.* 76 Pa. 414, 18 Am. Rep. 420; *Com. v. Mosler*, 4 Pa. 264; *Brown v. Com.* 78 Pa. 122; *Sayres v. Com.* 88 Pa. 291; *State v. Gut*, 13 Minn. 858; *State v. Shippey*, 10 Minn. 229, 88 Am. Dec. 70; *Blackburn v. State*, 23 Ohio St. 148, and others. The "irresistible impulse" test seems to meet the approval of the distinguished law writer, Mr. Wharton. Whart. Hom. § 574; 1 Whart. Crim. Law, § 44; 1 Whart. & S. Med. Jur. § 147.

This "irresistible impulse" test has been only recently presented, and, while it is supported by plausible arguments, yet it is rather refined, and introduces what seems to me a useless element of distinction for a test, and is misleading to juries, and fraught with great danger to human life, so much so that even its advocates have warningly said it should be very cautiously applied, and only in the clearest cases. What is this "irresistible impulse"? How shall we of the courts and juries know it? Does it exist when manifested in one single instance, as in the present case, or must it be shown to have been habitual, or at least to have evinced itself in more than a single instance, as *Chief Justice Gibson* said must be the case? We have kleptomania and pyromania, which better works on medical jurisprudence tell us cannot excuse crime where there is capacity to know the character of the act. Whart. & S. Med. Jur. §§ 592, 602, 616. Shall we introduce homicidal mania, and allow him of the manslaying propensity to walk innocent through the land while yet not insane, but capable of knowing the nature and wrong of his murderous act? For myself I cannot see how

a person who rationally comprehends the nature and quality of an act, and knows that it is wrong and criminal, can act through irresistible innocent impulse. Knowing the nature of the act well enough to make him otherwise liable for it under the law, can we say that he acts from irresistible impulse, and not criminal design and guilt? And if we are sure he was seized and possessed and driven forward to the act wholly and absolutely by irresistible impulse, his mind being diseased, how can we say he rationally realized the nature of the act,—realized it to an extent to enable us to hold him criminal in the act? How can the knowledge of the nature and wrongfulness of the act exist along with such impulse that shall exonerate him? Can the two coexist? The one existing, does not the other nonexist? Can we certainly say that a person who is really driven to an act by such an impulse was capable, at the instant of the act, of knowing its true nature? The mother who threw her child overboard into the billows of the deep was held innocent because she was possessed and impelled by the uncontrollable impulse to do so, while yet she was conscious of the heinousness of the act. Can we be sure she knew the character of the act? If in fact she did, can we safely say she was driven on by the mysterious spirit of irresistible impulse? So it appeared to the Kansas court, in *State v. Nizon*, 32 Kan. 205, where the court says: "It is possible that an insane impulse is sometimes sufficient to destroy criminal responsibility, but this is probably so only when it destroys the power of the accused to comprehend rationally the nature, character, and consequences of the particular acts, and not where he still has the power of knowing the character of the acts, and that they are wrong. . . . The law will hardly recognize the theory that an uncontrollable impulse may so take possession of a man's faculties and powers as to compel him to do what he knows to be wrong and a crime, and thereby remove him from all criminal responsibility. Whenever a man understands the nature and character of an act, and knows that it is wrong, it would seem that he ought to be held legally responsible for the commission of it."

After preparing this opinion, I met with Stephens' History of the Criminal Law of England. Mr. Stephens is quoted as favoring the "irresistible impulse" theory, and in volume 2, pp. 170, 171, brings himself to the admission that one who is the subject of such an impulse does not know that his act is wrong; that one who does know the right has power to choose the right over the wrong, this very knowledge involving and including power of self-control; that so the rules laid down by the law ought to be construed; that the test of "knowledge that an act is wrong" is the best and most proper test of accountability, and that such is the test by the law of the land. He says: "Knowledge and power are the constituent elements of all voluntary action, and, if either is seriously impaired, the other is disabled. It is as true that a man who cannot control himself does not know the nature of his acts as that a man who does not know the nature of his acts is incapable of self-control." I admit the existence of irresistible impulse, and its efficacy to exonerate from responsibility, but

not as consistent with an adequate realization of the wrong of the act. It is that uncontrollable impulse produced by the disease of the mind, when that disease is sufficient to override the reason and judgment, and obliterate the sense of right as to the act done, and deprive the accused of power to choose between them. This impulse is born of the disease, and when it exists capacity to know the true nature of the act is gone. This is the sense in which "irresistible impulse" was defined in *Hoppe v. People*, 31 Ill. 885, 88 Am. Dec. 231, and *Dacey v. People*, 116 Ill. 556. It seems to me to be very dangerous to life to tell juries that a party may know the nature of his murderous act, and know and be conscious that it is wrong and criminal, and yet be excusable if he did the act at the command of irresistible impulse; thus eliminating the knowledge of the wrong of the act as an unessential, unimportant element in the test. I do not regard it essential to the safety of the parties accused. The operations of the human mind are wonderful, mysterious, and occult. Insanity is one of its melancholy and impenetrable conditions. Its types and phases are infinite and dark. Volumes upon volumes have been compiled by writers upon medical jurisprudence, mental philosophy, and law to pierce its depths, and find the general rules which shall tell criminal courts what degree and character of insanity shall avail to excuse crime; but no general rule universally applicable has been or can be found, because, as Mr. Bishop says, it is not in the nature of the subject to extract such a rule from it. I know of no better rule than the "right and wrong" test as above stated. Hence I do not think instruction 21 is good in law.

There is another objection to instructions 17 and 21, in that there was a theory presented by the evidence that before the killing of the deceased the prisoner had taken laudanum; and if he was under its intoxication, produced by the voluntary use of the drug, that intoxication would furnish him no excuse. These instructions do not insert that theory as an element of the hypotheses presented by them, but disregard and ignore it, and are bad for that cause. *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799; *State v. Welch*, 86 W. Va. —.

An objection to James Kelly's competency as a juror is not insisted on in the brief of counsel, and is not tenable. Nor is the motion to quash the indictment because of irregularity in the formation of the grand jury, or other cause, insisted on. No irregularity as to the grand jury appears.

Did the court err in refusing a new trial because the verdict was contrary to evidence and law? This involves the merits of the case upon the evidence before the jury; but it is unnecessary to elaborate the voluminous evidence, or even any of the facts touching the merits of the case. Suffice it to say, however, that Allen Harrison, the prisoner, was about 26 years of age. Having some difficulty with his father, he left his home, and was a homeless wanderer, and was kindly taken under the roof of Frank Adams, where he had been furnished a home, and treated very kindly as a member of the family for nearly a year before the tragedy, making no return but in small jobs of work. He fell in love with

Bettie Adams, daughter of Frank Adams, and paid her frequent attention, but his love was not by any means reciprocated, as he was well aware. Miss Adams preferred another, and so gave Harrison to understand. He became exceedingly jealous of attention to her from her lover, and when he would visit the house Harrison would leave it, and quarrel with Miss Adams about her receiving attention from others. They had frequent "spats," in the language of the witness, on that account. He declared his love to the girl's mother, but she told him that it would do him no good, and the best thing he could do was to leave the house; that her daughter was a mere child; that she wanted him to take his clothes and go; that her daughter would not stay at home; that talk was abroad in the neighborhood, and he was trying to keep other folks from going with her daughter. This she told him several months, and the last time about a week before the killing of the daughter. The daughter feared him,—feared that he would poison her. On Friday night he stayed with a neighbor, and there he secretly took a pistol from the drawer. He next day went to a store, and asked for cartridges. The pistol had two loads in it, but he seems to have wanted more cartridges to make sure work. He bought two two-ounce vials of laudanum. On Saturday he returned to the home of Adams, and at the kitchen door called for a drink of water, then walked through it into the front room, and Bettie Adams went into that room, just behind him, to take up ashes, and almost immediately the mother heard a shot, and the exclamation of her daughter, "Oh, ma, Allen has shot me!" and ran to her, took her in her arms, when Bettie sunk to the floor, never spoke again, and died at once. The mother found Harrison in the room, pistol in hand, trying to shoot it again, it being an old pistol, out of order; and she said he had an unusually vicious look on his face. A little sister saw Harrison place the pistol close to the back of the deceased, and fire. He went to the woods close by, threw the pistol by a log, and was found in a few hours, lying down, with coat under his head. He declared he did not know why he had done the act. He wanted them to take an axe and kill him, as he had done so dreadful an act. He said he shot the deceased in the breast as she raised up in raking up ashes, and as she

turned he shot her in the back. Afterwards, when being conveyed to jail, he was asked, if it were to do over again, would he do it? and answered, "Yes, I would;" that he was not sorry for it, or ashamed of it, but was ashamed for anybody to see him. The mother requested him to go to see her child's dead body, but he declined to do so. On the way to jail he unloosed the rope with which he was tied, and ran a short distance, trying to escape. Either before or after the act he took laudanum, probably a large quantity, and vomited several times after his arrest, appearing sick and weak. The only defense was insanity. It was a question for the jury, and they found against it, as we think, properly. Here is a ruthless, cruel murder of a child a little over 15 years of age, simply because of unrequited love and jealousy. There is no evidence at all adequate to sustain the plea of insanity. The prisoner had practiced masturbation, and there was evidence tending to show that he was afflicted with melancholia caused by it; but the great volume of evidence is utterly insufficient to show any want of capacity to excuse him. The attempt to commit suicide, if he really attempted it, is the strongest evidence to support the insanity theory, but it does not show insanity necessarily. 1 Whart. & S. Med. Jur. § 686; *Coyle v. Com.* 100 Pa. 573.

The theory of irresistible impulse was so little borne out by the evidence that it may be questioned whether the instruction based on it, even if correct in law, was relevant to the case. He deliberately and secretly prepared the pistol, hours before the bloody and cruel deed. He knew that the girl did not love him, and that marriage with her was out of the question. It is simply another instance of the many in the annals of criminal law where a man murders a woman because she will not reciprocate his love, and because of intense jealousy, perhaps mingled in this case with malice, because he had been bidden to leave the house on her account.

Solemn as is the judgment, we are compelled to affirm it.

As the day fixed for the execution of the sentence has passed, the case is remanded to the circuit court, with direction to cause the defendant to be brought before it, and to fix another day for the execution of the judgment.

ILLINOIS SUPREME COURT.

Frank HORNISH, *Pff. in Err.*,

v.

PEOPLE of the State of Illinois.

(.....III.....)

1. Lunacy or insanity to take away accountability must be of such degree as to obliterate the sense of right and wrong as to the particular act done.

NOTE.—The above case is reported in connection with the preceding one to illustrate still further the test of insanity by knowledge of right and wrong. See the notes on this subject at the foot of the preceding case.

18 L. R. A.

2. Reasonable doubt of sanity is not a proper test of the sufficiency of evidence to convict, but the reasonable doubt must be as to the whole evidence and not as to a particular fact in the case.

(November 2, 1892.)

ERROR to the Circuit Court of Coles County to review a judgment convicting defendant upon an indictment for assault with intent to commit murder. *Affirmed.*

The facts are stated in the opinion.

Messrs. Wiley & Neal, for plaintiff in error:

If at the trial of a person charged with crime

it shall appear from the evidence that the act was committed as charged, but at the time of committing the same the person so charged was a lunatic or insane the jury shall so find by their verdict.

Ill. Rev. Stat. chap. 88, § 284.

The instructions on behalf of the people make the test of accountability different from that authorized by our supreme court.

Hopps v. People, 81 Ill. 385; *Dacey v. People*, 116 Ill. 555.

There are two objections to the modifications made by the court:

1st. The court directs and confines the attention of the jury to the evidence only upon the question of insanity which was erroneous.

Mullins v. People, 110 Ill. 42.

2d. After restricting the attention of the jury to evidence upon the question of insanity instead of saying to the jury if they have a reasonable doubt of his sanity they should acquit, the word "sanity" is erased and "guilt" substituted, and the jury are told that if after considering all the evidence as to the insanity of the accused (they have a reasonable doubt as to his guilt they are to acquit. Their consideration of the evidence is restricted to the one question of insanity, but their "reasonable doubt" is enlarged to the question of guilt.

Messrs. J. H. Marshall, J. W. Craig, and George Hunt, Atty-Gen., for the People.

Bailey, Ch. J., delivered the opinion of the court:

Frank W. Hornish was indicted in the circuit court of Coles county for an assault upon Horace S. Clark, with intent to commit murder, and on trial before a jury was convicted and his punishment was fixed at imprisonment in the penitentiary for the term of five years. The court thereupon, after denying his motion for a new trial, pronounced sentence upon him in accordance with said verdict, and the record is now brought to this court by writ of error. The evidence shows that, on the 15th day of December, 1891, at about 7 o'clock in the evening, the defendant met Clark in a public street in the city of Mattoon, and fired four shots at him, from a 32-caliber revolver, two of which took effect in the person of Clark, inflicting upon him wounds of considerable severity. The fact that defendant made said assault is not denied. The only evidence in relation to it, and the circumstances under which it was committed, consists of the testimony of the people's witnesses, no rebutting testimony being offered on the part of the defendant. On that question, therefore, there was at the trial, and is now, no dispute. The only defense interposed is insanity, and to the issue thus raised most of the evidence on both sides was directed.

The first contention now made is that, in view of the evidence as to the defendant's insanity at the time the assault was committed, the verdict of the jury finding him guilty was unwarranted and should be set aside. We do not feel called upon to attempt here an analysis of the evidence, but, after having given it a careful consideration, we are unable to say that the jury have not deduced from it the correct conclusions. As is not unusual in cases of this character, there is a wide discrepancy in

the testimony of the witnesses. Part of them expressed the opinion that he was insane or partially so, while others expressed the contrary opinion. Very few of them, however, are able to testify that, in their opinion, he was so far mentally diseased as to be unable to distinguish right from wrong; and when all the facts and circumstances proved, as well as the opinions of witnesses, are considered, we do not find such doubt as to the correctness of the verdict raised in our mind as would justify us in setting it aside. The questions presented by the defense of insanity were for the jury, and they had the important advantage of seeing the witnesses and hearing them testify. If the jury, then, were accurately instructed as to the law, we ought not to disturb their finding, unless we are clearly satisfied that it is erroneous and unjust. A careful reading of the evidence does not bring our minds to that conclusion.

On the question of the defendant's insanity, the court, at the instance of the people, instructed the jury as follows: "If you believe from the evidence, beyond a reasonable doubt, that at the time of committing the alleged acts the defendant was able to distinguish right from wrong, then you cannot acquit on the ground of insanity. If you believe from the evidence, beyond a reasonable doubt, that the defendant committed the crime, in manner and form as charged in the indictment, and at the time of committing such act was able to distinguish right from wrong, you should find him guilty. If from all the evidence in the case you believe, beyond a reasonable doubt, that the defendant committed the crime of which he is accused, in manner and form as charged in the indictment, and that at the time of the commission of such crime the defendant knew that it was wrong to commit such crime, and was mentally capable of choosing either to do or not to do the acts constituting such crime, and of governing his conduct in accordance with such choice, then it is your duty, under the law, to find him guilty, even though you should believe, from the evidence, that at the time of the commission of the crime he was not entirely and perfectly sane."

The first two of these propositions are criticised upon the ground that they made the test of accountability, where insanity is set up as a defense, different from that laid down by the court in *Hopps v. People*, 81 Ill. 385, and *Dacey v. People*, 116 Ill. 555. In the *Hopps Case* it was said: "A safe and reasonable test, in all such cases, would be that whenever it should appear from the evidence that, at the time of doing the act charged, the prisoner was not of sound mind, but affected with insanity, and such affection was the efficient cause of the act, and that he would not have done the act but for that affection, he ought to be acquitted. But this unsoundness of mind or affection of insanity must be of such degree as to create an uncontrollable impulse to do the act charged, by overruling the reason and judgment, and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them." The same rule, in substance, was repeated in the *Dacey Case*. We are unable to perceive any necessary repugnancy between the test thus

laid down and that adopted by the instructions above quoted. By the very terms of said test, before criminal accountability ends, the affection of insanity, or the irresistible insane impulse thereby created, must be of such a degree and character as to obliterate the sense of right and wrong as to the particular act done; and it follows, as held in said instructions, that if the accused, at the time of committing the criminal act charged, was capable of distinguishing right from wrong, the defense of insanity is not made out. The third of said instructions further recognizes, as a test of want of criminal accountability, the mental incapability of the defendant to choose to do or not to do the act constituting the crime, as well as want of knowledge that it was wrong to do it. But it is sufficient, for the purposes of this decision, to refer to *Dunn v. People*, 109 Ill. 635, in which these identical instructions were given, and where it was held that they were proper and were not in conflict with the *Hoppe Case*, or other cases following that decision.

The following instruction, asked on behalf of defendant, was modified by the court by inserting therein the words in italics, and was given as modified: "You are instructed that if you believe from the evidence that the act charged against the defendant in the indictment was committed by him as therein charged, but that, at the time of committing the same, the defendant was a lunatic or insane, to the extent of obliterating the sense of right and wrong as to the particular act done, you should so find by your verdict," etc. Two other instructions of the same general character asked by the defendant were modified by the insertion therein of the same words. There was no error in this modification. As asked, these instructions held that lunacy or insanity, whatever its degree or character, was sufficient to take away criminal accountability, while, as we have already seen, to have that effect, it must be of such degree as to obliterate the sense of right and wrong as to the particular act done.

The following instruction asked by the defendant was modified by the court by striking out the word in brackets, and inserting in lieu thereof the word in italics, and given to the jury so modified: "That to warrant a conviction in this case, it is incumbent on the people to establish, by evidence, to the satisfaction of the jury, beyond a reasonable doubt, the existence of every element necessary to constitute the crime charged; and if after a careful and impartial examination of all the evidence in the case bearing upon the question of sanity or insanity, the jury entertain any reasonable doubt of the [sanity] *guilt* of the defendant, at the time of the alleged offense, they should give the defendant the benefit of that doubt and acquit him." Three other instructions were asked on behalf of the defendant, by which it was sought, in various forms, to submit to the jury the issue as to the defendant's sanity, as a separate issue, and to instruct them that if, on consideration of the evidence, they had a reasonable doubt as to his sanity, they should find a verdict of acquittal. These instructions were all modified in the same manner as above, and such modifications are assigned for error. We are of the opinion that this assignment of

error cannot be sustained. Mr. Bishop, in his treatise on Criminal Procedure, in discussing the defense of insanity and the mode in which it may be availed of, says: "Where the defendant sets up that he was insane when he did the act whereof he is accused, he simply declares that he had not the criminal intent which is one of the indispensable elements in every offense. The defense is, in principle, precisely the same as when he declares that he had not the requisite age, or that he acted under an innocent mistake of fact, or where a wife sets up coercion from her husband. It is a bare denial of a part of the prosecuting government's case." 2 Bishop, *Crim. Proc.* 3d ed. § 669. And again: "The doctrine of principle, sustained by a large part of our courts, and rapidly becoming general, is that, as the pleadings inform us, insanity is not an issue by itself, to be passed on separately from the other issues, but, like any other matter in rebuttal, it is involved in the plea of not guilty, upon which the burden of proof is on the prosecuting power; the jury to convict or not according as, on the whole showing, they are satisfied or not, beyond a reasonable doubt, of the defendant's guilt." *Id.* § 672. The precise question now before us was decided by the Texas court of appeals in *Webb v. State*, 9 Tex. App. 490. There, the defendant being on trial for murder, and the defense of insanity having been set up, the court charged the jury, in substance, that it was their province to determine, from all the evidence in the case, whether the defendant was sane or insane; that every defendant in a criminal case is presumed to be innocent until his guilt is established, by legal evidence, beyond a reasonable doubt, and in case of a reasonable doubt as to his guilt he is entitled to be acquitted; that if the jury had therefore any reasonable doubt of the guilt of the defendant, under the evidence in the case and the law as given them, they should acquit him. The court was thereupon asked to charge the jury specially that, if they entertained a reasonable doubt of the sanity of the accused at the time of the commission of the homicide, they should acquit him. This charge the court refused to give, and its ruling in that respect was sustained. In the opinion the court says: "It will not do to say that the reasonable doubt, independent of the whole case, applies and must be given to each and every element going to make up the *corpus* of the crime, and, failing to do so, that the charge would be insufficient; because such a rule would lead to unnecessary, and perhaps interminable, confusion, and in case of circumstantial evidence, for instance, it would be necessary to charge it with reference to each isolated fact in the chain of facts essential to the existence of the main fact. . . . In the case at bar, the evidence of insanity was no defense, save as it tended to rebut or destroy the criminal intent with which Webb shot and killed Foster, and it should only be given such weight as would produce upon the minds of the jury a reasonable doubt, not of Webb's insanity, but of the fact affirmed by the state, which was that Webb killed Foster with criminal intent, and under circumstances constituting the crime of murder. . . . Our conclusion of the whole matter is that the charge of the court was a

sufficient exposition of the law of insanity, and that, having fully charged the law of reasonable doubt, as to the whole case, the court did not err in refusing the special requested instruction." See Lawson, *Defenses to Crime*, 885.

The foregoing decision is quite in harmony with the rule laid down in repeated decisions of this court. Thus, in *Mullins v. People*, 110 Ill. 42, where a defendant, on trial for robbery, attempted to prove an *alibi*, we said: "Nor is it proper for the court to designate any particular branch of the case, and tell the jury, unless it is proved beyond a reasonable doubt, they should acquit. The reasonable doubt the jury is permitted to entertain must be as to the whole evidence, and not as to a particular fact in the case." In *Oreus v. People*, 120 Ill. 817, the court refused to instruct the jury that if they had any reasonable doubt as to whether the defendant, at the time of the shooting, was under reasonable apprehension and honest fear that deceased intended and was about to inflict upon him great bodily harm, and that he fired the shots under that belief and in self-defense, they should acquit. In sustaining this ruling we said: "The fact

that a jury may entertain a reasonable doubt in regard to some particular fact required to be proved, in order to convict a defendant of crime, will not, of itself, authorize an acquittal, as is implied in the instruction, but a reasonable doubt, which will authorize an acquittal, is one as to the guilt of the accused on the whole evidence, and not as to any particular fact." See also *Leigh v. People*, 118 Ill. 372; *Davis v. People*, 114 Ill. 86.

It follows from what we have said that the court was justified in refusing to give the following instruction asked on behalf of the defendant: "To constitute the crime charged, there must be a union of fact and intent; and if, from all the evidence, you have a reasonable doubt as to the defendant's having the intent to commit the crime charged, or a reasonable doubt as to his having a sufficiently sane mind to form the criminal intent, your verdict should be for the defendant." Certain objections as to the rulings of the trial court in the admission of evidence are urged, but, on careful examination of the record, we fail to find said objections sustained.

We perceive no material errors in the record, and the judgment will therefore be affirmed.

NEW YORK COURT OF APPEALS (3d Div.).

CAPITAL CITY BANK, *Appl.*,

v.

Adolphus PARENT, Impleaded, etc., *Respt.*

(.....N. Y.)

1. No debt is created on the part of a bank by the sale of its draft on another bank for cash, which can be levied on under attachment against the purchaser, so long as the draft remains outstanding without default thereon.
2. A creditors' bill cannot be based upon a judgment for money only in an action in which jurisdiction was obtained only by attachment of the property of a nonresident debtor since under Code Civ. Proc., § 707, such judgment can be enforced only against the attached property.
3. A bank which settles in a foreign country with one who has stolen money from it, and to enable him to make such settlement induces a third person to purchase from him a draft which he had procured with part of the stolen money, cannot dispute the purchaser's title thereto.

(October 1, 1902.)

APPEAL by plaintiff from a judgment of the General Term of the Supreme Court, Fourth Department, affirming a judgment of the Onondaga Special Term in favor of defendant in an action brought to procure the satisfaction of a claim which plaintiff had against one, Charles C. Nelson, out of an alleged credit consisting of an unpaid bank draft. *Affirmed.*

The facts are stated in the opinion.

Mr. W. Nottingham for appellant.

Mr. Frank H. Hiscock, for respondent: Plaintiff had not placed itself in a position, by the recovery of a valid judgment against Nelson, or Lee, and the issue of an execution thereon, to institute this action.

Such an action can be maintained by a judgment creditor only when it has obtained a valid judgment upon which an execution has been properly issued and returned.

N. Y. Code, §§ 1871, 1872; *Dunlevy v. Tallmadge*, 82 N. Y. 457; *Adair v. Butler*, 87 N. Y. 585.

It would have been impossible to make a valid levy upon the draft if the sheriff had obtained possession of it, the legal title thereto having been transferred before the warrant was issued.

Thurder v. Blanck, 50 N. Y. 86; *Castle v. Lewis*, 78 N. Y. 181; *Anthony v. Wood*, 96 N. Y. 186.

The judgment in question being void for want of jurisdiction could be attacked collaterally in this action.

Osterhout v. Hyland, 27 Hun, 167; *Lange v. Benedict*, 78 N. Y. 12, 29 Am. Rep. 80; *White v. Bogart*, 73 N. Y. 256; *Bartlett v. Spicer*, 75 N. Y. 584; *Schwinger v. Hickok*, 58 N. Y. 280, *Gilmore v. Ham*, 29 N. Y. S. R. 751.

Attachments are proceedings *in rem*, giving no rights except as against the very property seized and brought within the jurisdiction of the court, and a judgment rendered in an attachment suit against a nonresident, served by publication only, must follow the same theory. It cannot be a general one. It must be *in rem* and not *in personam*.

NOTE.—As to validity of personal judgment rendered upon constructive service of process, see note to *Moyer v. Bucks* (Ind.) 16 L. R. A. 231, 13 L. R. A.

As to relief from judgment rendered on publication of process, see note to *Dunlap v. Steere* (Cal.) 16 L. R. A. 331.

Cromwell v. Gallup, 17 Hun, 49; *Schwinger v. Hickok*, *supra*; *Bartlett v. Spicer*, 8 N. Y. Week. Dig. 227, 12 Hun, 896, 75 N. Y. 528; *Bartlett v. McNeil*, 60 N. Y. 58.

A judgment thus obtained, therefore, being *in rem* and special, would not afford a proper foundation for a creditor's suit.

Thomas v. Merchants Nat. Bank, 9 Paige, 216, 4 L. ed. 674; *Penoyer v. Neff*, 95 U. S. 714, 24 L. ed. 585; *Force v. Gower*, 28 How. Pr. 294; *McKinney v. Collins*, 88 N. Y. 216; *Warren v. Tiffany*, 17 How. Pr. 108.

Landon, J., delivered the opinion of the court:

This is an action in the nature of a creditors' bill. It is based upon an execution returned unsatisfied upon a judgment for money only, entered in an action in the supreme court in favor of this plaintiff against Charles O. Nelson, who was a nonresident, was served by publication, and did not appear, but in which a warrant of attachment was issued, and proof by affidavit produced and filed upon the motion for judgment that the attachment had been levied upon property of the defendant, which levy, it was shown upon this trial, was never made. We think the complaint was properly dismissed. The only attempt to levy under the attachment was as follows: Nelson, who had been a resident of Atlanta, in the state of Georgia, on June 30, 1888, by fraudulent practices, which under our laws would amount to larceny, obtained \$6,500 of the plaintiff, a banking corporation in Atlanta, and also \$4,600 of two other banks of the same place, and then absconded. July 6, 1888, he bought of the defendant the First National Bank of Syracuse its draft for \$5,000 upon another defendant, the First National Bank of New York, and paid \$5,000 in cash for the draft. The draft was payable to the order of W. C. Lee, a fictitious name which Nelson assumed. Nelson then fled to Canada, taking the draft with him, and there, July 2, 1888, transferred it for value to the appellant, who then became the owner of it in good faith, and still is its owner and holder. July 26, 1888, the sheriff of Onondaga county, holding the warrant of attachment, assumed to levy upon the \$5,000 paid by Nelson to the First National Bank of Syracuse, by serving a notice upon the bank that he thereby levied the warrant of attachment upon the moneys in its hands belonging to the defendant, and all deposits and moneys deposited by him with the bank, and debts owing by the bank to him. The bank thereupon gave the sheriff a certificate stating the facts respecting the purchase of the draft. The draft being outstanding, and no default having been made upon it, the Syracuse bank was not indebted to Nelson or to the holder of the draft. It was not the depository or bailee of the money paid for the draft. It sold the draft for cash in the usual course of business, and that ended the transaction, unless the draft should be dishonored upon presentation, or unless plaintiff's moneys could be identified, payment of the draft stopped, and the moneys reclaimed before the rights of third parties intervened, which would be a very different proceeding from a judgment for money only as upon contract, and an action in the nature of

a creditors' bill to secure its payment. The draft itself was not attached. Thus the attachment was not levied, and hence no jurisdiction to enter a judgment against Nelson existed.

The Code (§§ 1216, 1217) requires that in a case where the defendant is a nonresident, and the summons has not been personally served upon him within the state, and he has not appeared, and a warrant of attachment has been issued, proof by affidavit that the warrant of attachment has been levied upon property of the defendant must be produced and filed upon the application for judgment. Like the proof of the personal service of a summons in other cases, this is jurisdictional. True, the proof by affidavit was produced and filed, but this is not conclusive, and is overcome where, as in this case, proof of the actual facts shows the contrary. *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. Rep. 589. Besides, a judgment for money only, rendered against a nonresident, who has not appeared, and upon whom service of the summons is made by publication, and an attachment issued and levied, "can only be enforced against the property which has been levied upon by virtue of the warrant of attachment at the time when judgment is entered." Code, § 707. The execution is limited to the property attached. Section 1870. Jurisdiction of the person is not obtained, but of the property attached. *McKinney v. Collins*, 88 N. Y. 216; *Schwinger v. Hickok*, 53 N. Y. 280; *Bartlett v. McNeil*, 60 N. Y. 58; *Bartlett v. Spicer*, 75 N. Y. 528; *Cromwell v. Gallup*, 17 Hun, 49. If, therefore, anything was levied upon under the attachment, the plaintiff's remedy was limited to it, and whatever action in aid of the attachment was proper should have been brought by the sheriff under section 655 of the Code. See *Backus v. Kimball*, 62 Hun, 123. As the judgment against Nelson would affect only the attached property, it follows that the plaintiff was in no position to bring the present action. Plaintiff could, in the first action, only exhaust its legal remedies against the property attached, and not its legal remedies generally. It could issue no execution against Nelson's other property. If, indeed, a valid levy was made under the attachment, it seems to have been abandoned; if it was not made, the plaintiff's case rests upon its failure to take any legal remedy. The findings of the trial court which have been approved by the general term show that with respect to this appellant the case was properly disposed of upon the merits. The plaintiff procured the arrest of Nelson in Canada, and then, before the action in which the attachment was issued was commenced, upon being advised that he was not extraditable, made a settlement with him, and acknowledged full satisfaction of all demands in consideration of \$6,000, which Nelson then paid, less \$320 to be paid afterwards by the appellant. This was by him tendered when due, but its acceptance refused. The appellant was present at such settlement, and for the purpose of furnishing Nelson part of the money with which to effect the same, and at the procurement and solicitation of the plaintiff, and upon its representation that it was perfectly proper and safe for him to do so, purchased the draft of

Nelson for its face value, less \$50, and paid \$8,825.85 upon the purchase price, besides the \$320 tendered to and refused by the plaintiff. The evidence amply sustains the findings of the trial judge. If we assume that the plaintiff settled with a thief, and was not bound by its acquittance of its whole demand made upon only part payment of it, yet it was bound by its representations to the appellant upon the

faith of which he parted with his money, and it cannot dispute the title which it induced him for its benefit to accept. There may be a small surplus in the appellant's hands as between him and Nelson, but, if so, it cannot be reached in this action.

Judgment affirmed, with costs.

All concur, except *Vann, J.*, not sitting.

NEW YORK COURT OF APPEALS.

C. Gray BOLTON *et al.*, Appts.,

v.

William SCHRIEVER *et al.*, Repts.

(.....N. Y.....)

1. The decision that a testator was an inhabitant of the county, made by a surrogate to whom a will is presented for probate, is conclusive against collateral attack independent of any statutory provision, at least where the surrogate had jurisdiction of the subject-matter by reason of the fact that testator was an inhabitant of the state at the time of his death.
2. An extra allowance of costs is not precluded by the fact that on a former trial of the same case an extra allowance had been granted and the costs paid as a condition of a new trial.

(October 4, 1902.)

NOTE.—Collateral impeachability of findings as to jurisdictional facts on which administration of a decedent's estate is based.

Inhabitancy of county.

Of the decision in *Bolton v. Jacks*, 6 Robt. 166, that if a surrogate admits to probate a will of a testator not at the time of his death an inhabitant of his county he acts without jurisdiction and that his proceeding is void and open to collateral attack, *Barl. J.*, in *Roderigas v. East River Sav. Inst.*, 68 N. Y. 460, 469, 20 Am. Rep. 555, says, "I believe the decision to be unsound in this respect."

In direct support of the main case as against the doctrine of *Bolton v. Jacks*, *supra*, it has been held in numerous cases that the fact that a decedent was not at the time of his death a resident of the county or district in which an administrator was appointed is not a ground of collateral attack on such an appointment. *Coltart v. Allen*, 40 Ala. 155, 38 Am. Dec. 757; *Barcliff v. Freece*, 77 Ala. 528; *Irwin v. Scriber*, 18 Cal. 499; *Re Griffith*, 84 Cal. 107; *Tant v. Wigfall*, 65 Ga. 412; *Johnson v. Beazley*, 65 Mo. 250, 27 Am. Rep. 276; *Bumstead v. Read*, 31 Barb. 661; *Morrell v. Dennison*, 8 Abb. Pr. 401, 17 How. Pr. 422; *Bolton v. Brewster*, 32 Barb. 389; *Re Harvey*, 3 Redf. 214; *Rollins v. Henry*, 84 N. C. 569; *Burnley v. Duke*, 2 Rob. (Va.) 102; *Thornton v. Baker*, 15 R. I. 558; *Holmes v. Oregon & C. R. Co.* 7 Sawy. 380, 9 Fed. Rep. 229; *Smith v. Munroe*, 23 N. C. 345; *Eller v. Richardson*, 89 Tenn. 575.

Neither is nonresidence in the state. *Record v. Howard*, 58 Me. 225.

But there have been some decisions in conflict with those above cited which hold that an appointment of an administrator may be attacked collaterally on the ground that the intestate was not at the time of his death a resident of the county or district in which the appointment is made. *Olmstead's App.* 43 Conn. 110; *Cutts v. Haskins*, 9 Mass. 347; *Holyoke v. Haskins*, 5 Pick. 20, 9 Pick. 259, 16 Am. Dec. 373; *Collins v. Turner*, 2 Taylor's 18 L. R. A.

See also 33 L. R. A. 772; 36 L. R. A. 834; 38 L. R. A. 294.

APPEAL by plaintiffs from a judgment of the General Term of the Superior Court of the City of New York, affirming a judgment of a trial term in favor of defendants, in an action brought to recover possession of certain real estate. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. Edward C. Perkins, for appellants:

The probate of the supposed will of Dr. Talmadge was void, and as there was no other evidence of the existence of a will, the plaintiffs, as his heirs, have title to the premises in question.

Bolton v. Jacks, 6 Robt. 192.

The surrogate had no jurisdiction to prove the will of an inhabitant of another county.

N. Y. Laws 1837, chap. 430, § 1.

The probate record may be impeached collaterally.

The *Roderigas Case*, 63 N. Y. 460, 20 Am.

Repos. (N. C.) 541; overruled in effect on this point by *Smith v. Munroe*, *supra*; *Miltenerberger v. Knox*, 21 La. Ann. 399; *Re Williamson*, 3 La. Ann. 261; *Griffith v. Wright*, 18 Ga. 173; *McChord v. Fisher*, 13 B. Mon. 138.

But some of these cases at least are distinguishable from those in which the collateral attack is denied on the ground that the appointment was made without any finding of the jurisdictional fact of residence in the county. Thus in the Georgia case of *Griffith v. Wright*, *supra*, the decision is put expressly on the ground that the letters do not recite such facts, while the later Georgia case of *Tant v. Wigfall*, *supra*, in which the administration is upheld against collateral attack, puts the decision on the ground that the fact of residence was adjudicated and is expressly recited.

And in *Moore v. Moore*, 38 Neb. 509, letters of administration were held void where the petition therefor did not show the jurisdictional facts that the deceased was an inhabitant of the county in which letters were granted, or that he was a non-resident of the state.

Also in *Miller v. Swan*, 12 Ky. L. Rep. 632, where the statute makes probate of a will conclusive "except as to the jurisdiction," and residence in the county is necessary to give jurisdiction to probate a will, it is held that the probate may be collaterally questioned on an application for probate in another county, at least if the question of residence was not raised in the first proceeding.

The Massachusetts cases holding that the appointment of an administrator may be attacked collaterally on the ground that the decedent was not a resident of the county have been rendered obsolete in that state by Mass. Pub. Stat., chap. 156, § 4. *Cummings v. Hodgdon*, 147 Mass. 21.

The great weight of authority is now in favor of holding an appointment of an administrator valid against collateral attack on the ground merely that the decedent was not a resident of the county

Rep. 555, 78 N. Y. 316, 32 Am. Rep. 809, was an attempt to impeach letters of administration issued by the surrogate of New York county, on the ground that the supposed decedent was not dead.

It was admitted that the surrogate was not given jurisdiction to issue letters upon the estate of a living person, and the question before the court was, whether he was given jurisdiction to decide that a living person was dead.

Earl, J. (63 N. Y. p. 466), says: "While the statute gives him no jurisdiction to administer upon the estate of a living person, it imposes upon him the duty of inquiry," etc.

The *Jacks Case* was, and the case at bar is, an attempt to impeach the probate of a will, on the ground that the supposed testator was not an inhabitant of the county where the will was proved.

It was decided in the *Jacks Case* that the surrogate had no jurisdiction to admit to probate the will of Dr. Talmadge, he not being an inhabitant of the county; and the question is whether the surrogate had jurisdiction to decide that he was an inhabitant.

The ground of the *Roderigas* decision is, that the surrogate did have jurisdiction to decide that the supposed intestate was dead, because, and simply and solely because, the statute imposed on the surrogate the duty of determining whether he was dead or not. Consequently it does not follow from that decision that the surrogate had jurisdiction to decide

whether Dr. Talmadge was an inhabitant of New York county, unless the statute imposed on him the duty of determining that fact, which it does not.

See 2 N. Y. Rev. Stat. 74, § 23, relative to letters of administration, and N. Y. Laws 1887, chap. 350, § 1, relative to wills.

Probably no case in the New York Reports has been so severely criticised as the *Roderigas Case*. Much of this criticism is due to overlooking the fact that the decision turned on the peculiar language of the statute. It shows, however, that so far as a case is concerned to which, like that at bar, no such statute applies, the universal consensus of opinion is, that the jurisdiction can be questioned collaterally.

Thomas v. People, 107 Ill. 517, 47 Am. Rep. 458; *Devlin v. Com.* 101 Pa. 213, 47 Am. Rep. 710; *Lancaster v. Washington L. Ins. Co. of New York City*, 62 Mo. 12; *Lavin v. Emigrant Industrial Sav. Bank*, 18 Blatchf. 5; *Administration of Estates of Living Persons*, 21 Alb. L. J. 65; *D'Arusment v. Jones*, 22 Alb. L. J. 281; *Melia v. Simmons*, 45 Wis. 384; Redfield, Surrogates, 48, 49 note 1; *Jochumsen v. Suffolk Sav. Bank*, 8 Allen, 87; *Holyoke v. Haskins*, 5 Pick. 20, 16 Am. Rep. 372; 9 Pick. 259; *Duncan v. Stewart*, 25 Ala. 408, 60 Am. Dec. 527; *Morgan v. Dodge*, 44 N. H. 259, 83 Am. Dec. 213; *Cutts v. Haskins*, 9 Mass. 547; *Griffith v. Frazier*, 12 U. S. 8 Cranch, 9, 3 L. ed. 471.

The subject-matter over which each surrogate had jurisdiction in 1841 was the probate

if the fact of such residence is expressly or impliedly found as a condition precedent to making the appointment.

But if it appears on the records of the court that the necessary fact of residence did not exist the appointment is void on collateral attack. *Moore v. Philbrick*, 32 Me. 102, 52 Am. Dec. 642.

Existence of assets in county.

On substantially the same grounds as residence in the county stands the jurisdictional fact of assets in the county. On this question also most of the decisions hold that a finding of the court as a condition of the appointment of an administrator that there are assets in the county is not subject to collateral attack. *Epping v. Robinson*, 21 Fla. 36; *Weir v. Monahan*, 67 Miss. 424; *O'Connor v. Huggins*, 113 N. Y. 512; *Fisher v. Bassett*, 9 Leigh, 119, 53 Am. Dec. 227; *Andrews v. Avory*, 14 Gratt. 229, 73 Am. Dec. 355; *Re Shoenberger's Estate*, 139 Pa. 133; *Lees v. Wetmore*, 58 Iowa, 170; *Murphy v. Creighton*, 45 Iowa, 179.

But to the contrary it has been held in other cases that the appointment of an administrator of a non-resident may be attacked collaterally on the ground that there were no assets within the jurisdiction. *Thumb v. Gresham*, 2 Met. (Ky.) 306; *Crosby v. Leavitt*, 4 Allen, 410.

But in the last case the lack of assets was apparent on the records.

Administration of the estate of a living person.

Almost without exception the decisions of the courts have declared that administration on the estate of a live man as that of a decedent is utterly void. *Duncan v. Stewart*, 25 Ala. 408, 60 Am. Dec. 527; *Stevenson v. San Francisco City & County Superior Ct.* 62 Cal. 60; *Thomas v. People*, 107 Ill. 517, 47 Am. Rep. 458; *D'Arusment v. Jones*, 4 Lea, 251, 40 Am. Rep. 12; *State v. White*, 29 N. C. 116; *Devlin v. Com.* 101 Pa. 213, 47 Am. Rep. 710; *Jochumsen v. 18 L. R. A.*

Suffolk Sav. Bank, 3 Allen, 87; *Lavin v. Emigrant Industrial Sav. Bank*, 18 Blatchf. 5; *United States v. Payne*, 4 Dill. 387; *Melia v. Simmons*, 45 Wis. 384, 30 Am. Rep. 748; *Moore v. Smith*, 11 Rich. L. 559, 73 Am. Dec. 122.

In *Roderigas v. East River Sav. Inst.*, 63 N. Y. 459, 20 Am. Rep. 555, a decision was made by four judges against three that the grant of letters of administration under the New York statute giving the surrogate power to determine the fact of death was not void on collateral attack although the supposed decedent proved to be alive. This decision attempts to distinguish other cases to the contrary on the ground that the New York statute required an express determination of the fact of death by the surrogate. But as substantially the same is required by statutes in other states the sharp conflict between the New York decision and those in other jurisdictions is not explained by statutory provisions.

The later *Roderigas Case*, 76 N. Y. 316, 32 Am. Rep. 309, held that letters of administration were subject to collateral attack on the ground that the supposed decedent was alive where there had been no actual determination of the fact of death by the surrogate but the letters were issued by the clerk on a blank signed by the surrogate without any such protection.

But even where such determination is judicially made by the surrogate it is held by the circuit court of the United States that such determination is not due process of law as to the supposed decedent who is not a party to the proceedings; and therefore that such adjudication cannot deprive him of his property, and vest it in an administrator. *Lavin v. Emigrant Industrial Sav. Bank*, 18 Blatchf. 5.

Here seems to be a valid ground of distinction between the effect of a judicial determination of the fact of death and that of other jurisdictional facts. Considered merely as findings of jurisdic-

of wills of deceased persons, inhabitants of his county, or otherwise coming within one of the subdivisions of section 1 of the Act of 1887.

The Revised Statutes in force at the time of Dr. Talmadge's death appointed separate and entirely independent courts, one for each county, and they provided that each of them should have power "to take proof of wills of real and personal estate in the cases provided by law," (N. Y. Rev. Stat. 28th ed. p. 153, pt. 3, chap. 2, title 1, § 1); and these cases are provided in the Act of 1887, which further adds, that in such cases the jurisdiction shall be exclusive of that of any other surrogate.

The statute, therefore, prescribes that "certain facts" (in this case the fact of inhabitancy) "must exist before jurisdiction can attach," and there is no room for implication that it attaches to any more general subject, and includes the power to pass upon those "certain facts" itself.

tional facts there is no clear and satisfactory distinction to be made between a finding of the fact of death and that of residence or of the existence of assets within the jurisdiction. But when a supposed intestate is in fact alive, the finding by the probate court that he was dead and administration of his estate based thereon made in proceedings to which he was not a party and of which he had no notice seem clearly void as to him because depriving him of his property without due process of law.

The *Roderigas* Case stands alone so far as it holds administration on the estate of a live person to be valid as against him, but in *Plume v. Howard Sav. Inst.*, 46 N. J. L. 211, a decree appointing an administrator after a judicial determination of the fact of death is held to be valid as against any collateral attack on the ground that the decision is not justified by the evidence where the objection is raised by a savings bank against which the administrator brings an action for money due the estate.

So in Louisiana it is held that a judicial determination that a person is dead made on appointing an administrator for him is not subject to collateral attack by a third person in a suit by the administrator. *Davis v. Greve*, 82 La. Ann. 420.

And the fact that an administrator has been appointed is not conclusive proof of the death of a person in an action to recover insurance upon his life. *Lancaster v. Washington L. Ins. Co. of New York City*, 61 Mo. 121; *Tisdale v. Connecticut Mut. L. Ins. Co.* 28 Iowa, 170, 96 Am. Dec. 136.

In *Re Napier*, 1 Phillim. 83, on the appearance of a supposed intestate for whom letters of administration had been granted the administrator voluntarily surrendered the letters and the court revoked the appointment.

Conflict of jurisdiction.

By the grant of probate the jurisdiction of a court is exhausted for that purpose and a second grant of general letters of administration of the same state is utterly void. *Ryno v. Ryno*, 27 N. J. Eq. 522.

Letters of administration a. t. a. are held void when granted in another county after the first letters had been granted in the county of the testator's residence. *Johnson v. Corpenning*, 30 N. C. 218.

The court in this case declared that letters would be void if granted in any county except that of the testator's residence. But see *Smith v. Munroe*, 23 N. C. 345.

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Administration "shall be void if granted by an incompetent authority."

Toller, Extra. & Admra. 1st ed. chap. 3, pp. 89, 90, § 8; *Blackborough v. Davis*, 1 P. Wms. 44; *Prince's Case*, 5 Coke, 30; *Noell v. Wells*, 1 Lev. 235. See also 1 Wms. Extra. 6th Am. ed. 631; Bacon, Abr. title *Void and Voidable*, B; 11 Vin. Abr. *Executors*, F, 73; *Crossman v. Hume*, Noy. 96; *Allens v. Andrews*, Cro. Eliz. 283.

Residence was jurisdictional.

Cutts v. Haskins and Holyoke v. Haskins, supra; *Northampton v. Smith*, 11 Met. 395; *Pinney v. McGregory*, 102 Mass. 189; *Emery v. Hildreth*, 2 Gray, 231.

The United States courts take cognizance of certain causes by reason only of the fact that the parties are residents of different states or counties.

Cooley, Const. Lim. 6th ed. 493.

In *Voss v. Morton*, 4 Cush. 27, 50 Am. Dec.

One valid assumption of jurisdiction by the court in respect to administration makes the subsequent appointment of an administrator by another court void. *Oh Chow v. Brookway*, 21 Or. 440.

The appointment in another county is the bar to the appointment of an administrator in the county of the decedent's residence. *Coltart v. Allen*, 40 Ala. 155, 88 Am. Dec. 757.

So probate in another county cannot be collaterally attacked even in the county in which the proceedings should have been taken. *Johnson v. Gaines*, 1 Coldw. 238.

And the pendency of probate proceedings in another county will defeat the jurisdiction of a surrogate. *Re Buckley*, 41 Hun, 106.

After administration has been closed the second grant of administration to another person is void. *Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643.

The grant of ancillary letters to a nonresident on the representation that the decedent was a nonresident of the state but was a resident of the state in which the original letters were granted will not defeat the jurisdiction of the court in another county in which the decedent actually resided at the time of his death to appoint an administrator. *Frick's App.* 114 Pa. 29.

Lapse of time.

A grant of administration contrary to the express terms of a statute more than twenty years after the death of a person is void. *Rice v. Henly*, 90 Tenn. 69; *Wales v. Willard*, 2 Mass. 120.

But in the absence of any such statute such appointment is not open to collateral attack because of the length of time that had elapsed. *Martin v. Robinson*, 67 Tex. 368.

Miscellaneous.

The jurisdiction of the register in Pennsylvania to probate a will may be attacked collaterally if the so-called will probated was not executed. *Wall v. Wall*, 123 Pa. 545.

The want of interest in the proponent of a will is not a ground for collateral attack of the probate. *Morford v. Dieffenbacher*, 54 Mich. 593.

In Vermont the general doctrine is declared that the jurisdiction of a court to appoint an administrator cannot be collaterally attacked. *McFarland v. Stone*, 17 Vt. 165, 44 Am. Dec. 825; *Driggs v. Abbott*, 27 Vt. 580, 65 Am. Dec. 214; *Abbott v. Coburn*, 28 Vt. 663, 67 Am. Dec. 735.

The ground of attack in the two cases last cited was that the decedent was a nonresident of the state.

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750, Shaw, *Ch. J.*, held a judgment of the United States circuit court to be void, because he found as a matter of fact that the parties were not citizens of different states.

See also *Mississippi & Rum River Boom Co. v. Patterson*, 98 U. S. 405, 25 L. ed. 206; *Rose v. Himely*, 8 U. S. 4 Cranch, 268, 2 L. ed. 617; *Thompson v. Whitman*, 85 U. S. 18 Wall. 460, 21 L. ed. 699; *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. Rep. 589; *Boller v. New York*, 8 Jones & S. 523; *Chapman v. Phoenix Nat. Bank*, 12 Jones & S. 840.

Mr. Edward W. S. Johnston, for respondents:

The decree of the surrogate admitting this will to probate cannot be attacked collaterally in this proceeding.

The rule laid down in *Bolton v. Jacks*, 6 Robt. 166, that a finding of the surrogate in the proceedings presented to him as to the residence of the said testator is not judicial, and that the judgment founded upon such findings can be attacked collaterally in this respect, has been overruled expressly in *Roderigas v. East River Sav. Inst.* 68 N. Y. 460, 20 Am. Rep. 555.

See also *Boller v. New York*, 8 Jones & S. 533.

The supreme court in *Monell v. Dennison*, 8 Abb. Pr. 401, passing upon the Law of 1837 and upon the identical facts in issue here, has held that where the jurisdiction of a subordinate tribunal having cognizance of the general subject has attached by the presentation of a verified prima facie case and by appearance of the parties, *e. g.*, in the case of proceedings before the surrogate's court attacking probate of the will even upon a quasi jurisdictional fact such as that of inhabitation, its decision is conclusive unless reversed on appeal.

The supreme court also in *Bolton v. Brewster*, 82 Barb. 389, passes upon the identical facts in issue herein, and holds that general jurisdiction being given to the surrogate's court (*vide* Laws 1837, chap. 460, pp. 1, 5, § 1), jurisdiction depends upon facts which must be brought before the court for its determination upon evidence, and it is required to act upon such evidence (Laws 1837, chap. 460, § 5), its decision upon the question of his jurisdiction is conclusive until reversed, revoked, or vacated, so far as to protect its officers and all innocent persons who act upon the faith of it.

See also *Bumstead v. Read*, 81 Barb. 661.

If the surrogate had refused upon the petition before him to admit the will to probate, the executor upon applying could have procured a peremptory writ of mandamus to compel the surrogate to admit the will to probate.

People v. Dutchess County Judges, 20 Wend. 656; *Anderson v. Anderson*, 112 N. Y. 104; *Roderigas v. East River Sav. Inst.* 68 N. Y. 466; *Re Hammersley's Estate*, 9 N. Y. Civ. Proc. Rep. 293.

The surrogate having made a finding of fact that the testator was an inhabitant of the county of New York, this decree cannot be attacked in a collateral proceeding of this kind, the remedies for the parties being solely in the surrogate's court.

Kelly v. West, 80 N. Y. 144; *Harrison v. Clark*, 14 N. Y. Week. Dig. 136; *Re Harvey*, 8 Redf. 216.

The right to attack a judgment in a collateral L. R. A.

eral proceeding resolves itself into two classes; *first*, cases where the evidence offered to attack a judgment shows that the evidence or facts upon which such judgment was rendered could not by any possibility have existed; then such judgment is void; and, *second*, where the evidence offered goes merely to contradict the evidence upon which the judgment was rendered, in which case the judgment cannot be attacked collaterally, the remedy being by appeal or by motion in the court where the judgment was entered to vacate the same.

In the case at bar the evidence here goes merely to contradict the evidence submitted by the verified petition before the surrogate.

See *McCarthy v. Marsh*, 5 N. Y. 263; *Bumstead v. Read*, *supra*; *Porter v. Purdy*, 29 N. Y. 106, 86 Am. Rep. 283; *People v. Waldron*, 52 How. Pr. 231; *Re Buckley*, 41 Hun, 108; *Donnelly v. Libby*, 1 Sweeney, 279; *Lewis v. Dutton*, 8 How. Pr. 103; *Skinnion v. Kelley*, 18 N. Y. 356; *Sheldon v. Wright*, 5 N. Y. 497; *Archer v. Furniss*, 4 Redf. 88; *Rusher v. Sherman*, 28 Barb. 416; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 133; *Staples v. Fairchild*, 3 N. Y. 41.

Where the jurisdiction of an inferior court depends upon the existence of a fact which it is required to settle by its decision, such decision is conclusive against the collateral attack.

Montgomery v. Wasem, 116 Ind. 343.

In *Power v. Speckman*, 126 N. Y. 354, and *O'Connor v. Huggins*, 113 N. Y. 512, it is expressly held that the appointment of executors and administrators cannot be attacked collaterally.

An order of a probate court granting administration in the county in which it sits, although erroneous by reason of the nonresidence of the decedent, is not for that reason void, but voidable only, and can only be attacked by a direct proceeding for that purpose in the court in which it was granted, or upon an appeal from such order.

Martin v. Robinson, 67 Tex. 368; *Re Wagner*, 119 N. Y. 28; *Erwin v. Lowry*, 48 U. S. 7 How. 172, 12 L. ed. 655; *Sargent v. State Bank of Indiana*, 58 U. S. 12 How. 386, 13 L. ed. 1084. See also *Wood v. Peake*, 8 Johns. 69; *Re Griffith*, 18 Nat. Bankr. Reg. 510; *Brown v. Brown*, 7 Or. 285; *Fisher v. Bassett*, 9 Leigh. 119, 33 Am. Dec. 227; *Andrews v. Avery*, 14 Gratt. 229, 73 Am. Dec. 355; *Abbott v. Coburn*, 28 Vt. 667, 67 Am. Dec. 735; *Burdett v. Silabee*, 15 Tex. 615; *Guttford v. Love*, 49 Tex. 715; *Johnson v. Beasley*, 65 Mo. 264, 27 Am. Rep. 276; *Dequindre v. Williams*, 31 Ind. 444; *Erwin v. Lowry*, 48 U. S. 7 How. 180, 12 L. ed. 655; *Shroyer v. Richmond*, 16 Ohio St. 455; *Rigney v. Coles*, 6 Bosw. 479; *Coursen's Case*, 4 N. J. Eq. 408; *Smith v. Hilton*, 50 Hun, 237; *Nelson v. Yates*, 87 Hun, 55; *Horne v. Rochester*, 62 N. H. 348; *Devlin v. Com.* 101 Pa. 277, 47 Am. Rep. 710.

Objection to the jurisdiction of a probate court on the ground of residence of the decedent can be taken only by appeal.

Hodgdon v. Cummings, 151 Mass. 293. See also *Dyckman v. New York*, 5 N. Y. 434; *Grignon v. Astor*, 43 U. S. 2 How. 318, 11 L. ed. 283; *Haggart v. Morgan*, 5 N. Y. 423, 55 Am. Dec. 350; *People v. Putnam County Sur-*

rogate, 36 Hun, 218, 21 N. Y. Week. Dig. 498; *Lange v. Benedict*, 73 N. Y. 80, 29 Am. Rep. 80.

In *Re Cordova*, 4 Redf. 68, the reasoning of the *Roderigas Case* was applied in a question involving the validity of letters testamentary and the issue as to inhabitancy came up, also, in *Carroll v. Hughes*, 5 Redf. 887, and the court held that the letters could not be attacked collaterally.

See also *Sullivan v. Fodick*, 10 Hun, 173; *Louisville & N. R. Co. v. Chaffin*, 84 Ga. 519; *Bransford v. Wolfe*, 108 Mo. 891; *Schoenberger's Estate*, 139 Pa. 132; *Brown v. Landon*, 4 N. Y. Civ. Proc. 14, 30 Hun, 59; *Goldtree v. McAlister*, 86 Cal. 98; *Robinson v. Epping*, 24 Fla. 237; *Johnston v. Smith*, 25 Hun, 176; *Ontario v. Hill*, 33 Hun, 255.

Where the jurisdiction of the court depends upon the existence of a fact it has the power to find whether the fact existed, and its determination upon that subject can only be attacked in a direct proceeding for that purpose.

Re Buffalo, 78 N. Y. 369. See also *Nelson v. Yates*, 37 Hun, 55; *O'Connor v. Huggins*, 118 N. Y. 512; *Vanderpool v. Van Valkenburgh*, 6 N. Y. 190; *Potter v. Merchants Bank*, 28 N. Y. 652, 86 Am. Dec. 278; *Stevenson v. San Francisco City & County Super. Ct.* 62 Cal. 60; *Andrews v. Avery*, 14 Gratt. 286, 78 Am. Dec. 355; *Irwin v. Scriber*, 18 Cal. 499; *Fisher v. Bassett*, 9 Leigh, 119, 33 Am. Dec. 227; *Devlin v. Com.* 101 Pa. 278, 47 Am. Rep. 710.

The judgment of a probate court as to the residence of the intestate is free from collateral attack.

D'Arusmont v. Jones, 4 Lea, 261, 40 Am. Rep. 12; *Perkins v. Fairfield*, 11 Mass. 228; *Kindell v. Titus*, 9 Heisk. 727; *Lavin v. Emigrant Ind. Sav. Bank*, 18 Blatchf. 8.

In *Epping v. Robinson*, 21 Fla. 86, the court says: "The county court has general and exclusive jurisdiction, by the statute, to grant letters of administration upon the estates of deceased persons. The order granting letters is the exercise of jurisdiction, involving the adjudication or jurisdictional facts. The judgment cannot be attacked collaterally by proof *abunde* the record to disprove the jurisdictional facts already adjudicated by the county court," citing—

Emerson v. Ross, 17 Fla. 122; *Price v. Winter*, 15 Fla. 66; *Comstock v. Crawford*, 70 U. S. 8 Wall. 403, 18 L. ed. 37; *Brockenborough v. Melton*, 55 Tex. 493; *Arnold v. Arnold*, 62 Ga. 627; *Taut v. Wigfall*, 65 Ga. 412; *Dequindre v. Williams*, 31 Ind. 456; *Johnson v. Beasley*, 65 Mo. 250, 37 Am. Rep. 276; *Shroyer v. Richmond*, 16 Ohio St. 455; *Abbott v. Coburn*, 28 Vt. 663, 67 Am. Dec. 735; *Irwin v. Scriber*, *supra*; *Quidort v. Pergeaux*, 18 N. J. Eq. 472; *Galpin v. Page*, 85 U. S. 18 Wall. 350, 21 L. ed. 959; *Fisher v. Bassett*, *supra*.

In *Dodge v. Cole*, 97 Ill. 357, 37 Am. Rep. 111, the court distinguishes between the entire want of jurisdiction over the subject-matter and a case where there is jurisdiction over the subject-matter but certain facts are necessary to be brought before the court to determine whether or not the court has jurisdiction in each particular case, citing—

Wight v. Wallbaum, 39 Ill. 563; *Duffin v. Abbott*, 48 Ill. 18.
18 L. R. A.

A decree of a court cannot be attacked collaterally except in case of fraud or want of jurisdiction apparent upon the face of the record.

Re Brinton's Estate, 10 Pa. 408; *Bradshaw's App.* 3 Grant, Cas. 109; *Fox v. Winters*, 4 Rawle, 174.

And this applies to the appointment of an administrator.

McFeely v. Scott, 128 Mass. 16; *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *Johnson v. Beasley*, *supra*.

The decision of the court on the question of inhabitancy properly presented for its adjudication is not open to an examination in a subsequent collateral proceeding.

Holmes v. Oregon & C. R. Co. 9 Fed. Rep. 229. See also *Fisher v. Bassett*, *supra*; *Abbott v. Coburn*, 28 Vt. 667; *Guilford v. Love*, 49 Tex. 715; *Burdett v. Silsbee*, 15 Tex. 615; *Dequindre v. Williams* and *Schroyer v. Richard*, *supra*; *People v. Protestant Epis. House of Mercy*, 128 N. Y. 185.

Peckham, J., delivered the opinion of the court:

This is an action of ejectment to recover possession of a lot of land on Tenth avenue between Thirty-Third and Thirty-Fourth streets in the city of New York. The land belonged at the time of his death to one Theodore B. Talmadge, who died in January, 1841. Mr. Talmadge is the common source of title, the plaintiffs claiming as his heirs-at-law, while the defendants claim through his will, which in May, 1841, was proved before the surrogate of the county of New York, and letters granted to the executor named therein. It is claimed by plaintiffs that Mr. Talmadge died in the county of Columbia, and that at the time of his death he was not an inhabitant of New York county, and the surrogate of that county had no jurisdiction to take proof of the will, or to grant letters testamentary thereon; and, as there was no other proof of the execution of the will, the defendants made out no title to the land, and the plaintiffs were entitled to recover it as heirs-at-law of Talmadge. There was a hearing before the New York surrogate, and a judicial investigation, and the result was the judgment or decree admitting the will to probate. The infant daughters of the testator appeared on this investigation by guardian appointed by the surrogate. This judgment, now over 50 years old, is assailed by the plaintiff, and, if it can be successfully attacked in this collateral manner, it may follow that the defendants, by reason of this great lapse of time, will have no means of proving the will, and thus will have no defense to interpose to the plaintiffs' claim, although they have relied upon the sufficiency of a judgment over half a century old, decreeing that the will of Mr. Talmadge was properly proved, and under which their mediate grantor (Mr. Talmadge's executor) had power to convey the land in dispute. The petition of the executor named in the will to the surrogate of New York alleged that the deceased was at or immediately previous to his death an inhabitant of the county of New York, by means of which

the proving of the will belonged to such surrogate. The surrogate, in admitting the will to probate and issuing letters testamentary to the executor, in effect decided the fact of inhabitancy, for it was a fact necessary for the surrogate to decide before admitting the will to probate or granting letters, and his decision of that fact, based upon evidence having a legal tendency to support it, ought, it would seem, on general principles to stand until reversed or set aside, even though it were erroneous.

Much of the general importance which might otherwise attach to the decision of this question is taken from it by reason of legislation upon the subject. In 1870 an Act was passed which applied to judgments of surrogates' court in New York county, and in 1880 a similar Act was passed in regard to those courts in all the other counties of the state. Laws 1870, chap. 859; Code Civ. Proc. § 2473. These Acts provided, in substance, that the objection to the jurisdiction of such judgments should not be taken collaterally. We are of opinion that in a case like the present the same rule obtains which has been authoritatively declared as to future cases by the statutes cited. Under these circumstances, we do not feel called upon to enter into any detailed and extended discussion of the grounds for our decision. It is unnecessary to go as far in order to uphold the decision of the courts below as the court went in the decision of the first *Roderigas Case*, 68 N. Y. 460, 20 Am. Rep. 555. This case differs from that in the main and important fact that there was here an estate of a deceased person to administer upon. Mr. Talmadge died in the state of New York and at the time of his death he was an inhabitant thereof. In the *Roderigas Case* letters were issued to an administrator upon the estate of a living man, but who was, in effect, declared by the judgment to be dead. We think that where the individual died an inhabitant of the state, by reason of which there was in fact an estate to be administered upon, and the only question is which of the surrogates' courts should act, there is in that case jurisdiction over the subject-matter,—that is, over the administering upon the estate of a deceased person dying an inhabitant of the state; and which surrogate is to exercise such jurisdiction depends upon the fact as to which county deceased was an inhabitant of at the time of his death. The decision of such question where evidence is given, and upon a hearing of the parties, ought to be, and, we think, is, conclusive upon any collateral attack. Under our statute as to proof of wills, although it does not in terms provide that the petition shall state, or that the surrogate shall inquire and decide, as to the fact of inhabitancy, yet we think the fair implication arising from a perusal of the whole statute upon the subject is that the surrogate has power, and is bound, before admitting the will to probate or issuing letters, to institute the inquiry, and to decide upon the fact of inhabitancy. Laws 1887, chap. 460, §§ 4, 5 *et seq.* As the surrogate is directed to inquire as to the names and places of residence of the heirs of the testator, the implication is a necessity that

he must first inquire whether there was a testator. Within the meaning of this statute, there could be no testator if there were no deceased person; neither could there be any heirs of one who was then alive. The surrogate is to take proof of these facts where the testator died an inhabitant. Section 1 of above cited Act. He must, therefore, as part of his statutory duty, inquire as to that fact of inhabitancy before taking the proof of the will. Another statute authorizes the surrogate to issue subpoenas, and take testimony in all matters material to any inquiry pending in his court. 2 Rev. Stat. p. 221, § 6. The duty to investigate and decide upon the fact of inhabitancy is necessarily and naturally to be implied from the whole provisions of the statute relating to wills and their probate, and such duty is to be performed before the will is admitted, or letters issued. If no contest is made, and there is no evidence upon the subject of the inhabitancy of the testator, one way or the other, except the sworn allegation in the petition, I do not see why the surrogate may not rely upon the fact so stated. Whether, when the fact thus appears in the sworn petition addressed to the surrogate, such fact shall be re-sworn to by the petitioner, or some one else, upon an oath administered by the surrogate himself, is a matter which, as it seems to us, is not of a jurisdictional nature. The surrogate may regard the oath taken to the petition as sufficient prima facie evidence, although the statute does not in terms require the fact of inhabitancy to be stated in the petition. If it be so stated and sworn to, and no evidence is offered on the other side, and no issue raised as to the truth of the allegation in any manner or form, the decision of the surrogate should be regarded as conclusive, subject only to attack by a direct proceeding to review it. It might happen that, where there is evidence pro and con., the decision would appear to be erroneous, and for that reason it ought to be reversed; but unless a direct attack be made upon it, the judgment should remain. This is upon the principle that the surrogate must decide upon some evidence the fact of inhabitancy before he can go further, and when he does so decide, although erroneously, the decision must stand until reversed.

The nature of a judgment which admits a will to probate is somewhat similar to that of one *in rem*. The *res* which the court takes into its hands for purposes of administration as representative of the state is the property which was once possessed and owned by the deceased, who died an inhabitant of the state. Civilized states have for generations past recognized their obligations to specially protect that kind of property. That obligation arises the moment the death occurs. The obligation assumed has been not only that of protection of the property, but also that of the distribution thereof to those who are living, and who come within the rules of law governing the subject. How great the right of testamentary disposition should be, and under what rules and regulations it should be permitted, are questions which have been differently decided by different nations, and

by the same nations at different times. Such rights are matters of municipal regulation. The right to inherit from or to receive by gift under the will of a deceased person is recognized and protected by the state, and from the fact of such recognition and protection the state owes the duty to see to it that the estate of a deceased person shall pass in accordance with the law which obtains in the state when the death occurs. To prevent contention, and to achieve a peaceful distribution of the estate under the rules of law, and to protect the rights of the creditors of the deceased, all civilized states have created tribunals of a judicial nature, whose function and duty it is to represent and exercise the powers of the state in the course of administration, and whose judgments determine the rights of the respective parties interested in the property as such rights are made to appear. The general jurisdiction over matters of this nature belongs to the state itself by reason of its general sovereignty. The practical exercise of the jurisdiction is vested in the so-called courts of probate or surrogates' courts. In construing the language of the statute creating such courts, the fact must continually be borne in mind that the state is creating a tribunal or tribunals for the purpose of fulfilling its general obligations to all its inhabitants to protect and distribute according to law that which was once the property of one of their own number. That obligation is as broad as the sovereignty of the state itself. In the organization of the tribunals which are to exercise this jurisdiction, although the language of the statute may create a separate and distinct tribunal for each county in the state, and upon certain facts grant jurisdiction to one of them to the exclusion of all others, yet the facts upon which the jurisdiction is given to the court of one county instead of to another are merely incidental, partaking somewhat of the character of matters of procedure, the main fact being the actual death of an individual who at the time of his death was an inhabitant of the state. That is the jurisdictional fact upon the existence of which is founded the duty of the state to protect and distribute the property according to law. Whether one or the other of the surrogates' courts in the various counties shall administer upon the estate, and thus fulfill the obligation which lies with the state itself, is a question which the Legislature has provided for, and it depends, among other things, upon the fact of inhabitancy. This fact the surrogate to whom the matter is presented must decide, and if he decide that it exists, and upon evidence which legally tends to support his decision, under such circumstances we think it ought to stand until reversed. This is believed to be the general rule. It is a matter of very trifling importance, except upon the mere question of convenience which of such surrogates' courts shall take the proof as to the due execution of the will, and grant letters testamentary thereon. For the purpose of the orderly administration of the estates of deceased persons who died inhabitants of our state the Legislature has provided certain

rules governing the subject, and has also provided certain conditions upon which the power of a surrogate to take jurisdiction of the matter depends. The subject-matter, however, of the jurisdiction is the administration of the estates of deceased persons, and over this subject-matter the state has granted to the surrogate of each county general jurisdiction. It is to be exercised upon various conditions, as was said by Church, *Ch. J.*, in the second *Roderigas Case*, 76 N. Y. 816, 32 Am. Rep. 309, dependent upon the residence and the like; and the decision of the surrogate of one county, after a hearing of the parties upon the question whether the case calling for the exercise of the jurisdiction of his court or the surrogate's court of some other county exists or not, should be conclusive in all collateral proceedings. The jurisdiction to administer is bestowed upon each surrogate to the exclusion of all others where the facts exist which are named in the statute. It is granted to him, however, out of the general and complete jurisdiction resting with the state over the entire subject of administration upon the estates of deceased inhabitants, and that general jurisdiction has been exercised by the state in the creation of a tribunal in each county for such purpose of administration; and when the question of jurisdiction arises before one of such courts where the deceased died an inhabitant of the state, and the right of administration attaches to the surrogate's court of some county, it must, in the nature of things, be decided by the surrogate before whom it comes; and, being matter incidental only in its nature, the decision of the surrogate, founded upon some evidence, must be conclusive, even though erroneous, except upon a direct review. I am aware that much has been written by the courts of the various states upon these questions of jurisdiction of courts of probate and the conclusiveness of their judgments. Decisions both ways have been reached. Criticisms have also been made in regard to the decision of the first *Roderigas Case*. It is not needful to refer to them or to again renew the discussion, which, as to this state, was ended by the decision in that case. The question is alluded to and the various cases cited in the first volume of the treatise on the American Law of Administration by I. C. Woerner, § 208 *et seq.*, and notes.

There is, in the nature of things, a broad distinction between the case of the granting of letters of administration upon the estate of one not in fact dead, and the granting of letters upon the estate of one who was at the time of his death an inhabitant of the state, but not of the county where the will was proved, although the surrogate, upon some evidence, erroneously decided that he was. It is quite unnecessary and wholly unprofitable to enlarge upon it here. We do not intend by this decision to attack the principle or to shake the authority of the first *Roderigas Case*, *supra*, for we simply say it is not necessary to here go so far as that case goes. In the opinions delivered in the two *Roderigas* cases will be found much of the learning on this subject, and a citation to

most of the decided cases then reported and bearing upon the question. In this record we think it appears that there was evidence enough to call upon the surrogate of New York to decide upon the question of the inhabitancy of Mr. Talmadge, and the surrogate, by admitting the will to probate, and issuing letters testamentary, did in fact decide that Mr. Talmadge was at the time of his death an inhabitant of New York county, and this conclusion must, in such an attack as this, be a bar to a reopening of that question. This view of the main issue involved in this case calls for the affirmance of the judgment. In *Bolton v. Jacks*, 6 Robt. 166, a contrary result was arrived at by the superior court of New York in a very elaborate and learned opinion. With many of the views therein expressed as to the right to question a judgment rendered without jurisdiction we entirely concur, but for the reasons above given we think they are inapplicable to the particular facts of this case.

Upon this appeal the plaintiffs seek to re-

view the order granting an extra allowance of costs to the defendants. The ground of the appeal is that a new trial herein was taken by plaintiffs under the section of the Code (section 1525) granting such right as of course upon payment of costs, and that included in the costs which plaintiffs paid when availing themselves of the right to a new trial was the amount of an extra allowance granted by the court after the former trial. The plaintiffs contend that but one extra allowance can be collected in the same action. This precise question has already been determined adversely to the plaintiffs' view in the case of *Wing v. De La Rionda*, 181 N. Y. 422.

We have considered the other questions raised by the appellants, but we do not think that any error prejudicial to them appears in the record.

The whole judgment must be affirmed, with costs.

All concur, except *Gray, J.*, taking no part.

WISCONSIN SUPREME COURT.

Anna May FARR *et al.*, *Appts.*,
v.

Trustees of GRAND LODGE OF ANCIENT
ORDER OF UNITED WORKMEN of
the State of Wisconsin *et al.*, *Receipts.*

(.....Wis.....)

A joint tenancy in the beneficiaries of a mutual benefit society is created where the whole sum without any direction for division is made payable to two persons named, and on the death of one of them during the life of the insured the other takes the whole amount of the benefits.

(November 15, 1892.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Eau Claire County in favor of defendants in an action brought to recover the amount alleged to be due on a mutual benefit certificate. *Reversed.*

The facts are stated in the opinion.

Messrs. Wickham & Farr, for appellants:

The death of Ida B. Peck revoked her appointment as a beneficiary, and when no other direction is made the laws of the society control the disposition of the funds.

Given v. Wisconsin O. F. Mut. L. Ins. Co. 71 Wis. 547; *Riley v. Riley*, 75 Wis. 464.

Mrs. Farr is entitled to the full amount named in the certificate: first, by virtue of the direction in the certificate; and secondly, by virtue of the laws of the society.

If both beneficiaries had survived the insured, both would have been, as against the defendant, entitled to the whole amount, but death having revoked the appointment of one, her name became eliminated from the certificate

which now reads that \$2,000 "shall at his death be paid to his daughter, May," she being the only person competent to receive it who has been selected by the insured. She is, as against the defendant, entitled to recover the whole amount.

The society contracted to pay the whole amount to both of them—not one half to each of them.

Northrup v. Phillips, 99 Ill. 449.

One who is entitled to recover at all must be entitled to recover the whole amount.

Hartford F. Ins. Co. v. Davenport, 87 Mich. 608.

As a surviving joint obligee, plaintiff is entitled to recover the whole amount.

1 *Parsons*, Cont. 81; *Brooklyn Masonic Relief Assn. v. Hanson*, 6 N. Y. Supp. 161; *Robinson v. Duvall*, 79 Ky. 88, 42 Am. Rep. 208; *Day v. Case*, 43 Hun, 179; *Davis v. Wanamaker*, 3 Colo. 637; *Covenant M. B. Assn. v. Hoffman*, 110 Ill. 608; *Bacon*, Ben. Soc. & Life Ins. § 364.

The law is analogous to the law relating to legacies and devises, where on the death of a joint legatee or devisee the survivor is entitled to the whole amount.

2 *Redf. Wills*, 175; *Doe v. Sheffield*, 13 East, 526; *Downing v. Marshall*, 23 N. Y. 866, 80 Am. Dec. 290; *Ball v. Deas*, 3 Strobb. Eq. 24, 49 Am. Dec. 651.

The constitution of the society provides that in case one beneficiary shall die during the lifetime of the member, the survivor should be entitled to the fund.

Respondents, however, claim that because of the use of the word "shall" this provision was not intended to apply to this case, as Ida B. Peck died before this provision was passed.

It is the duty of the court to construe its

NOTE.—On the very novel and interesting question presented in the above case the briefs of 18 L. R. A.

counsel and opinion of the court furnish the authorities most nearly in point.

rules and regulations liberally to effect the benevolent purposes of the order.

Ballou v. Gile, 50 Wis. 614.

As for respondents construction, it is a mere technical attempt to defeat the object of the enactment, and such refinement upon language is not to be indulged in in the construction of these policies which are usually drawn up by business men who use language in its common meaning.

Riley v. Riley, 75 Wis. 464.

The word "shall" applies to past as well as future occurrences, where the remedy designed by the statute is thereby promoted.

Endlich, Interpretation of Statutes, § 112; *Beard v. Rowan*, 1 McLean, 135; *Plum v. Fond du Lac*, 51 Wis. 393.

The insured was bound to take notice of the laws of the society.

Cooke, Life Ins. p. 20; Bacon, Ben. Soc. & Life Ins. §§ 81, 92, and cases cited; *Supreme Lodge K. of P. v. Knight*, 3 L. R. A. 409, 117 Ind. 439; *Supreme Commandery Knights Golden Rule v. Ainsworth*, 71 Ala. 486, 46 Am. Rep. 832; *Stohr v. San Francisco Musical Fund Soc.* 82 Cal. 557; *Figure v. Mutual Soc. of St. Joseph*, 46 Vt. 362; *St. Patrick's Male Ben. Soc. v. McVey*, 92 Pa. 510; *Poultney v. Bachman*, 31 Hun, 49; *McCabe v. Father Matthew T. A. Ben. Soc.* 24 Hun, 149; *Sanger v. Rothschild*, 123 N. Y. 577; *Durian v. Central Verein*, 7 Daly, 168; *Com. v. Union League of Philadelphia*, 8 L. R. A. 195, 135 Pa. 301; *Georgia Masonic Mut. L. Ins. Co. v. Gibson*, 52 Ga. 640; *May v. New York Safety Reserve Fund Soc.* 14 Daly, 339; *Allen v. Life Assn. of America*, 8 Mo. App. 52; *Catholic Knights v. Kuhn* (Tenn.) Feb. 18, 1892.

Where members are given an opportunity to avail themselves of a change no actionable wrong is done.

Supreme Lodge K. of P. v. Knight, 3 L. R. A. 409, 117 Ind. 439.

In this case Mr. Peck by failing to appoint a new beneficiary signified his satisfaction with this law of the society.

Riley v. Riley, 75 Wis. 464.

Mr. John A. Daniels, for respondents:

The common law favored title by joint tenancy, by reason of the right of survivorship. Its policy was adverse to the division of tenures, because it tended to multiply the feudal services, and weaken the efficacy of that connection.

But Lord Hardwicke observed, in the case of *Hawes v. Hawes*, 1 Wils. 165, that the reason of that policy had ceased with the abolition of tenures.

In this country the title by joint tenancy is very much reduced in extent, and the incident of survivorship is still more extensively destroyed, except where it is proper and necessary as in the case of titles held by trustees.

4 Kent, Com. 12th ed. 361.

Survivorship on the principle of joint tenancy is contrary to the genius of our institutions, and was in effect, abrogated by the course of descents prescribed by the ordinance of 1787, organizing this great northwestern territory.

Sergeant v. Steinberger, 2 Ohio, 305, 15 Am. Dec. 553.

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In cases of policies of insurance, or benefit certificates, issued by mutual benefit societies, the beneficiary has no vested interest in the certificate until the death of the insured member.

Sabin v. Grand Lodge A. O. U. W. 28 N. Y. S. R. 45; *Clark v. Durand*, 12 Wis. 223; *Foster v. Gile*, 50 Wis. 603; *Richmond v. Johnson*, 28 Minn. 447.

Now, if Mrs. Ida B. Peck, being a sole beneficiary and dying before her husband, did not have such an interest in the certificate as would go to her administrator and form a part of her estate, how could she, under the same conditions, being a beneficiary joined with another, have such an interest as would go to her co-beneficiary?

Unless the policy points out to whom the insurance money shall be paid in case the beneficiary dies before the insured, the appointment of the beneficiary is revoked by his death.

Given v. Wisconsin O. F. Mut. L. Ins. Co. 71 Wis. 550; *Foster v. Gile*, *supra*; *Riley v. Riley*, 75 Wis. 464; *Arthur v. Odd Fellow's Ben. Assn.* 29 Ohio St. 557.

There is no direction in the constitution or by-laws under which Mr. Peck's certificate was issued, as to how or in what manner the fund shall be distributed in case the direction made by the insured shall have been for any cause revoked.

Therefore, the \$1,000 in dispute here, after the death of the wife Ida B. reverted back to Mr. Peck freed from any beneficial appointment, and at his death became a part of his estate and should go to the administrator.

The revision of the constitution made ten years after the certificate issued, cannot govern and control the disposition of the fund to be paid on this certificate.

Morrison v. Wisconsin O. F. Mut. L. Ins. Co. 59 Wis. 165; *Riley v. Riley*, *supra*.

A corporation has not capacity, as the legislative power from which it derives its existence has not competency, by laws of its own enactment, to disturb or divest rights which it has created, or to impair the obligation of its contracts, or to change its responsibilities to its members, or to draw them into new and distinct relations.

Ang. & A. Priv. Corp. § 399; Bliss, Life Ins. § 463; *Becker v. Farmers Mut. F. Ins. Co.* 48 Mich. 610; *Hamilton Mut. Ins. Co. v. Hobart*, 2 Gray, 543; *Great Falls Mut. F. Ins. Co. v. Harvey*, 45 N. H. 292; Cooke, Life Ins. § 501 et seq.; *Close v. Glenwood Cemetery Co.* 107 U. S. 466, 27 L. ed. 408; *Mills v. Central R. Co.* 41 N. J. Eq. 5; *Ashton v. Burbank*, 2 Dill. 435.

When Mr. Peck, under the then existing rules, declared who should be the objects of his bounty, that appointment with its legal consequences must stand for all time, unless he consented to a change.

Laws cannot be retroactive, or be so construed as to cut off rights already fixed.

Bacon, Ben. Soc. & Life Ins. § 185; *Kent v. Quicksilver Min. Co.* 78 N. Y. 159; *Bauer v. Samson Lodge K. of P.* 102 Ind. 262; *Gundlach v. Germania Mechanics Assn.* 4 Hun, 339; *Pellazzini v. German Catholic Soc.* 16 Cin. L. Bull. 27.

If this new article could affect or control this certificate at all, it must lay hold of and act

upon it in precisely the condition in which it stood at the time of adopting that article.

Mrs. Peck was dead and her interest had gone back to the source from whence it sprang. To make her a joint beneficiary with the daughter, it would be necessary to bring her to life again which the article was powerless to do even if Mr. Peck had contracted it might be done.

The new rule could not be retroactive.

State v. Atwood, 11 Wis. 423.

Orton, J., delivered the opinion of the court:

On the 28th day of March, 1879, A. C. Peck became a member of the subordinate Banner Lodge No. 17, at the city of Eau Claire, by virtue of a certificate of insurance duly issued by the Grand Lodge of the Ancient Order of United Workmen of the State of Wisconsin to the said A. C. Peck, by which said grand lodge promised and agreed, for a valuable consideration, to pay at the death of said A. C. Peck, according to the laws of the order, the sum of \$2,000 to Oda B. Peck, the wife, and to Anna May Peck, the daughter, of said A. C. Peck, (since intermarried with the co-plaintiff J. F. Farr.) On or about the 8th day of March, 1881, the said Oda B. Peck died. After her death the said A. C. Peck intermarried with the defendant Mary E. Peck, by whom he had one child, now living; and on the 1st day of March, 1891, the said A. C. Peck died. The defendant the grand lodge paid to the plaintiff Anna May Farr one half of said \$2,000 on her giving bond, but refused, on demand, to pay her the other half of it; and she now demands the \$2,000 by right of survivorship, on the death of her mother, as a joint tenant, or joint beneficiary of the insurance. This being the controlling question in the case, no other need be considered. It will be observed that the whole insurance of \$2,000 is made payable to both Oda B. and Anna May Peck as an entirety. Since the death of Oda B., the grand lodge has so changed and amended its constitution and laws that the whole insurance in such a case shall go and be paid to the surviving beneficiary. It is claimed by the learned counsel of the appellants that such amendment has the legal effect to control the direction of this insurance. Although it is not necessary to consider that question, it may be said that the grand lodge has at least approved in this way the policy of such a principle of law. The learned circuit court, after finding the facts, found as a conclusion of law that upon the death of Oda B. Peck before the death of the insured the appointment of her as a beneficiary became and was revoked, and the interest in the fund she would have been entitled to receive if she had survived the insured lapsed and reverted to the estate of A. C. Peck at his death, no other direction having been made by him. Judgment was entered dismissing the plaintiff's action with costs, without prejudice to the right of the administrator of the estate of Alderson C. Peck to recover the amount remaining unpaid of such insurance.

The learned counsel on both sides have 18 L. R. A.

presented unusually able briefs on the important questions involved in this case, and the court is greatly aided by their cogent arguments and the authorities cited in deciding the question upon which the case depends. The question whether this benefit insurance is made payable to the wife and daughter as an entirety or in severalty as tenants in common or as joint tenants is somewhat difficult of solution. It must be determined by its analogy to the terms "tenancy in common and joint tenancy" in respect to realty and at common law. They may be said to have the same nature and incidents. There may be joint tenancy of personalities, and, like the properties of a joint estate, they are derived from its unity, which is fourfold,—of interest, title, time, and possession. Each of the joint tenants must have the entire possession as well of every parcel as of the whole. Where a horse is given to two persons, they are joint tenants. *Martin v. Smith*, 5 Binn. 18, 6 Am. Dec. 395. "A joint tenancy is where they have the same interest, arising from the same conveyance, commencing at the same time, and held by one and the same undivided possession. On the death of one, the entire tenancy remains to the surviving cotenants, and not to the heirs of the deceased." 2 Bl. Com. 180. This insurance, payable to two persons, has all the essential characteristics of a joint tenancy, without any words or reasons appearing to indicate an intention to make it payable in severalty, or to have it go to heirs, or to revert to the assured or to his estate, on the death of one of the beneficiaries. The assured lived about ten years after the death of his wife,—one of the beneficiaries,—and made no change in the direction as to whom the insurance should go, but in the mean time procured another insurance of \$5,000 for the benefit of his second wife, Mary E. Peck, his present widow. He must be presumed to have known the law, and that his daughter was entitled to the whole insurance on the death of his wife, and assented to such a construction of the policy. In a majority of the old states the *jus accrescendi* or right of survivorship in such a case has been abolished by statute without any exceptions. Most of the cases at common law relate to estates and devises. The unity of possession is the essential feature, so that, if an estate has been conveyed in parcenary, and one of the tenants seeks to destroy the unity by a conveyance of his interest, it is a question whether such a deed is not a nullity. *White v. Sayre*, 2 Ohio, 116. "Where an estate is given to several persons jointly, without any expressions indicating an intention that it shall be divided among them, it must be construed a joint tenancy." *Martin v. Smith*, *supra*. "When by the terms of a will there is an estate in joint tenancy at common law, and one or more of the tenants die in the lifetime of the testator, the principle of the common law applies, and the survivor takes the whole estate." *Ball v. Deas*, 2 Strobb. Eq. 24, 49 Am. Dec. 651. Such is the law in all cases of devise or bequest. *Downing v. Marshall*, 23 N. Y. 386, 80 Am. Dec. 290.

This is sufficient to show the strictness of the doctrine at common law, especially as to devises. This leads us to the consideration of our own statute on the subject of joint tenants. Our statute (Rev. Stat. § 2068) provides that "all grants and devises of lands made to two or more persons, except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy." The following section is that "the preceding section shall not apply to mortgages, nor to devises or grants made in trust, or made to executors or to husband and wife." It will be seen that our statute makes many important exceptions, which save the doctrine of the common law in respect to the subjects named. This shows at least that there is nothing in our principles of government or policies of law opposed to the principle or doctrine of survivorship in joint tenancy in such cases. We are more immediately concerned with joint tenancy in devises. On the principle of analogy, if devises to joint tenants with the *ius accrescendi* are lawful, so are legacies of personalities. They are substantially alike, and within the same reason, and they have been decided to be within the doctrine of the common law. *Jackson v. Roberts*, 14 Gray, 546; *Stires v. Van Rensselaer*, 2 Bradf. Sur. 172; 2 Redf. Wills, 175.

We may say, therefore, that legacies come within the exceptions of our statute, and that, when made to two joint legatees, without any words to indicate a severance of their interests, if one die, the survivor takes the whole legacy. The analogy between legacies and the benefits secured by a certificate or policy of a benefit insurance company or of a common life insurance company, when the insurance is payable to two or more

persons jointly on the death of the assured, is still closer. The assured, like a testator, makes provision in writing for his wife and children, to be enjoyed on his death. He can change the direction of his bounty during his life. So far as the doctrine of joint tenancy and survivorship are concerned, they are strictly within the same reason. And so it has been held in respect to life insurance, if made for the benefit of a wife and children, the last survivor takes the whole. *Robinson v. Duvall*, 79 Ky. 83, 42 Am. Rep. 208. And so as to a fire insurance policy, made to two persons jointly. *Northrup v. Phillips*, 99 Ill. 449. The same doctrine is held in respect to benefit insurance similar to that of this case. *Day v. Case*, 43 Hun, 179; *Covenant Mut. Ben. Assn. v. Hoffman*, 110 Ill. 603. See also Bacon, Benefit Societies, § 264. And so we conclude that this insurance in joint tenancy with the right of survivorship is within the exception of our own statute in analogy to devises, and that the doctrine of the common law governs it. This is a new question in this state, but we are satisfied that the application of this doctrine to this case is within reason and the authorities. We are not called upon to vindicate the policy of this doctrine, any more than to vindicate the exceptions of our own statute. This being decisive of the case, no other question will be considered. The question of interest, we think, was properly disposed of by the circuit court. There was no unreasonable delay of payment, as found by the court, and there is no fund to meet any such demand. The costs will go with the reversal of the judgment.

The judgment of the Circuit Court is reversed, and the cause remanded, with directions to render judgment in favor of the plaintiffs in accordance with this opinion.

TENNESSEE SUPREME COURT.

BUCKEYE MARBLE & FREESTONE CO., Appt.,

v.

James W. HARVEY.

(.....Tenn.....)

1. A purchase of shares of a domestic corporation by a foreign corporation

NOTE.—Power of corporation to deal in the stock of other corporations, or in its own.

1. Power to deal in the shares of other corporations.

In England it is now settled that one corporation may deal in the shares of another without express authority to do so, unless where expressly prohibited, or the nature of its business renders it improper so to deal. *Re Barnard's Bkg. Co.* L. R. 8 Ch. 105; *Re Asiatic Bkg. Co.* L. R. 4 Ch. 252; *Green's Bkce, Ultra Vires*, 92.

And this rule has been followed in Maryland. *Elysaville Mfg. Co. v. Oksko County*, 1 Md. Ch. 392, affirmed on appeal in 5 Md. 152; *Booth v. Robinson*, 55 Md. 434.

But in most of the states in this country the rule 18 L. R. A.

engaged in a similar business for the express purpose of controlling and managing the domestic corporation is *ultra vires* and therefore unlawful and void.

2. A contract by a stockholder who was president of a corporation to pay one half of all liability which might be fixed upon it as the result of certain suits which is made as part of the transfer of all his

is that an incorporated company cannot, unless authorized by statute, make a valid subscription to the capital stock of another. *Valley R. Co. v. Lake Erie Iron Co.* 1 L. R. A. 412, 46 Ohio St. 44; *Holmes & G. Mfg. Co. v. Holmes & W. Metal Co.* 127 N. Y. 252; *Milbank v. New York, L. E. & W. R. Co.* 64 How. Pr. 20.

In *Mechanics' & W. Mut. Sav. & Bldg. Assn. v. Meriden Agency Co.*, 24 Conn. 159, the directors of the company had subscribed for stock in a building corporation. It was held that they had departed from the legitimate business of the company, and that the subscription was not binding, and that payments on the subscription amounted to money received without consideration.

shares to another corporation which buys them for the purpose of controlling the former is unlawful and cannot be enforced although the purchasing corporation has fully executed the contract on its part.

(October 31, 1892.)

A PPEAL by complainant from a decree of the Chancery Court for Knox County dismissing its bill filed to compel defendant to comply with his agreement to satisfy a portion of the judgments obtained against the McMillan Marble Company. *Affirmed.*

The facts are stated in the opinion.

Messrs. Green & Shields for appellant.

Mr. W. C. Kain for appellee.

Lurton, J., delivered the opinion of the court:

The complainant is an Ohio corporation, and was organized, under the general incorporation law of that state, "for the purpose of cutting, dressing, manufacturing, selling, and disposing of marble, stone, slate, granite, and other substances, with such other incidental and necessary powers essential to carrying on said business." This company, with its place of business in Cincinnati, Ohio, has acquired the entire issues of shares made by a Tennessee corporation engaged in a similar business, and under a similar charter, and known as the McMillan Marble Company. Its last acquisition of shares was under a contract with the defendant, who was president of the Tennessee company, and who owned at the time of the sale 25 shares, being one half of the entire stock

of the company. These shares he conveyed to a trustee selected by the purchasing corporation, for its use and benefit. The consideration for the sale was the payment of \$6,000, the defendant assuming and agreeing to personally pay and discharge one half of all liability which might be fixed upon the McMillan Marble Company as a result of certain suits against that company then pending in the courts of this state. The bill alleges, and the evidence establishes, that the complainant company has been compelled, in order to protect the property of the McMillan Marble Company, to pay out about the sum of \$3,000 in the settlement and satisfaction of the claims in suit at time of its contract with defendant. The relief sought is a decree against defendant for one half this sum, being the proportion he agreed to pay under the agreement of sale. The defense is that the contract of sale to the complainant company was unlawful and void,—that is to say, that the purchase of these shares was outside the object of its creation, as defined in its charter, and is therefore such a contract as is not only voidable, but wholly void, and of no legal effect; that it is not a case of excessive use of power granted, but that no power whatever was conferred to deal in or hold the shares of another corporation; that the suit is one upon a void contract, and in furtherance of it, and it should not be entertained by a court of law and equity.

"The rule in the United States is," says Mr. Green, the American editor of Brice's *Ultra Vires*, "that a corporation cannot become a stockholder in another corporation unless by power specially granted by its charter or neces-

In *Talmage v. Pell*, 7 N. Y. 843, it was held that a banking corporation had only authority to carry on its business in the manner and with the powers specified in the Act, and that therefore it had no power to purchase stocks for the purpose of selling them for profit.

In *Franklin Co. v. Lewiston Sav. Inst.*, 68 Me. 43, it was said that, upon principle as well as authority, the trustees of a savings bank had no authority, outside of the charter, or public laws, to invest funds of the bank in manufacturing corporations.

Dealing in stocks by national banks is not expressly prohibited by the National Banking Act; but such a prohibition is implied from the failure to grant the power. *First Nat. Bank of Charlotte v. National Exch. Bank of Baltimore*, 92 U. S. 122, 23 L. ed. 679.

And a national bank is not authorized to act as broker for the purchase of bonds or stocks. *First Nat. Bank of Allentown v. Hoch*, 89 Pa. 324; *Fowler v. Scully*, 73 Pa. 463.

In *Sumner v. Marcy*, 3 Woodb. & M. 105, recovery was refused on notes given by a manufacturing corporation for the purchase of shares in a bank.

A corporation cannot in its own name subscribe for stock, or be a corporator under the General Railroad Law, nor can it do so by a simulated compliance with the provisions of the law through its agents as pretended corporators and subscribers of stock. *Central R. Co. v. Pennsylvania R. Co.* 31 N. J. Eq. 475.

A railway company may not purchase stock in another railway company with intent to hold it, and especially with intent to use the power thus acquired to secure an interest in the management of the latter. *Pearson v. Concord R. Corp.* 63 N. H. 537; *Central R. Co. v. Collins*, 40 Ga. 582, followed in *Hazelhurst v. Savannah, G. & N. A. R. Co.* 43 Ga. 18 L. R. A.

13; *Milbank v. New York, L. E. & W. R. Co.* 64 How. Pr. 20.

A corporation engaged in business of a public character will not be allowed to gain control of the stock of other corporations engaged in the same business and so create a monopoly. *People v. Chicago Gas Trust Co.* 8 L. R. A. 497, 150 Ill. 363.

A corporation formed for the purposes of creating or operating gas-works and manufacturing and selling gas, has no power to purchase and hold or sell shares of stock in other gas companies as an incident to such purpose of its formation though such power is specified in its articles of incorporation. *Ibid.*

In the course of the opinion in *Hodges v. New England Screw Co.*, 1 R. L. 812, 53 Am. Dec. 624, it was said that religious and charitable corporations, and corporations for literary and scientific purposes, may properly invest in the stock of other corporations. Insurance companies may invest in the stock of banks and railroads and the like. Such investments are in the line of their business.

And so in *Pearson v. Concord R. Corp.*, 63 N. H. 537.

But in *Berry v. Yates*, 24 Barb. 190, it was held that an insurance incorporation may not invest its moneys to sustain another corporation, in a similar or dissimilar business.

In *State v. Butler*, 86 Tenn. 614, it was held that an insurance company had no power by purchase to vest in itself the stock and franchises of a bank, there being no express authority to do so either in the charter, or by additional legislative grant.

a. May take stock in payment of debts.

Under extraordinary circumstances it may be necessary for a national bank, or a manufacturing corporation, or a railroad corporation, to acquire

sarily implied in it." Green's Brice, *Ultra Vires*, 91, note b, and American cases cited. "A corporation has no implied right to purchase shares in another company for the purpose of controlling its management, nor may a corporation hold shares in another company as an investment, unless this be the usual method of carrying on its proper business. A corporation must carry on its business by its own agents, and not through the agency of another corporation. It is clear, also, that a corporation has no implied right to speculate in shares, unless this be the kind of business for which the company was founded." 1 Morawetz, *Priv. Corp.* § 431.

The evidence shows that the declared purpose of complainant in buying in the shares held by the defendant was to enable it to manage and control the business of the Tennessee company in the interest of the Ohio company. There is no pretense that it had any express power to purchase shares in another company, and it is too clear to need argument or further citation of authority that it had no implied authority to purchase and hold shares, either in its own name or in that of a trustee, for the purpose of controlling another corporation. That these corporations were engaged in a similar business does not help the case. The purpose and intent in granting a charter is that the corporation shall carry on its business through its own agents, and not through the agency of another corporation. The public policy of this state will not permit the control of one corporation by another. Especially is this true when a foreign corporation thus undertakes to control and swallow up a domestic

company. Such control of one corporation by another in a like business is unlawful, as tending to monopoly. The result is that this purchase of shares for the express object of controlling and managing another corporation was *ultra vires*, and therefore unlawful and void. Being void, it was of no legal effect, and no rights result from it, enforceable by or through the courts of this state, when such aid is invoked in furtherance of the unlawful agreement.

But it has been insisted very earnestly by the able and learned counsel for complainant that, when the contract had been fully executed by the plaintiff, the defendant should not be permitted to invoke such defense to a suit brought to compel performance; that to permit such a defense would work injustice, and enable defendant to repudiate his liability while holding on to the price he has received. There are cases where, the contract being fully executed on both sides, the court in the interest of justice, has refused to aid either in obtaining a rescission. *Whitney Arms Co. v. Barlow*, 68 N. Y. 62, 20 Am. Rep. 504, is one of this class. So there are cases where the defense of *ultra vires* has not been entertained when the defect was in the mode of executing the contract or in the power of the agent. So there are many cases holding the party relying upon the defense of *ultra vires* to an accountability for the benefit received. Green's Brice, *Ultra Vires*, 717, and note at end of chapter. Again, there are cases where the courts have refused to entertain suits to recover property from corporations which is held in excess of charter capacity. In such cases the courts have held

stock in another corporation, as in satisfaction of a valid debt, or by way of security, but with a view to its subsequent sale or conversion into money. First Nat. Bank of Charlotte v. National Exch. Bank of Baltimore, 62 U. S. 123, 23 L. ed. 681; Fleckner v. Bank of United States, 21 U. S. 8 Wheat. 351, 5 L. ed. 634; First Nat. Bank of Charlotte v. National Exch. Bank of Baltimore, 39 Md. 600.

One manufacturing corporation may take stock in another for the payment of a debt. *Howe v. Boston Carpet Co.* 16 Gray. 495.

It was held in *Hodges v. New England Sewing Co.*, 1 R. 1, 312, 58 Am. Dec. 624, that a sewing company might have rightfully taken stock in an iron company in payment for property if it had been taken with a view to sell again.

In *Franklin Bank v. Commercial Bank*, 36 Ohio St. 361, both corporations were organized under an Act providing that no banking company should hold or purchase any portion of its stock, or of the stock of any other company, unless such purchase should be necessary to prevent loss upon a debt previously contracted in good faith. It was held that the refusal of the defendant to permit the transfer upon its books, to the plaintiff, of certain shares of stock taken by the latter as security at the time of loaning a sum of money, did not amount to conversion of the stock.

A statute forbidding one corporation to subscribe for or purchase stock or securities of another corporation, except in payment of a bona fide debt, does not apply to a case where one corporation, which made advances to another on the security of its mortgage bonds, which it is unable to redeem, makes further advances secured by its bonds and stock. *Taylor County Ct. v. Baltimore & O. R. Co.* 35 Fed. Rep. 161.

18 L. R. A.

2. Power to deal in its own stock.

A corporation may, if it acts in good faith, buy and sell shares of its own stock. *Republic L. Ins. Co. v. Swigert*, 12 L. R. A. 323, 136 Ill. 150; *Clapp v. Peterson*, 104 Ill. 25; *Chetlain v. Republic L. Ins. Co.* 86 Ill. 223; *Chicago, P. & S. W. R. Co. v. Marseilles*, 84 Ill. 145; *Johnson County Comrs. v. Thayer*, 94 U. S. 651, 24 L. ed. 133; *Re Republic Ins. Co.* 3 Biss. 452; *First Nat. Bank of Salem v. Salem Capital Flour Mills Co.* 39 Fed. Rep. 89; *Blalock v. Kernersville Mfg. Co.* 110 N. C. 99.

A corporation to which power is given to purchase all kinds of property that may be deemed desirable may purchase its own stock. *Iowa Lumber Co. v. Foster*, 49 Iowa. 25.

But corporations cannot buy in or deal with their stock to the prejudice of creditors. *Heggie v. People's Bldg. & Loan Assn.* 107 N. C. 581.

And the purchase will be declared illegal at the instance of creditors injured thereby. *Fraser v. Ritchie*, 3 Ill. App. 554; *Heggie v. People's Bldg. & Loan Assn.* *supra*.

Business corporations cannot exchange their goods for their capital stock so as to reduce or retire the latter. *St. Louis Carriage Mfg. Co. v. Hilbert*, 24 Mo. App. 338.

In *Barton v. Port Jackson & U. F. Pl. Road Co.*, 17 Barb. 407, the company was organized under an Act giving it power to hold, purchase, and convey such real and personal estate as the purposes of the corporation should require, and it was held not to have authority to purchase its own stock.

A sale of its own stock to a bank was held in *Farmers & M. Bank v. Champlain Transp. Co.*, 18 Vt. 181, to remove the disability of the stockholder on the ground of interest and make him competent to testify for the bank.

that the defect in the power could not be set up in a collateral way, and that the state only could complain of such violation. To this effect were our own cases of *Barrow v. Nashville & C. Turnp. Co.*, 9 Humph. 803, and *Heiskell v. Chickasaw Lodge*, 87 Tenn. 668.

The question here is not like any of these. The complainant sues upon its contract, and in affirmance of it seeks to have the defendant perform an agreement which sprung from, and was collateral to it. It has received the shares it purchased, and holds onto them. It simply asks that the defendant be further compelled to perform its contract, by contributing, in accordance with his agreement, his proportion of the liability paid off by complainant in protection of the property of the McMillan Marble Company. The suit is clearly in furtherance of the original unlawful and void contract. That the contract has been executed by the plaintiff does not make it lawful, or entitle it to an enforcement of it. This proposition was very plainly put in *Pittsburgh, U. & St. L. R. Co. v. Keokuk & H. Bridge Co.*, where it was stated, as a result of all the previous discussions of that court upon this subject, that "a contract made by a corporation, which is unlawful and void, because beyond the scope of its corporate powers, does not, by being carried into effect, become lawful and valid; but the proper remedy of the party aggrieved is by disaffirming the contract, and suing to recover, as on a *quantum meruit*, the value of what the defendant has actually received." 131 U. S. 389, 38 L. ed. 163. The case of *Central Transp. Co. v. Pullman's Palace Car Co.* is an exceedingly interesting case, as it involved a consideration of the circumstances under which a defendant may interpose the defense of *ultra vires*, notwithstanding full performance by the plaintiff. In that case the Central Transportation Company had leased

and transferred all its property of every kind to the defendant company, which was engaged in a similar and competitive business. The lessee company undertook to pay all of the debts of the lessor company, and to pay to it annually the sum of \$264,000 for a term of 99 years. Possession was taken, and the installments paid for a number of years. The suit was for a part of the installment for the last year before suit. The defense of *ultra vires* was interposed and sustained. The court held that the sale was unauthorized and in excess of the power of the selling company. It was urged for the plaintiff, as in this, that even if the contract was void, because *ultra vires* and against public policy, yet that having been fully executed on the part of the plaintiff, and the benefits of it received by the defendant for the period covered by its duration, the defendant was estopped to set up the invalidity of the contract as a defense to an action to recover the compensation agreed on for that period. After reviewing its own decision on this branch of the case, the court said: "The view which the court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows: A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation, is defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation

A water-power company when its business is no longer profitable and its water power has been extinguished by contract with the state may on a sale of its land take its own stock in payment. *Dupee v. Boston Water Power Co.* 114 Mass. 37.

The charter of a corporation may authorize it to buy and sell its own stock after it has been issued and paid for the same as any other article. *Yeaton v. Eagle Oil & Ref. Co.* (Wash.) April 22, 1892.

An agreement on certain conditions to retake its own stock may be made by a corporation on selling the stock, if the stock has once been regularly issued and paid for, but such an agreement cannot be made as a part of the original issue of stock. *Ibid.*

A contract for the surrender of stock to a corporation is valid where its articles of incorporation do not prohibit it but its powers enumerated are broad enough to include such right. *Rollins v. Shaver Wagon & Carriage Co.* 80 Iowa, 330, 20 Am. St. Rep. 427.

In *Coleman v. Columbia Oil Co.*, 51 Pa. 74, a claim by a stockholder that a purchase of its own stock by the corporation was illegal was rejected on the ground that the stockholder had affirmed the transaction by bringing suit for his share of the stock thus bought.

a. May take its own stock in satisfaction of debts.

In *Ex parte Holmes*, 5 Cow. 426, it was said that without doubt an incorporated company could take its own stock in pledge or payment and keep 18 L. R. A.

it outstanding to prevent merger. But it was held that the company could not hold its stock so as to give its directors or trustees a right to vote it in.

In *Columbus City Bank v. Bruce*, 17 N. Y. 507, it was held that the bank might receive its own stock in payment of debts, and that stock so transferred would not be extinguished without the manifestation of an intent that such a result should follow.

In *Taylor v. Miami Exporting Co.*, 6 Ohio, 176, it was held that a bank might receive its own stock in payment of a debt and hold it as it did its other corporate property.

And stock so taken may be sold for the benefit of the corporation. *Chillicothe Branch of State Bank of Ohio v. Fox*, 3 Blatchf. 431.

In *Union Nat. Bank v. Hunt*, 7 Mo. App. 42, it was held that a national bank could purchase its own stock to prevent loss upon a debt although it must sell it again within six months.

On the sale by a national bank of its own stock which it has taken to prevent a loss upon a debt it may receive some of its own stock as collateral security for the purchase price. *Union Nat. Bank v. Hunt*, *supra*.

b. Donations.

In Illinois a corporation may receive a donation of shares of its own stock. *Eggmann v. Blanke*, 40 Mo. App. 516.

And in *Rivanna Nav. Co. v. Dawsons*, 3 Gratt. 19, 46 Am. Dec. 123, a bequest to a corporation of its own stock was held good. A. P. W.

is acting within the general scope of the powers conferred upon it by the Legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisite to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing law, neither the corporation, nor the other party to the contract, can be estopped by assenting to it, or by acting upon it to show that it was prohibited by those laws. . . . A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract." 139 U. S. 60, 85 L. ed. 68. This seems to us to fully and clearly state the rule.

The passage cited by counsel from *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 287, 24 L. ed. 695, "that the doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail when it would defeat the ends of justice or work a legal wrong," is misleading, and, if literally construed, would result in an erroneous practical extension of the powers of corporations. We do not understand that a result required by adherence to the law would be either unjust or a legal wrong. The learned judge doubtless intended to be understood that the defense would be a legal wrong only when the law did not require its consideration by the court. This passage, and one of similar character in *San Antonio v. Mehaffy*, 96 U. S. 312, 24 L. ed. 816, was uncalled for in the case in which it was used, and in *Central Transp. Co. v. Pullman's Palace Car Co.*, *supra*, characterized as a mere passing remark. To sustain the suit as now presented would be in affirmance and furtherance of an unlawful and void contract. It is in no sense a suit in disaffirmance. Whether complainant could tender back the shares received, and maintain a suit to recover the money paid for the shares upon an implied agreement to return money which the defendant had no right to retain, is a question not presented upon this record.

The decree dismissing the bill must, upon the grounds herein stated, be and accordingly is affirmed.

CONNECTICUT SUPREME COURT OF ERRORS.

City of NEW HAVEN, *Apph.*,

v.

NEW HAVEN & DERBY R. CO. *et al.*

(.....Conn.....)

1. An agreement by a city not to oppose a railroad company's closing certain of its streets crossed by the latter at grade in consideration of the making of compensation solely to private individuals is void as against public policy.
2. The invalidity on the grounds of public policy of a contract by a city with a railroad company will be considered by the court in an action to enforce it although such invalidity is not pleaded.
3. A municipal corporation cannot become a trustee to collect in its own name, especially at its own expense, separate sums of money due to some of its citizens for damages from the closing of streets by a railroad.
4. A contract between a city and a railroad company by which the former consents to the closing of certain streets upon the consideration that the latter shall pay certain damages to thirty-five different property holders, if enforceable at all, can be enforced only by such property holders.

5. A demurrer to a complaint by a city upon a contract between it and a railroad company by which it consents to the closing of certain streets on condition that the company pays to thirty-five different property holders injured thereby the damages sustained must be sustained even if such property holders have a right of action thereunder, since such rights would be several and not joint and the court is not required to select and substitute one of the thirty-five claimants in place of the city.

(September 12, 1892.)

APPEAL by plaintiff from a judgment of the Superior Court for New Haven County sustaining a demurrer to the complaint in an action brought to recover the amount alleged to be due under a contract by which defendants were alleged to have undertaken to recompense certain property holders for damages caused by closing certain streets over which defendants' road extended. *Affirmed.*

The facts are stated in the opinion.

Messrs. C. T. Driscoll, C. S. Hamilton, Edmund Zacher and David Callahan,
for appellant:

If anybody has a right of action upon this

NOTE.—The power of a municipal corporation to act as a trustee, which has been affirmed in numerous cases cited in a note to *Dalley v. New Haven* (Conn.) 14 L. R. A. 60, although denied in that case, 18 L. R. A.

was extended by those cases only to trusts which were for charitable purposes, none of them going so far as to uphold such a trust as that asserted in the main case above.

See also 22 L. R. A. 393; 24 L. R. A. 403.

contract or for the acts done by the defendants whereby the property owners suffered the damages which the arbitrators have found that they have, there was manifest error in rendering the judgment dismissing the complaint.

Where there is a legal right, there is a legal remedy by suit, whenever it is invaded.

State v. Bulkeley, 14 L. R. A. 675, 61 Conn. 287.

The law and sound justice have very little respect for the plea of *ultra vires*, when first urged after the party who pleads it has obtained all the advantage of the performance of the contract which he claims to be *ultra vires*.

But the plea of *ultra vires* should not as a general rule prevail, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong.

Beach, Priv. Corp. § 222.

If the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation.

One who has received from a corporation the full consideration of his engagement to pay money, either in service or property, cannot avail himself of the objection that the contract thus fully performed by the corporation was *ultra vires*, or not within the chartered privileges and powers.

3 *Beach, Priv. Corp.* § 424; *Whitney Arms Co. v. Barlow*, 68 N. Y. 70, 20 Am. Rep. 504; *Diamond Match Co. v. Roeder*, 106 N. Y. 478; *Oil Creek & A. R. R. Co. v. Pennsylvania Transp. Co.* 88 Pa. 160; *Bigelow, Estoppel*, pp. 465-468.

The New Haven & Derby Railroad Company is liable for these damages, and the defendants cannot set up as a defense that the city had no power to make this contract.

Burritt v. New Haven, 42 Conn. 174.

But a municipal corporation has the right to affix conditions to its consent to a railroad corporation taking or occupying any of the streets of the city.

2 *Dill. Mun. Corp.* 4th ed. § 706, and cases there cited.

And municipal corporations also have the power to submit claims to arbitration.

Dill. Mun. Corp. 4th ed. 478.

Messrs. Simeon E. Baldwin and William Trumbull, for appellees:

The city made the agreement for the benefit of future claimants, whose claims would only come into existence in case of the closing thereafter of parts of three streets. If any such claim had thereafter come into existence, the claimant would have had a right of action on this agreement, if on his demand, the company refused to prepare the papers for or enter into a submission with him.

But the city would have had no right of action for damages then, and has none now.

The city has suffered no damages, and could not suffer any.

No averments are made to put the plaintiff in the position of the assignee and equitable and bona fide owner of a chose in action, under Conn. Gen. Stat., § 981.

Bizby v. Parsons, 49 Conn. 488, 44 Am. Rep. 246; *Kinns v. New Haven*, 82 Conn. 210, 18 L. R. A.

A municipal corporation has no power to engage in litigation in behalf either of its citizens or of strangers.

Dailey v. New Haven, 14 L. R. A. 69, 60 Conn. 814.

The city, in this case, has no capacity to collect \$30,000 damages, and distribute the money among numerous claimants, and the contract never contemplated such a procedure. On the contrary, the contract gave a right of action to any individual injured by its breach.

Coster v. Albany, 48 N. Y. 399.

This suit is brought to collect "awards" made in favor of thirty or forty different persons, on as many different causes of action.

All these parties could not have united in one action to recover a joint judgment for their several awards. The claim of each would be one that did not "affect all the parties to the action."

Conn. Gen. Stat. § 878; *Miles v. Strong*, 60 Conn. 898.

Fenn, J., delivered the opinion of the the court:

In this action, the defendants, the New Haven & Derby Railroad Company and the Housatonic Railroad Company, having severally demurred to the amended complaint, which demurrers were sustained by the superior court, the plaintiff, by its appeal, has brought before this court the question of the sufficiency of such complaint. The material allegations are as follows: The New Haven & Derby Railroad Company, having operated and located its railroad tracks through a portion of the city of New Haven, which tracks crossed at grade certain streets in the city, the company desired to make changes for its benefit, in order to obtain which they desired, subject to the approval of the railroad commissioners, to close, in part, said streets, and thereby cut off travel on the same where they crossed their tracks. Such changes, if made, would greatly injure, damage, and cut off from public travel and convenience the property of many persons located on or near said streets, among whom are the persons named in the complaint; and the company knew that, unless provision was made by it for recompensing the persons whose property would be so injured by such closing, the city of New Haven, on behalf of such persons themselves, would strenuously oppose such change, and that, with such opposition, it would be impossible to obtain the same, for which it had preferred its petition to the railroad commissioners, notice of which had been given the city, and which application to the commissioners was heard by the court of common council, and was pending before it. In order to obtain and procure from this joint special committee a recommendation to the court of common council of the passage of a vote that the city would make no opposition to the approval by the railroad commissioners of the location and proposed change desired, the railroad company, on February 16, 1888, executed and delivered to the city a written contract, under seal, which was procured, made, and entered into, at the request of the owners of said property, and for their benefit and pro-

tection, by which the railroad company, in consideration of the joint special committee having unanimously recommended to the court of common council the passage of the vote that the city would make no opposition to the approval by the railroad commissioners of said location, did covenant and agree to and with the city that it would refer any and all claims for damages arising from the discontinuance of the streets, as described in said location, which might be made by any party or parties against the company, whether the parties did or did not own real estate abutting on said parts of the streets, to the final decision and award of three disinterested arbitrators, to be appointed by any judge of the superior court on due notice to the parties claiming such damages, and would prepare all necessary papers to secure any such arbitration at its sole expense, free of charge to the parties claiming damages, and would abide by and perform whatever award might be adjudged to any party for any excess of damages over benefits that he might sustain according to such award within thirty days from the award, together with the fees of the arbitrators, as directed by the award. The committee did recommend the passage of such vote. The report was accepted by the common council, and approved by the mayor. Afterwards, on October 15, 1888, the railroad commissioners did, upon the application of said company, approve in writing, with a single alteration, an amended location, pursuant to which the company closed two of the three streets named, and bridged the other. By reason of these changes certain property owners, named in the complaint, were, and their property was, greatly damaged and injured, and cut off from public access and travel, being the property owners for whose benefit and at whose request said contract was made, all of whom had just claims for damages which ought to have been paid by the company, but the company refused to pay upon request, or to submit said claims to arbitration, or to abide by their said agreement. Afterwards, in August, 1889, the company leased its property and franchises to the other defendant, which assumed all its liabilities and obligations, and is now liable therefor. Afterwards, on May 9, 1890, the parties claiming such damages, and at whose request and for whose benefit the contract was made, having demanded payment, the plaintiff preferred its application in their behalf, at their request, and for their benefit, for the appointment of arbitrators, to a judge of the superior court, giving due notice, and said judge made such appointment, and the arbitrators, so appointed, heard the claimants, who proved their claims before them; and afterwards, on November 7, 1890, the arbitrators made their award, awarding to the different persons named in the complaint, some 35 in number, the several sums therein stated, amounting in the whole to the sum of \$22,867, the fees of the arbitrators for said service being \$384. The arbitrators reported said awards to the court of common council of the city of New Haven, which accepted their report, and the doings of the

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arbitrators in connection therewith; and thereupon the plaintiff notified each of the defendants, and demanded payment of the several amounts awarded to said several persons, and the said several persons likewise made demand, but the defendant refused to pay. And said several persons and claimants are ready and willing to accept the amounts fixed by the awards, in full satisfaction of their claims, and in full payment, and upon such payment to release the defendants from all further claim and liability on said accounts and matters. The plaintiff has paid the arbitrators their fees of \$384.

There can be no doubt but that the performance of a public duty to lay out, make, and maintain necessary streets within its limits is imposed by law and rests upon the plaintiff city; and the interest of the city in such streets is commensurate with the duties imposed. The plaintiff would therefore have the unquestionable right to appear, upon such an application as that made by the Derby & New Haven Railroad Company to the railroad commissioners, as a party in interest, and to be heard in opposition to the same. And it would be proper for the plaintiff to stipulate, as a condition of the withdrawal of such opposition, that the company should do such acts or make such compensation to the plaintiff as should be a reasonable and just equivalent for any added burden, direct or indirect, upon the municipality, in consequence of any such change. That the plaintiff should do this would be a simple measure of justice to its citizens and taxpayers. But this is not the case which the record presents to us. On the contrary, it expressly, and by repeated averments in the complaint, appears that the condition exacted in consideration of the withdrawal of opposition was required at the instance of private parties, and for their sole and exclusive benefit and advantage. The interest of the city is therefore entirely irrelevant to the present consideration, and must be wholly laid out of the case. Indeed, so far is the existence of such interest a justification for the action taken, that it may be truly and forcibly said that, if the proposed change would result in either benefit or injury to the plaintiff, if the former, opposition to it ought not to have been made, and if the latter, ought not have been withdrawn, on any such ground as the complaint and agreement recite. The interest of the city, as such, begins where the interest of adjoining landowners ends, and ends where such private interest begins. Conceding that it is a part of the duty of the city to promote to the convenience of the traveling public, it in no wise alters the proposition. If the change proposed in fact renders the streets of the city less convenient for public travel, compensation to landowners for damages sustained by their property neither lessens such inconvenience, nor furnishes to the public any just equivalent therefor. The case before us, therefore, considered in its true light, is that of the plaintiff exacting, as a condition of the withdrawal of an opposition which neither in its own behalf nor in the interest of the general traveling public it

claims to have had any reason to make, matters purely of private advantage to private parties, most of whom were indeed citizens of New Haven, but one of whom is stated in the complaint to be a corporation located elsewhere. It is true that the right of the plaintiff to make such a contract is not questioned in the very numerous grounds of demurrer presented in behalf of the defendants. It may have been thought that such an objection would come with a savor of ill grace from the defendant, who, on the face of the record, appears, for its own advantage, to have induced the making of the contract in question. But, however that may be, since it underlies the decision to be arrived at upon other grounds, which are stated, it is proper for us to consider it; and it would not be proper for us to neglect to do so, if such neglect would lead to the possible inference of approval of action upon the part of a joint special committee of the court of common council of the plaintiff city, which, however pure may have been in fact the motive which inspired it in this particular instance, it would be entirely subversive to public policy to commend. That a public officer should regulate his official conduct by considerations of private benefit to himself or to others can never, as we trust, receive the sanction, either express or tacit, of this court. And, even if we were at liberty to pass this question of the validity of the consideration of the contract in silence, it would not avail the plaintiff. Could the city have a right of action at law for damages resulting from its breach? Clearly not in its own right. It could recover nothing which would go into its treasury and belong to it. *Kinne v. New Haven*, 83 Conn. 210. But, indeed, the plaintiff does not claim this. The plaintiff claims that, if the contract is valid, it creates the plaintiff the trustee of an express trust, namely, a person with whom a contract is made for the benefit of another, and that such a person may sue without joining the persons represented by him, and beneficially interested in the suit. Gen. Stat. § 886; *Rules of Practice*, 58 Conn. 561, 562. But the reason stated in *Dailey v. New Haven*, 60 Conn. 819, 820, 14 L. R. A. 69, applies with equal force in this case, and demonstrates that the plaintiff could not legally become such a trustee, and, if such were the effect of the agreement under consideration, (as we do not think it is, or was intended to be,) we should be compelled to hold it, also for that reason, so far, at least, illegal and void. In the case just cited, in speaking of the rule that "municipal corporations have only such powers as are expressly granted in their charters, or are necessary to carry into effect the powers so granted," this court said: "It is a rule of great public utility, and courts should recognize and enforce it, as a safeguard against the tendency of municipalities to embark in enterprises not germane to the objects for which they are incorporated." The wisdom of these remarks and the utility of this rule receive signal illustration in the case before us. If the position of the plaintiff is correct, the city is to be (and, whether

correct or not, it has been) embarked in the enterprise of undertaking to collect, in its own name, and presumably at its own expense, separate sums of money due from one or both of these defendants to some thirty-five private parties for damages, involving expensive and doubtful and protracted litigation, in which it has already expended a considerable sum from its treasury in the one item of arbitration fees, not to speak of other and probably much greater outlays, and in which, in the event of its ultimate success in recovering judgment, and in collecting any sum whatever as damages, it is manifest that, except in the most improbable event of such recovery being commensurate with the aggregate of the several sums claimed, the question of the proper apportionment of the sums collected among the various claimants, none of which are alleged in the complaint to be willing to accept less than the entire sum severally awarded to such claimant, is likely to give rise to further questions, and lead to further litigation. How is it possible that the city can derive any advantage from such litigation, in which the loss must be its own, and the benefit inure to others? Would the court hesitate, at the instance of a taxpayer, to enjoin the continuance of such proceedings; and, if not, would it not be because, even waiving the original invalidity of the contract, its enforcement by the city, as the trustee of an express trust, would be opposed to public policy, and beyond its power? It seems to us that if any right of action could accrue for the breach of the agreement in question, it must reside in the parties severally injured, and be exercised by them, and cannot be by the plaintiff in their behalf.

But the plaintiff further insists that, if any one has a right of action under the agreement in question, the demurrer should not have been sustained, and the present suit dismissed; and the provisions of the practice rules are quoted. It is further said, and truly, that the want of proper parties is not alleged as a ground of demurrer. But, although our decision rests on other grounds, we will add that herein the plaintiff misconceives the true difficulty, which is not the want of proper parties. If the plaintiff is not such a party, there can be none for the cause or right of action alleged. There is no community of interest between the several claimants, and, if each of them would have a cause of action for his separate damage, there can be no joint action maintained by all of them to recover such damage, unless the plaintiff, by reason of the contract, had a cause of action for the whole damage. No one else (there having been no assignment to the plaintiff or any one else) can have it. If the plaintiff has a right of action for the whole, such action is within the jurisdiction of the superior court. As to most of the several claimants, the amount of their several claims would be below the jurisdiction of such court. Clearly it would not have been the duty of the trial court to have required or proposed such an amendment of the complaint as should have substituted one of the thirty-five claimants

whose claim was of a sufficient amount to place it within the jurisdiction of the superior court, suing individually and in his own behalf, for the present suit of the plaintiff. There would be but little semblance of similarity between the two. The conclusions reached upon the questions discussed

render the consideration of the many other questions presented by the demurrers unnecessary.

There is no error in the judgment appealed from.

The other Judges concurred.

ALABAMA SUPREME COURT.

LOUISVILLE & NASHVILLE R. CO.,

Appt.,
v.

William H. BOLAND.

(.....Ala.....)

1. It is a matter of common knowledge that the demands and exigencies of commerce require the cars of one railroad company to be hauled over the road of another.
2. The extra hazard to a brakeman by the use of cars with couplings of different patterns some of which have double dead-woods or double buffers is one of the risks or dangers assumed by entering the employment.
3. It is not negligence in a railway company to haul cars of another company with double dead-woods or double buffers while couplings of a different pattern are in use on its own road.
4. A brakeman twenty-six years of age and of average intelligence is sufficiently warned of the increased danger which is open to ordinary observation in coupling cars with double dead-woods or double buffers which sometimes pass over the road by a caution that railroading is dangerous and that coupling cars is specially so requiring very great care, where he is further notified that cars with different coupling apparatus are hauled over the line.

(November 3, 1892.)

APPEAL by defendant from a judgment of the Circuit Court for Jefferson County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Hewitt, Walker & Porter for appellant.

Messrs. Leonidas C. Dickey, J. F. Gillespie and Talliaferro & Houghton, for appellee.

It is the duty of employers to inform servants of extra hazard or danger.

Missouri Pac. & I. & G. N. R. Co. v. White, 76 Tex. 103, 18 Am. St. Rep. 83. See also *Brennan v. Gordon*, 118 N. Y. 489, 16 Am. St. Rep. 775, and *note*; *Wood, Mast. & S. p. 714.*

Failure to warn of danger in service is negligence.

NOTE.—The denial of liability of a railroad company for running cars from another line with double buffers in the same train with other cars may be fairly considered settled law under the above decision and those cited in the opinion. 18 L. R. A.

Jones v. Florence Min. Co. 66 Wis. 263, 57 Am. Rep. 269; *Towns v. Vicksburg, S. & P. R. Co.* 87 La. Ann. 630, 55 Am. Rep. 508; *Ellis v. New York, L. E. & W. R. Co.* 95 N. Y. 546.

It is the duty of an employer to warn an inexperienced servant.

See *Louisville & N. R. Co. v. Hall*, 87 Ala. 719; *Williams v. North & South Ala. R. Co.* 91 Ala. 635; 14 Am. & Eng. Encyclop. Law, p. 897.

The question of negligence *vel non* in this case was properly left to the jury.

See *Pennsylvania Co. v. Long*, 94 Ind. 250; 15 Am. & Eng. Encyclop. Law, p. 845, and cases there cited; *Smoot v. Mobile & M. R. Co.* 67 Ala. 13; *Louisville & N. R. Co. v. Allen*, 78 Ala. 494; 14 Am. & Eng. Encyclop. Law, p. 904, *note 5.*

An inexperienced brakeman whose inexperience is known to his employer, and who has accepted the position of brakeman on a construction train, and who has not been warned of the danger, does not take the risk upon himself of coupling cars with double draw-heads or buffers, which are essentially different from, and more dangerous than, those with which he is acquainted and accustomed to use in his employer's business.

The employer is ever charged with the duty of care to those in his service, and must not subject them to risk by his own negligence.

Chicago & N. W. R. Co. v. Bayfield, 87 Mich. 205, and cases there cited.

When a servant is sent into a dangerous place, or put to dangerous tasks, of the risk of which he is ignorant, due care on the part of the master requires that he shall give the servant notice and put him on his guard.

Svoboda v. Ward, 40 Mich. 420, and cases there cited.

As to its being negligence in a railway company to have cars furnished with buffers of unusual height, see—

Towns v. Vicksburg, S. & P. R. Co. 87 La. Ann. 630, 55 Am. Rep. 508; *Ellis v. New York, L. E. & W. R. Co.* 95 N. Y. 546, and cases there cited.

Thorington, J., delivered the opinion of the court:

Appellee brought suit against the Louisville & Nashville Railroad Company to recover damages for an injury sustained by him while in the company's employment as a brakeman. At the time of his employment he was about twenty-six years of age, and without experience in the railroad business. When the injury complained of was received he had been acting as a brakeman on construction trains on appellant's mineral road for about four weeks, and during that time

had exhibited skill and dexterity in coupling cars. At the beginning of his employment he was instructed generally that railroading was a dangerous employment, and that coupling cars was specially dangerous, and to be done with great care and particularity. On being transferred from the first construction train, on which he had been employed for about two weeks, to another train of the same class, he was again instructed by his conductor that "coupling cars was a very dangerous business, and that he should use great care in making couplings." He was also informed that "there were cars on the company's line of railroad with different styles of couplings, and that he must be very particular and careful in coupling cars." After appellee had been in service as such brakeman for three or four weeks, he was called upon to couple two cars having double dead-woods or buffers, and which cars belonged to another system of railway, but were then being hauled over appellant's road. These double dead-woods or buffers are horizontal timbers at the end of the car, projecting, one on each side of the drawhead, the latter extending three or four inches beyond the dead-woods. In coupling, the drawhead yields to the impact of the two cars, and the dead-woods or buffers of the opposing cars coming together arrest the force of the blow. The coupling is done by holding the coupling pin with one hand above the dead-woods or buffers, while the link is guided by the other hand underneath the dead-wood or buffer. Coupling cars of this kind is more dangerous, according to the proof, than coupling those without buffers or dead-woods. Appellee had never seen a car with a coupling of this pattern, although the company frequently used such cars on its line; that is, hauled cars of that kind for other railroads. The testimony for appellee showed that he was compelled to make the coupling in a hurry, and that the cars came together quickly, and with force, and that he did not observe that the construction of the cars or their coupling was different from those to which he had been accustomed. On the other hand, appellant's testimony shows that appellee was not hurried in making the coupling, that the dead-woods or buffers were plainly open to his observation, and that the increased danger was patent. Appellee undertook to make the coupling as he would have done with ordinary cars, and his arm was caught and crushed between the buffers, causing permanent injury. The negligence alleged, and on which the right of recovery is based, is the negligence of the company in hauling on its line the cars of another company, so constructed as to render coupling more hazardous than it is with appellant's cars, and in not instructing appellee specially as to the increased danger in coupling cars with double dead-woods or buffers.

The questions reserved for review in this court are the exceptions of appellant to the charge given by the court at the instance of appellee, the refusal of the court to give the general charge for appellant, and the denial by the court of appellant's motion for a new

trial. The ruling of the court upon the charges is involved in the correctness of its ruling in denying the motion for a new trial, and we shall address ourselves to the determination of that question without specially noticing the others. It is the duty of the master to furnish his employes, for use in the prosecution of his business, safe and suitable machinery, and to keep the same in good repair. But this duty is not an absolute one, and is discharged when the master exercises reasonable care and prudence in selecting machinery and appliances for the servant's use, in view of the nature of the business or employment and incidental hazards. No rule of law imposes upon the master the duty to select the latest and most approved machinery, but only such as is suitable for the purpose for which it is employed; and in selecting which of several styles of machinery or apparatus he will use in his business the discretion of the master is absolute, subject alone to the exercise of reasonable care and prudence. *Kahler v. Schwenk*, 144 Pa. 348, 18 L. R. A. 874, and notes; *Wood, Mast. & S.* §§ 881, 883; *Smoot v. Mobile & M. R. Co.* 67 Ala. 18.

There is an entire absence of proof showing that the couplings or double buffers to the cars which caused the injury to appellee were defective, or out of repair, or that they were discarded or prohibited on well-regulated railways, or that they were unsuited to the service; but it does appear that they are a style of coupling used on one at least of the great railway systems of this country, and that cars so constructed were frequently hauled or transported over appellant's road. Nor does appellee base the charge of negligence on the fact of the coupling to said cars being defective or out of repair, or unsuited to the business, but on the alleged fact that cars with that style of coupling are more dangerous to couple than those belonging to appellant, and the testimony sustains that charge. The question, therefore, is presented whether it is negligence *per se* in a railway company to receive from other companies, and haul over its own track, cars having different styles of coupling from those in use on its own cars, and which increase the hazard of coupling. It may be said it is a matter of common knowledge that the demands and exigencies of commerce require in the transportation of freight that the cars of one company shall be hauled over the road of another, and that, in order to meet this demand, the gauge of the tracks of the great trunk lines has been made uniform. This necessity has been recognized and provided for by statute in many of the states, including Alabama. Section 21 of article 14 of the Constitution, and section 1165 of the Code of 1886, carrying the same into effect, make it mandatory on railroads, when required, to transport or draw over its line the passengers, freight, or cars of any intersecting or connecting road, on reasonable terms, provided such cars are adapted to the gauge of its track, are sufficiently strong, and otherwise in proper condition for safe transportation. Probably in no other matter pertaining to the machinery

or apparatus used in the railroad business has human ingenuity and invention been so frequently and constantly taxed as in the efforts to improve car couplings, and lessen the danger of that particular employment, which, under the best conditions, is known to be attended with much hazard. As a result of this, the taste and judgment of the managers of railroads in selecting styles or patterns of coupling, it has been said, have been as varied as the ingenuity of others in their invention, and consequently not only do such patterns vary on different roads, but sometimes on the same road. Cars of these different patterns, carrying through freight, so often pass from one road to another that the extra hazard thereby occasioned in handling them by employés ought to be considered, and we may say is one of the risks or dangers necessarily incident to the employment or business, and which the servant must be deemed to have assumed at the time of entering the service. In determining the question of negligence on the part of the company in such cases, the question is not whether the couplings of the cars so received upon its road are different from those on its own cars, or whether they are the best in use, or whether they increase the hazard of coupling cars, but whether they are reasonably suited or adapted to the use to which they are applied. To say that a certain style or pattern of coupling increases the hazard if it is reasonably adapted to the purpose intended, or one that a railway company, in the exercise of reasonable care and prudence, would adopt, is simply to say that it requires greater care and skill on the part of the brakeman in using it than a coupling of a different pattern. While, as we have said, the duty rests on the master to provide safe and suitable machinery in the prosecution of his business, the presumption is he has performed that duty, and the burden is on the injured employé to show negligence in the discharge of such duty. So, likewise, it is the duty of a railroad company, under section 1165 of the Code, to which we have referred above, to receive from a connecting line of railway such cars only as are adapted to the gauge of its tracks, that are sufficiently strong, and otherwise in proper condition for safe transportation; and when it receives a car on its line from such other company the presumption is that it meets the above requirements. If it does not, and an employé is injured in consequence thereof, the burden is on him to show negligence on the part of the railway company in receiving or hauling a car not in proper condition for transportation over its road.

We have stated that the proof fails to point out any defect or fault in the coupling apparatus of the two cars in question, or that the pattern of coupling on them was unsuited to the business, and we may now go further, and say the proof also fails to show that such cars were not adapted to the gauge of appellant's track, or not sufficiently strong, or otherwise not in proper condition for safe transportation; but on the contrary, it is shown that they have been frequently hauled over appellant's line. If,

therefore, as we have indicated, the mere fact of the cars having couplings of a different construction from those of appellant's cars, and which required greater care and prudence in hauling them, did not *per se* make it negligence for appellant to haul them on its road, then appellee fails in his proof to support the charge of negligence based on those facts. We have carefully investigated the question arising on these facts, and, with one exception, the authorities hold that it is not negligence in a railway company to haul cars of another company with double dead-woods or double buffers, while couplings of a different pattern are in use on its own road. The cases which support this view are the following: *Pittsburg & L. E. R. Co. v. Henly*, 48 Ohio St. 608, 15 L. R. A. 384; *Michigan Cent. R. Co. v. Smithson*, 45 Mich. 212; *Hathaway v. Michigan Cent. R. Co.* 51 Mich. 253; *Indianapolis, B. & W. R. Co. v. Flanigan*, 77 Ill. 385; *Baldwin v. Chicago, R. I. & P. R. Co.* 50 Iowa, 680.

In the case last cited the act of negligence complained of was that the defendant received on its tracks cars of another company on which the "couplings, bumpers, or chafing irons," commonly called "dead-woods," were not the usual ones in use on its road, nor such as had been in use thereon at any time during which the plaintiff had been in defendant's employ, and that the same were of an "old and unusual pattern, not now in use on the cars of the defendant, and were imperfect and defective." The plaintiff had only been working for the defendant three or four days when he was injured while coupling the cars of another company with double dead-woods, which had been taken on its track with through freight. It was held that the defendant was not guilty of negligence in taking upon its track cars of that description, and that the additional danger from such cars "must be regarded as ordinary and incidental to the business." In the case of *Indianapolis, B. & W. R. Co. v. Flanigan* a similar question is elaborately discussed, and it is there held that a railroad company will not be liable to an employé for personal injury received while coupling cars having double buffers, simply because a higher degree of care is required in using them than in those differently constructed. Appellee, however, urges further that, if it was not negligence in appellant to have such a car on its track, it was appellant's duty to specially instruct him of the increased danger in coupling cars of that description, he being inexperienced in the business. It is unquestionably a high and binding duty of a master in assigning a young or inexperienced servant to work at or about dangerous machinery to give such servant detailed and special warning or instruction as to all latent dangers not discoverable by the exercise of reasonable and ordinary care on the part of the servant, but no principle of law imposes on the master the duty to explain to the servant patent dangers which are ordinarily incident to the service, and which it may reasonably be expected, under the circumstances, the servant

can see and appreciate. The duty of the master, in cases of latent defects, to explain, is the same, whether the servant be a minor or an intelligent adult; the difference being, however, that as great diligence in observing and comprehending the dangers is not to be expected of the young and inexperienced. The latter, as much as intelligent adults, are held, on entering a particular service, to have assumed the ordinary hazards incident to such service, including the risks of injury from open defects in machinery and appliances. As to latent risks, the duty of the master is not discharged when he simply instructs the servant in a general way that the service engaged in is dangerous; and especially is this true where the servant is a person who, from inexperience or want of education, would not likely have knowledge of such latent risks. In such cases he should not only be instructed that the service is dangerous, but, where extraordinary risks are to be encountered, he should be warned by the master, as far as possible, of their character and extent, if known to the master, or should be known to him. But, as we have said, this duty is required only as to latent dangers or risks, and we know of no rule or principle of law that requires the master to give any express or particular instructions to guard against such dangers as are manifestly obvious. In *Holland v. Tennessee O. I. & R. Co.*, 91 Ala. 444, 12 L. R. A. 232, this court uses the following language: "Whether the defendant was negligent or not in failing to notify and instruct the intestate and his fellow servants as to the dangers of the work they were directed to do depends upon the further consideration whether the peril involved in it was patent or latent,—such as could be seen and known by ordinary care and prudence in the use of the senses, or such as was obscured, and could not be appreciated. If the former, the law is well settled that the master need not advise his servants of its existence, and instruct them as to the means necessary to its avoidance, since they, equally with himself, are held to know both the fact of peril and how to avoid or escape it. . . . On the other hand, it is the imperative duty of the master to inform the servant of all latent dangers incident to the service, and instruct him as to their avoidance." What we have said on this subject is further supported by the following authorities: *Smith v. Peninsular Car Works*, 60 Mich. 501; *Fones v. Phillips*, 39 Ark. 17; *Buckley v. Gutta Percha & R. Mfg. Co.* 118 N. Y. 540.

In the case we are now considering the plaintiff in the action is not a minor, but was at the time of the injury twenty-six years of age, and, in the absence of proof to the contrary, it must be presumed that he was of average intelligence. He had been warned more than once that railroading was a dangerous business, and that coupling cars was attended with special risk, and that it was necessary he should use very great care and particularity in that service; and, furthermore, he was notified that the company hauled cars of different construction, and 18 L. R. A.

with different coupling apparatus. The double buffers or dead-woods were so located with reference to the drawhead that it was impossible to see one without the other. They were on each side of the drawhead, and projected to within about three inches of the same length as the drawhead. A view of the buffers and drawhead as attached to the car should be sufficient notice to a man of average intelligence of the risk incident to the coupling of such a car. Ordinary observation could not fail to disclose to appellee the difference between the appliances for coupling these cars and those on appellant's cars, and that a higher degree of care was necessary on his part. In *Hathaway's Case*, above cited, it is said, in referring to the case of *Michigan Cent. R. Co. v. Smithson*: "In that case the plaintiff claimed the same kind of negligence on the part of the defendant as a ground of recovery as in this, and the plaintiff's own view of the cars, dead-woods, and couplings at the time of the injury was held to be all the notice that was necessary to be given by the company; and that the plaintiff could not recover. The correctness of that decision is not questioned, but admitted, by the plaintiff's counsel in this case, and the only difference claimed between the two cases is that in the *Smithson Case* the coupler injured had long experience in coupling, and in the present case he had little or none at all. This fact, if admitted, cannot make this an exception to the rule. If the character of any particular danger is so simple that it can as well be ascertained at a single view as at many, it is difficult to see how additional observation could be of any benefit to the party whose duty it is to encounter it." True, there is testimony tending to show that appellee was hurried in making the coupling, and that the two cars were only about four feet apart when he stepped in to make the coupling, and that the engineer brought them together with much force. Without referring to the testimony contradictory of these statements, it may be remarked that the negligence of the engineer cannot be looked to either to defeat or support this action. It is a question of the negligence of the company, and not of appellee's coemployees. If the engineer brought the cars together so hurriedly that the appellee did not have time to observe the particular style or pattern of coupling with which they were furnished, and he was thereby injured, that would not affect the question whether the company was negligent in using or having on its road cars of that particular pattern, or whether plaintiff had been properly instructed as to the risks of his employment. If, as we have shown, it was not incumbent on appellant to specially instruct appellee as to these particular couplings because such risk was open to ordinary observation, the act of the engineer in depriving the plaintiff of the opportunity to make such observation is not the negligence of the company, although it might, if appellee was himself without fault, support an action under the employés' statute, on proper averment and proof that the en-

gineer sustained towards him such a position as would make the company liable, under the terms of the statute for the negligence of such engineer resulting in injury to his coemployé. The authorities we have cited, with the single exception, we believe, of the case of *Missouri Pac. R. & I. & G. N. R. Co. v. White*, 78 Tex. 103, cited by appellee are clear and uniform on the propositions discussed, and are in accord with our view of the law applicable to this case.

Our conclusion is that on the undisputed testimony showing the structure, nature, and office of the double dead-woods or double buffers, and that cars of that description were frequently hauled over appellant's tracks, and in the absence of all proof showing that the particular coupling apparatus was defective, or out of repair, or unsuited to the purpose intended, or that the car was unsafe for transportation over appellant's road, it results as a matter of law that it was not negligence in appellant to receive

or transport such car over its tracks. And, it likewise appearing that the increased hazard in coupling such cars was open to the ordinary observation of any person using reasonable care and prudence, it further results that it was not negligence on the part of appellant in not instructing or warning appellee specially in regard to the increased risk in coupling cars with double dead-woods or double buffers, such increased risk being, under the circumstances, incident or ordinary to the risks assumed by appellee on entering appellant's employment, and merely calling for the exercise of a higher degree of care and prudence on the part of appellee in discharging his duties than when coupling cars of the style generally in use on defendant's road. The general charge requested by the defendant should have been given, and its motion for a new trial should have been granted.

The judgment of the Circuit Court will be reversed, and the cause remanded.

CALIFORNIA SUPREME COURT.

M. B. ANGEVINE, *Appt.*,

Mrs. S. L. KNOX-GOODRICH, Resp't.

(.....Cal.....)

1. **A landlord is not liable for damages to an employee of his lessee from illness caused by defective plumbing where he is not charged with fraud or deceit or with any more knowledge of the defects than the lessee had.**
2. **No implied warranty of the habitable condition of a house leased for a dwelling is created by Civ. Code, § 1941, which provides that the lessor must put it in such condition.**

(November 29, 1902.)

APPEAL by plaintiff from an order of the Superior Court for Santa Clara County granting a new trial after verdict in his favor in an action brought to recover damages for injuries to his health through the alleged negligence of defendant. *Affirmed.*

The facts are stated in the opinion.

Messrs. Jackson Hatch and B. F. Bergen, for appellant:

The first clause of section 1941 of the Civil Code provides that the lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation.

This section fastens upon the landlord two obligations: *first*, to put the building into a condition fit for occupation; *second*, to repair all subsequent dilapidations thereof which render it untenable.

No penalty, however, is provided by the stat-

ute for a violation of the obligation of a landlord to put the premises into a condition fit for the occupation of human beings.

Hence the same consequences will follow a violation of this primary obligation of the landlord as will result from a violation of any obligation imposed by statute or common law upon the landlord.

The owner of a building erected by himself, to be let for hire, is responsible to third persons for injuries resulting to them from a nuisance existing upon the premises at the time of the making of the lease; also, he is liable where the structure was in such a condition at the time it was leased that it would be likely to become a nuisance in the ordinary and reasonable use of the same for the purpose for which it was constructed and let, and he fails to repair it; also, where he authorizes and permits the act causing the premises to become a nuisance, occasioning the injury.

Kalis v. Shattuck, 69 Cal. 593, 58 Am. Rep. 568; *Jessen v. Sweigert*, 66 Cal. 132; *Robbins v. Mount*, 4 Robt. 553; *Marshall v. Cohen*, 44 Ga. 459, 9 Am. Rep. 170; *Owings v. Jones*, 9 Md. 108; *Beltons v. Sackett*, 15 Barb. 96; *Carson v. Godley*, 26 Pa. 111, 67 Am. Dec. 404; *Godley v. Hagerty*, 20 Pa. 387, 59 Am. Dec. 731; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Kern v. Myll*, 80 Mich. 525; *Riley v. Simpson*, 7 L. R. A. 623, 83 Cal. 217.

The erection of the building and placing therein of a system of sewerage in plain violation of the law made the sewerage system so placed a nuisance in itself.

Willy v. Mulledy, 78 N. Y. 310, 84 Am. Rep. 536.

A tenant complaining of a nuisance may continue to lease the premises after the manifestation of the nuisance, at the same rent,

NOTE.—On the question of an implied covenant that a dwelling is fit for habitation, which the above decision holds is not changed by the California Code, see *Franklin v. Brown*, 6 L. R. A. 770, 18 L. R. A.

118 N. Y. 110; *Daly v. Wise*, 16 L. R. A. 226, 133 N. Y. 306; and as to the exception to the ordinary rule, see *Ingalls v. Hobbs (Mass.)* 16 L. R. A. 51.

and yet recover damages resulting from such nuisance.

Smith v. Phillips, 8 Phila. 10; *Howell v. Mc'oy*, 3 Rawle, 256.

Messrs. A. S. Kittredge, H. V. Morehouse and Hiram D. Tuttle, for respondent:

In the lease there is no covenant binding the landlord to repair, or as to its condition as to occupancy. The complaint therefore fails to state a cause of action. The plaintiff was the employé of the lessee, and therefore occupied the relation of tenant to the defendant.

Willson v. Treadwell, 81 Cal. 58; *Sieber v. Blanc*, 76 Cal. 173; *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; *Taylor, Land. & T.* 8th ed. § 175, p. 198.

Therefore plaintiff assumed the same risk as the lessee, and the landlord is not liable to the tenant for personal injuries resulting from defective premises leased, when the lease contains no covenant obligating the landlord to make necessary repairs, and no covenant of warranty as to the condition of the premises.

Sieber v. Blanc and Willson v. Treadwell, supra; *Van Every v. Ogg*, 59 Cal. 563; *Green v. Redding*, 92 Cal. 548; *Taylor, Land. & T.* 8th ed. § 383; *Chappel v. Gregory*, 34 Beav. 250.

The lessor is not required to make repairs, except upon an express covenant in the lease, and nothing is implied.

Green v. Redding, Sieber v. Blanc, and Willson v. Treadwell, supra; *Lynch v. Speed*, 23 N. Y. S. R. 90; *Murray v. Albertson*, 50 N. J. L. 167; *Wood, Land. & T.* § 382, p. 642; 6 *Lawson, Rights, Rem. & Pr.* § 2830.

Civil Code, §§ 1941, 1942, do not change the rule so as to enable plaintiff to sue in this action.

Green v. Redding, Van Every v. Ogg, and Sieber v. Blanc, supra; *Tatum v. Thompson*, 86 Cal. 203.

When the lessee continues the occupancy and possession of the premises, knowing them to be untenable, and pays the rent, he has no complaint or cause of action. He has elected and must stand by his election.

Tatum v. Thompson, supra; *Williamson v. Miller*, 55 Iowa, 86.

If the action by the lessee is not founded upon a warranty or an express or implied covenant, or upon misrepresentation or deceit or fraud, the action cannot be maintained.

Loupe v. Wood, 51 Cal. 586; *Lynch v. Speed and Murray v. Albertson, supra*; *Donner v. Ogilvie*, 1 N. Y. Supp. 638; *Wilkinson v. Clouston*, 29 Minn. 91; *Krueger v. Ferrant*, 29 Minn. 385, 43 Am. Rep. 223; *Lucas v. Coulter*, 104 Ind. 81; *Brewster v. DeFremery*, 83 Cal. 341; *Davidson v. Fischer*, 11 Colo. 583; *Willson v. Treadwell and Green v. Redding, supra*; *McKenzie v. Chestham*, 88 Me. 543; *Booth v. Merriman* (Mass.) Feb. 24, 1892; *Smith v. Buttner*, 90 Cal. 95; *Mason v. Wolf*, 40 Cal. 250; *Wood, Land. & T.* pp. 921-923; *Wood, Nuisances*, § 118; *Ebert v. Fisher*, 54 Mich. 294; 6 *Lawson, Rights, Rem. & Pr.* § 2829; *Tuttle v. Gilbert Mfg. Co.* 145 Mass. 169; *Stevens v. Pierce*, 151 Mass. 207; *Herrin v. Libbey*, 36 Me. 350; *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47; *Leonard v. Storer*, 115 Mass. 86, 15 Am. Rep. 76; *Town v. Armstrong*, 75 Mich. 580; *Cutter v. Hamlen*, 1 L. R. A. 429, 18 L. R. A.

147 Mass. 471; *Cook v. Soule*, 56 N. Y. 420; *Moore v. Logan Iron & Steel Co. (Pa.)* Oct. 4, 1886.

The employé of the tenant occupies the same position as the tenant, and he cannot sit by, and through his own negligence receive an injury, and the payment of rent by the tenant estops him from claiming the defective condition of the building and as there was no warranty, or fraud, or deceit, or misrepresentation, or covenant, expressed or implied in the lease, the tenant takes the property for better or worse and has therefore no ground for complaint.

McKeon v. Cutter (Mass.) May 10, 1892; *Daly v. Wise*, 16 L. R. A. 236, 132 N. Y. 306.

FOOTE, C., filed the following opinion:

The plaintiff demanded damages from the defendant for injury to his health, caused by the neglect of the defendant to construct a house with safe and proper sewage pipes and conduits, which house was occupied by the plaintiff as an employé of the lessees of the defendant. Following the verdict of the jury, judgment for \$3,500 was rendered in favor of the plaintiff. A motion was made for a new trial upon various grounds, and it was granted, without any specification as to the ground moving the court thereto. The respondent contends that the trial court erred in its rulings upon the demurrer to the complaint, in the admission of evidence, and in the charge to the jury; and in this connection it is urged that the trial court in all these matters took an erroneous view of the force and effect of section 1941 of the Civil Code, in that it was ruled by that tribunal that under such section there was virtually written into every lease of the kind here involved, by operation of the statute, even though not expressed in the lease or a covenant, that the premises leased are habitable, and fit for occupation by human beings, if intended for habitation; and that, as a consequence, if such building or structure is not in such condition, the covenant is broken, and an action for damages such as here instituted will lie. Such evidently was the view taken and expressed by the court in all these matters, and such view is not in harmony with the decisions of the supreme court. It is raised in *Sieber v. Blanc*, 76 Cal. 173: "Nor was there any liability arising from section 1941 of the Civil Code, which provides that the lessor of a building intended for the occupation of human beings must put it in a condition for such occupation. In the first place, it is not alleged or found that the building was intended for the occupation of human beings; and, in the second place, it was held in *Van Every v. Ogg*, 59 Cal. 566, as we understand the decision, that the obligation imposed upon the landlord by section 1941 'should be limited by the extent of the privilege conferred upon the tenant' by section 1941; and that, therefore, the only consequence of a breach of the landlord's obligation is that the tenant may either vacate the premises, or expend one month's rent towards the repairs, after notice," etc. There is no fraud or deceit on the part of the landlord charged in the complaint, or proved in the case, as we read the transcript. It is a case where the plumbing of the house as constructed was defective, and the illness of the

plaintiff was caused by noxious gases that escaped from sewage pipes by reason of this defective plumbing. It is not alleged or proven that the defendant knew anything more about this defect when the lease was made than the plaintiff or his employer, the lessee. But it is sought to make the defendant responsible under the idea that by the Civil Code (sec. 1941) there is an implied warranty in every lease of a house for the occupancy of human beings that the same is in a habitable condition when leased. This view of the case is not only opposed by the cases we have first cited, but it is in direct conflict with the decision of the appellate court in the case of *Green v. Redding*, 92 Cal. 548, where this was said about a somewhat similar contention: "This would be placing the burden of looking out for the health of one's family on the landlord, and leaving the husband and father without any responsibility, therefore, in renting a house

for them to live in." If this is the extent of the defendant's responsibility to the tenant, it must be the same with reference to an employé of the tenant, as was the plaintiff here. *Willson v. Treadwell*, 81 Cal. 59; Taylor, Land. & T. (8th ed.) p. 198, § 175.

We therefore conclude that the action of the court below was erroneous as to all the matters alluded to as occurring on the trial of the cause, and for these reasons its action in granting a new trial was founded in justice, and was the exercise of a sound judicial discretion. We therefore advise that the order granting a new trial be affirmed.

We concur: *Haynes, C.; Belcher, C.*

Per Curiam:

For the reasons given in the foregoing opinion the order granting a new trial is affirmed.

Rehearing denied.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Harriet W. LEIGHTON *et al.*, *Appls.*,
v.

Rowena YOUNG *et al.*

(52 Fed. Rep. 439.)

1. That the mode of procedure in a Federal court adopted by an occupying

claimant to enforce compensation for improvements placed by him on land which has been adjudged to the true owner does not conform strictly to the requirements of the State Occupying Claimants' Law, will not defeat the action if in the state statute legal and equitable rights and modes of proceeding are confounded, since the Federal courts will enforce the right

NOTE.—Adoption by federal courts of remedies created by state statutes.

Whenever a general rule as to property or personal rights or injuries to either is established by state legislation its enforcement by a Federal court in a case between proper parties is a matter of course and the jurisdiction of the court in such case is not subject to state limitation. *Chicago & N. W. R. Co. v. Whitton*, 80 U. S. 13 Wall. 270, 20 L. ed. 571; *Dennick v. Central R. Co.* 108 U. S. 11, 28 L. ed. 439.

This applies to a statutory right of action for death. *Ibid.*

Thus a right of action for death caused by negligence which is created by state statute cannot be limited by such statute to suits in the state courts, but such attempted limitation will be void as against a suit in a Federal court which has jurisdiction by reason of the citizenship of the parties. *Chicago & N. W. R. Co. v. Whitton*, *supra*.

A claim for pilotage created by state statute in favor of a pilot who offers his services which are refused can be enforced in a Federal court in admiralty. *Re McNiel*, 80 U. S. 13 Wall. 236, 20 L. ed. 424.

Preservation of equity jurisdiction.

The general doctrine that the equity jurisdiction of the Federal courts is the same in all the states and unaffected by state legislation has been declared in nearly all the cases cited below as well as in many others.

The abolition of common-law forms of pleading and practice does not destroy the distinction in the Federal courts between remedies at law and in equity. *Bennett v. Butterworth*, 52 U. S. 11 How. 659, 13 L. ed. 859; *Jones v. McMasters*, 61 U. S. 20 How. 8, 15 L. ed. 805; *Basey v. Gallagher*, 87 U. S. 20 19 L. R. A.

Wall. 670, 22 L. ed. 452; *Thompson v. Central O. R. Co.* 73 U. S. 6 Wall. 184, 18 L. ed. 763.

And the ordinary equity practice of Federal courts was early adopted and has been steadily preserved in the Federal courts sitting in Louisiana. *Ridings v. Johnson*, 128 U. S. 212, 32 L. ed. 401; *Bein v. Heath*, 53 U. S. 12 How. 163, 18 L. ed. 999; *Gaines v. Chew*, 48 U. S. 2 How. 619, 11 L. ed. 402; *Gaines v. Reif*, 40 U. S. 15 Pet. 9, 10 L. ed. 642; *Story v. Livingston*, 38 U. S. 13 Pet. 390, 10 L. ed. 200; *Ex parte Whitney*, 38 U. S. 13 Pet. 404, 10 L. ed. 221; *Poultney v. Lafayette*, 37 U. S. 13 Pet. 472, 9 L. ed. 1161; *Livingston v. Story*, 34 U. S. 9 Pet. 632, 9 L. ed. 226.

Enlargement of equitable remedies.

But while equity jurisdiction is preserved unimpaired in all Federal courts an enlargement of equitable rights by state statutes may be enforced in the Federal courts if they have jurisdiction of the case in other respects as well as in the state courts. *Gormley v. Clark*, 134 U. S. 333, 33 L. ed. 909; *Frost v. Spitley*, 121 U. S. 552, 30 L. ed. 1010; *Reynolds v. First Nat. Bank of Crawfordsville*, 112 U. S. 405, 28 L. ed. 733; *Holland v. Challen*, 110 U. S. 15, 28 L. ed. 53; *Cummings v. Merchants Nat. Bank*, 101 U. S. 153, 25 L. ed. 908; *Keeley v. McGlynn*, 38 U. S. 21 Wall. 503, 22 L. ed. 599; *Clark v. Smith*, 38 U. S. 13 Pet. 195, 10 L. ed. 123.

Thus a statute extending the remedy of a suit to quiet title to any person having both legal title to and possession of the land giving him the right to compel any other person setting up a claim thereto to release his claim was, as early as 1839, held enforceable in a Federal court, in *Clark v. Smith*, *supra*.

Almost identical with this is a recent decision that a suit to quiet title and obtain a release of defendant's claim to land authorized by state statute

but will preserve the distinction between law and equity.

2. An injunction suit in a Federal court when it has jurisdiction against the execution of the writ of possession is a proper remedy to enforce an occupying claimant's right to compensation for improvements, and it may be instituted at any time before he is dispossessed of the premises after they have been adjudged to the true owner, where the state statute provides for the protection of his rights by the appointment of appraisers after such judgment to ascertain the value of improvements and state the account.
3. Jurisdiction having attached on an injunction against the execution of a writ of possession in favor of an occupying claimant, the court may retain the cause and take and state accounts which are necessary to a final decree.
4. In a suit by an occupying claimant to restrain the execution of a writ of possession a Federal court may in its discretion refer the case to a master or appoint commissioners instead of directing the marshal to summon appraisers in accordance with the state practice, although it is desirable to follow a state practice as near as may be.
5. Statutes providing that the value of improvements by an occupying claimant in good faith may be adjudged to be a lien on the land and that he may retain possession until he has been paid the value thereof are valid.
6. Fixing the uniform date for the valuation of improvements by an occupying claimant in good faith as the date of the occupant's entry upon the land is not a violation

in favor of any person having possession and legal title may be maintained in a Federal court if it has jurisdiction of the parties. *Land & River Imp. Co. v. Bardon*, 45 Fed. Rep. 706.

And a similar extension of the same remedy to persons out of possession has been in several cases held enforceable by Federal courts where the defendant is not in possession claiming adversely. *Holland v. Challen and Reynolds v. First Nat. Bank of Crawfordsville*, *supra*; *Southern Pac. R. Co. v. Stanley*, 49 Fed. Rep. 203; *Grand Rapids & I. R. Co. v. Sparrow* (Mich.) 1 L. R. A. 480, 36 Fed. Rep. 210. But see *Whitehead v. Shattuck and United States v. Wilson*, *infra*.

Likewise a suit to restore the record title where the records of real estate have been destroyed by fire, which is a remedy created by state statute, being essentially a cause of equitable cognizance can be maintained in a Federal court which has jurisdiction of the case otherwise. *Gormley v. Clark*, *supra*.

The right under a state statute to remove a cloud on title consisting of a lien which may result in a sale and a deed may be enforced in a Federal court if it has jurisdiction of the case otherwise. *Chapman v. Brewer*, 114 U. S. 158, 29 L. ed. 63.

The power of a court of equity under a state statute to set aside a will obtained by fraud and undue influence or a forged will and any probate obtained by fraud, concealment, or perjury is said in *Kieley v. McGlynn*, *supra*, to be probably a case in which an enlargement of equitable rights is created which may be administered by Federal courts as well as by those of the state.

And in *Gaines v. Fuentes*, 92 U. S. 10, 28 L. ed. 524, it is held that a suit authorized by state practice to annul a will alleged to be void and to limit the operation of a decree admitting it to probate may be maintained in a proper case in a Federal court.

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of any constitutional right of the owner of the fee.

7. An occupying claimant in good faith and the owner of the fee should be regarded in effect as tenants in common in proportion to the value of their respective interests with the sole right of possession in the occupant so long as the joint tenancy continues where the owner does not pay for the improvements and the occupant does not pay for the land as is required by statute, and the statute does not provide for such a contingency.
8. A sale of the property and a distribution of the proceeds according to the rights of the parties may be decreed in an equity case between an occupying claimant and the owner of the fee where by the failure of each to pay to the other the value of his interest in the property they have become cotenants.

(September 20, 1893.)

APPEAL by complainants from a decree of the Circuit Court of the United States for the District of Nebraska attaching conditions to a decree in their favor in a proceeding brought to restrain the execution of a writ of possession for certain premises upon which they had made improvements while in possession until those improvements have been paid for. *Reversed*.

Before Caldwell and Sanborn, Circuit Judges, and Shiras, District Judge.

Statement by Caldwell, Circuit Judge:

In 1884, Rowena Young brought suit in ejectment in the circuit court of the United

An injunction against the collection of a tax in accordance with state practice may be granted in a proper case by a Federal court, as the proceeding is equitable in its nature. *Cummings v. Merchants Nat. Bank*, 101 U. S. 153, 25 L. ed. 908.

A suit in equity to enforce an assessment against abutting property for a street improvement which is authorized by state statute may be maintained where there is jurisdiction on account of citizenship in a Federal court as such a case is in its nature appropriate for chancery. *Fitch v. Creighton*, 65 U. S. 24 How. 159, 18 L. ed. 596.

The right of a creditor to ask for a receiver of the estate of an insolvent trader after default in payment being given by state statute without the existence of any lien may be enforced by a Federal court which has jurisdiction of the case. *Fechheimer v. Baum* (Ga.) 2 L. R. A. 153, 37 Fed. Rep. 167.

The statutory right to a supplementary proceeding in a state court to enforce a judgment extends to the enforcement in a Federal court of a money decree in an equitable suit. *Sage v. St. Paul, S. & T. F. R. Co.* 47 Fed. Rep. 3.

In the absence of a rule of the Supreme Court of the United States authorizing such practice a lower Federal court cannot make a decree in a foreclosure suit that the mortgagor pay the deficiency remaining after sale of the premises. *Noonan v. Braley*, 67 U. S. 2 Black, 499, 17 L. ed. 273; *Orchard v. Hughes*, 68 U. S. 1 Wall. 78, 17 L. ed. 560.

Such rule has since been supplied. See rule of April 18, 1864; Equity Rule 92, 20 L. ed. 919.

Limitation of to enlargement of equity powers.

Where the defendant is in possession claiming adversely an action against him is in effect an action of ejectment, and although a state statute authorizes such suit to be brought in a court of equity no jurisdiction of such suit can be had by a

States for the district of Nebraska against Harriet Leighton and Charles M. Leighton for the land which gave rise to this suit. On the trial of the ejectment suit the land was adjudged to belong to the plaintiff in that suit. The defendants were bona fide occupants and claimants of the land, and entitled to the rights secured to such occupants by the Occupying Claimant's Law of that state.

In answer to an inquiry submitted to them by the court, at the request of the parties, the jury in the ejectment suit returned a special finding to the effect that the land was worth \$6,000 without the improvements, and that the improvements were worth \$11,000. The statutory mode of proceeding to ascertain the value of the land and the improvements was not observed, and the special finding returned by the jury was not made the basis of any order or judgment of the court in the case. On the 17th day of December, 1888, judgment was entered in favor of the plaintiff for the recovery of the land. See 37 Fed. Rep. 46. In this state of the record, the plaintiff in that suit, on the 19th day of March, 1889, without paying or tendering to the defendants the value of their improvements, caused a writ of possession to issue on the judgment in ejectment, and the marshal was about to put the defendants out of possession of the land, when they filed the present bill against the plaintiff in the ejectment suit and the marshal, setting up the foregoing facts, and their rights as occupying claimants, and praying that the execution of the writ of possession be enjoined until the complainants had been paid the value of their improvements on the land. The injunction was granted.

The defendant answered the bill, admitted

the special finding of the jury in the ejectment suit, but denied that it was binding on either party as to the value of the land and improvements; alleged that it was merely made "for the purpose of that hearing, and for the purpose of appeal, if necessary;" that the land was worth more, and the improvements less, than was stated in the special finding; admitted the defendant had sued out a writ of possession upon the judgment in ejectment, "and that this defendant desires possession of said property, or that the said plaintiff shall proceed according to law to have the value of said property fixed, and duly tender to this defendant the value of said property."

The cause was heard on the bill, answer, and replication before Mr. Justice Brewer, then circuit judge, and it was decreed that the special verdict did not estop the parties on the question of the value of the land and improvements, and a master was appointed, with directions to ascertain and report (1) the value of the lasting and valuable improvements erected on the land by the complainants before they received actual notice of the defendant's claim; (2) the net annual value of the rents and profits received by the complainants after they received notice of the defendant's title by service of process, which amount was to be deducted from the value of the improvements; (3) the value of the land at the time the complainants went into possession thereof, or when they commenced to pay taxes thereon, as the case might be. On the 8th of November, 1890, the master reported that the value of the lasting improvements put upon the land by the complainants prior to receiving notice of the defendant's claim to the land was \$10,868; that the value

Federal court in equity. *Whitehead v. Shattuck*, 133 U. S. 146, 34 L. ed. 878; *United States v. Wilson*, 118 U. S. 86, 30 L. ed. 110.

The constitutional right of parties to a trial by jury in action at law in a Federal court cannot be defeated by any state statute enlarging equitable remedies. *Whitehead v. Shattuck*, *supra*; *Scott v. Neely*, 140 U. S. 109, 35 L. ed. 358.

A suit in equity to subject property of defendant to the payment of a debt before proceedings at law to establish or enforce it cannot be maintained in a Federal court although such a remedy is created by state statutes. *Scott v. Neely*, *supra*.

Legal and equitable claims cannot be blended together in one suit in a Federal court although it may be done under state practice by virtue of a statute. *Ibid.*; *Bennett v. Butterworth*, 52 U. S. 11 How. 669, 13 L. ed. 869.

A suit which is merely for an account without any other ground of equitable jurisdiction cannot be maintained in equity in a Federal court although it is authorized by state statute on the ground that the nature of the account is such that it cannot be conveniently and properly adjusted and settled in an action at law. *Hunton v. Equitable Assur. Soc.*, 45 Fed. Rep. 561.

A remedy by injunction authorized by state statute cannot be enforced in a Federal court where there is an adequate remedy at law and the essential character of the remedy does not come within any recognized head of equitable jurisdiction. This rule applies to an injunction against the sale of a vessel on execution. *Van Norden v. Morton*, 99 U. S. 373, 25 L. ed. 452.

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An equity suit to enforce the collection of drafts which is in its nature nothing but an ordinary action at law cannot be maintained in a Federal court although it conforms to practice under the state statutes. *Thompson v. Central Ohio River R. Co.*, 78 U. S. 6 Wall. 134, 18 L. ed. 765.

A married woman cannot bring a suit in equity in her own name without a next friend in a Federal court, although she is allowed to sue alone by state statute. *Wills v. Pauly*, 51 Fed. Rep. 257.

Extending legal remedies.

The practice of courts of law under state statutes to go beyond the old-fashioned writ of error *coram vobis*, in administering summary relief against their own judgments after the term at which they were rendered tending in this respect to the practice in equity cannot be followed by Federal courts. *Bronson v. Schulten*, 104 U. S. 410, 26 L. ed. 797.

The attachment law of a state may be enforced by a Federal court sitting in the state by virtue of U. S. Rev. Stat., § 915, expressly giving the plaintiff in a common-law cause similar remedies by attachment or other process against the defendant's property as those provided by the state law. *Brooks v. Fry*, 45 Fed. Rep. 773.

State statutes regulating proceedings on injunctions and giving them certain effects in courts of law are of no force in relation to the courts of the United States. *Boyle v. Zacharie*, 31 U. S. 6 Pet. 648, 8 L. ed. 532.

A specific lien on property conveyed to secure a debt cannot be defined and enforced by a Federal

of the rents since the service of the process in ejectment was \$180, leaving \$10,188 as the net value of the improvements after deducting the rents; that the value of the land at the time the complainants became the actual occupants thereof, which was on the 28th day of April, 1881, was \$1,800. The order of reference to the master embraced only these matters, but the parties stipulated that the master might report the value of the land without improvements at different dates, which he did as follows: The value of the land March 12, 1886, the date of the verdict in the ejectment suit, was \$2,000; 12th of December, 1888, the date of the judgment in the suit, \$4,500; 27th of December, 1889, the date of the order of reference to the master, \$5,000; and at the date of the master's report, 8th of November, 1890, \$5,500. No exceptions were filed to the master's report. J. H. McMurtry, having purchased the land from Rowena Young, was, upon his own motion, substituted as defendant. The court below decreed "that the defendant has the right to elect whether he will take the value of the land or shall pay for the improvements; and, the defendant having filed in court his election to take the value of the land, and tendered his deed therefor, and placed the same in the hands of the clerk of this court for future delivery, it is therefore considered and adjudged that, unless said plaintiff within ninety days pay to said defendant the sum of five thousand five hundred dollars, with interest from the date of the master's report, November 8, 1890, at seven per cent per annum, this injunction shall stand dissolved, and this cause be dismissed, at plaintiff's costs." From this decree the complainant appealed.

The sections of the Nebraska statute most

material to the consideration of the case read as follows:

"4886. If upon the final hearing there shall be found a balance in favor of the occupant or unsuccessful claimants, the person proving the better title may either demand of the occupant or claimant the value of the real estate without improvements, as shown by the appraisal, and tender a general warranty deed for the real estate in question to such occupant or claimant, or he may pay into court the balance so found due such occupant or claimant within such time as the court shall allow in its final decree.

"4887. If the successful claimant shall elect to pay, and does pay, to the occupant or claimant the balance found due him on the final hearing within such time as the court shall direct, then a writ of possession shall be issued in his favor against such occupant, or decree shall be entered against such unsuccessful claimant, as the case may require.

"4888. If the successful claimant shall elect to receive the value of the real estate without improvements, to be paid by the occupants or claimant within such time as the court shall direct, and shall tender a general warranty deed for such real estate to the occupant or claimant, and such occupant or claimant shall refuse or neglect to pay said sum of money to the successful claimant within the time allowed by the court for that purpose, then such successful claimant shall deposit with the clerk of the court the amount found due the occupant or claimant, and thereupon a writ of possession shall be issued in favor of such successful claimant or decree shall be entered in his favor, as the case shall require.

"4889. The occupant or claimant shall in no case be evicted from the possession, or de-

court in a suit at law for the debt, although this practice may be authorized by state statute as the remedy is essentially equitable. *American Freehold L. & M. Co. v. Thomas* (Ga.) 12 L. R. A. 681; *Alexander v. Mortgage Co. of Scotland*, 47 Fed. Rep. 181; *New England Mortg. Secur. Co. v. Gay*, 33 Fed. Rep. 686.

Limiting equitable jurisdiction.

The equitable jurisdiction of a Federal court cannot be limited or restrained by state legislation. *Kirby v. Lake Shore & M. S. R. Co.* 120 U. S. 180, 30 L. ed. 569; *Payne v. Hook*, 74 U. S. 7 Wall. 425, 19 L. ed. 260; *Barber v. Barber*, 62 U. S. 21 How. 562, 16 L. ed. 235; *Hartford F. Ins. Co. v. Bonner Mercantile Co.* (Mont.) 11 L. R. A. 623, 44 Fed. Rep. 151; *McConihay v. Wright*, 121 U. S. 201, 30 L. ed. 932.

The equity jurisdiction of a Federal court may extend to a suit for the disclosure and distribution of assets held by an executor *de son tort* although such suit could not be maintained in the state courts for the reason that a complete remedy was afforded by the probate system of the state. *Rich v. Bray* (Mo.) 2 L. R. A. 225, 37 Fed. Rep. 273.

The denial to equity courts in the state of jurisdiction of a bill for relief against fraud of an administrator and to compel him to make a true account and pay over what is justly due to a distributee does not defeat the jurisdiction of a Federal court in such a case. *Payne v. Hook*, *supra*.

The enforcement of a mechanics' lien being essentially equitable in its nature, the jurisdiction of 18 L. R. A.

a Federal court in such a case to maintain such suit is not defeated by a state law giving jurisdiction of such suits to courts of law. *De La Vergne Refrigerating Mach. Co. v. Montgomery Brew. Co.* 46 Fed. Rep. 829.

A suit in equity to set aside an award of arbitrators brought in a Federal court is not defeated by a state statute providing a remedy at law to vacate such awards. *Hartford F. Ins. Co. v. Bonner Mercantile Co.* *supra*.

The power of an equitable court to grant the right of discovery in equity cannot be defeated by state statutes enlarging the power of witnesses to testify. *Smythe v. Henry*, 41 Fed. Rep. 705.

The fact that an action of ejectment is authorized by state statute against one claiming title to or interest in land although not in possession does not defeat the jurisdiction of a Federal court in a suit to quiet title. *McConihay v. Wright*, *supra*.

A state Statute of Limitations which begins to run against a right of action for relief against fraud although the fraud has not been discovered cannot defeat the jurisdiction of a Federal court to grant such relief according to the ordinary rules of equity. *Kirby v. Lake Shore & M. S. R. Co.* 120 U. S. 180, 30 L. ed. 569.

The adequate remedy at law which is the test of the equitable jurisdiction of Federal courts is that which existed when the Judiciary Act of 1789 was adopted unless subsequently changed by Act of Congress. *McConihay v. Wright*, *supra*.

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prived of his right in the premises, except as provided in the two preceding sections; and, in case the successful claimant shall neglect to elect to take said real estate with improvements, or to convey the same to the occupant or claimant within such time as the court shall direct, then decree shall be entered in favor of the occupant or claimant upon his paying into the court the value of the real estate without improvement. Such decree shall have the effect to transfer and convey to such occupant or claimant the title and rights of the successful claimant." *Cobbey, Consol. Stat. Neb. 1891, chap. 47, §§ 4386-4389, pp. 933, 934.*

Messrs. N. S. Harwood, John H. Ames, and T. M. Marquett, for appellants:

The enactment of 1807 by the commonwealth of Massachusetts, which remains in force substantially unchanged, is very nearly like the present statute of Nebraska.

The validity and construction of this statute were drawn in question in *Jones v. Carter*, 13 Mass. 318, and the validity was sustained.

The statute has since been frequently construed and enforced by the courts of Massachusetts, and its validity has not, to our knowledge, been disputed.

See *Wales v. Coffin*, 105 Mass. 328; 2 Story, Eq. par. 1:37.

The validity of the Michigan statute was drawn in question in *Guild v. Kidd*, 48 Mich. 307, and upheld. See also *Ross v. Irving*, 14 Ill. 171; *Claypoole v. King*, 31 Kan. 612; *Puquette v. Pickness*, 19 Wis. 219.

The statute is to be so construed whenever a case comes within its letter, that the person receiving the benefits and advantages of improvements shall make compensation.

Davis v. Powell, 13 Ohio, 308; *Longworth v. Wolfington*, 6 Ohio, 10.

Plaintiff is entitled to full value of all the improvements and ameliorations which he has made upon the estate to the extent of the additional value which they have conferred upon the land.

Bright v. Boyd, 2 Story, 605.

The Supreme Court of the United States has never held a law similar to ours unconstitutional, but, on the contrary, has repeatedly recognized the validity of such statutes, and also held that it was a matter exclusively within the jurisdiction of the state courts.

Miles v. Caldwell, 69 U. S. 2 Wall. 44, 17 L. ed. 758; *New Orleans v. Gaines*, 82 U. S. 15 Wall. 630, 21 L. ed. 23. See also *Griswold v. Bragg*, 18 Blatchf. 202; *Withington v. Corey*, 2 N. H. 115; *Whitney v. Richardson*, 81 Vt. 300; *Armstrong v. Jackson*, 1 Blackf. 874; *McCoy v. Grandy*, 8 Ohio St. 463; *Ross v. Irving*, 14 Ill. 171; *Childs v. Shower*, 18 Iowa, 261.

The Nebraska Act of 1883 came before the Supreme Court of Nebraska in *Page v. Davis*, 26 Neb. 675, in which case the court plainly recognizes the validity of the statute.

See also *Shuman v. Willette*, 19 Neb. 705; *Albee v. May*, 2 Paine, C. C. 74.

Bank of Hamilton v. Dudley, 27 U. S. 2 Pet. 491, 7 L. ed. 496, determined the correct practice in cases of this kind.

Mr. Joseph R. Webster, for appellees:

Under the Occupying Claimant's Law, upon 18 L. R. A.

a fair construction, the occupying claimant cannot require the successful claimant to pay for the improvements if he elect to accept the value of the land and make a conveyance.

Stephens v. Ballou, 25 Kan. 618.

If the wrongdoer can compel the unwilling owner to purchase the improvements or to abandon his property, then the Act is unconstitutional in that it passes the bounds of legal or equitable interference with the dominion and right of the owner, and by denying him remedy to recover his property in effect deprives him of his property without process of law by depriving him of remedy.

Green v. Biddle, 21 U. S. 8 Wheat. 1, 5 L. ed. 547; *McCoy v. Grandy*, 8 Ohio St. 466; *Nelson v. Allen*, 1 Yerg. 383; *Childs v. Shower*, 18 Iowa, 267; *Hearn v. Camp*, 18 Tex. 545.

If these provisions are objectionable on constitutional grounds, then the former Act is still in force, as the present Act is a mere re-enactment of the former Act (with these changes), and the present Act is a mere continuation of the original Act of 1873, as is held by the supreme court of Nebraska in similar cases and by other courts.

State v. McColl, 9 Neb. 204; *Re Hall*, 10 Neb. 638; *Fullerton v. Spring*, 3 Wis. 871; *Wright v. Oakley*, 5 Met. 406; *Erie Academy Trustees v. Erie*, 31 Pa. 517.

As appellant has not sought remedy under the law of occupying claimants but brings original bill without tender of equity to enjoin appellee from obtaining possession of his own property, the dismissal of the bill must be affirmed.

The proceedings can be instituted only by the occupant; the proceedings are by application in the original suit (an action at law in ejectment) and not by bill in equity or yet any original action; the time is to be immediately after overruling of motion for new trial, or filing of mandate from supreme court.

Page v. Davis, 26 Neb. 671; *Burlington & M. R. Co. v. Dobson*, 17 Neb. 457.

Equity having obtained jurisdiction by complainant's bill, if the decree is not affirmed to its whole extent and the decree dismissing the bill affirmed, then equity will retain jurisdiction to do complete justice and modify the decree by making sale of the property and distribute the proceeds to the parties, according to their respective priorities and interests.

Stephens v. Ballou, 27 Kan. 594.

Caldwell, Circuit Judge, delivered the opinion of the court:

It is objected by the appellees that the mode of proceeding adopted by the complainants does not conform to the requirements of the Occupying Claimant's Law, and that the suit was brought out of time. Where a state statute creates a right and prescribes a mode of proceeding to enforce it in the state courts, the courts of the United States, in that state, will enforce the right, but not always in the mode prescribed for enforcing it in the state courts. The state courts may be authorized to enforce an equitable right by an action at law, or a legal demand by a suit in equity, or to confound the two jurisdictions in the same suit. But in the courts of the United States the distinction between

legal and equitable rights and modes of proceeding must be observed. Those courts will enforce the right by the appropriate remedy, having regard to these distinctions. The Nebraska statute does not contemplate any proceeding to establish the occupant's claim for the improvements until after final judgment has been rendered in favor of the plaintiff in the ejectment suit. Any time after that, and while the occupant remains in possession, he may secure the benefits of the statute by applying to the court for the appointment of three appraisers, who are to assess the value of the land at the time the occupant went into possession, and the value of the valuable and lasting improvements erected thereon by the occupant prior to the time he received actual notice of the owner's claim, and to take and state an account of the rents and profits of the land received by the occupant after he had notice of the owner's title by the service of process. The title to the land is no longer in controversy. That issue has been tried to a jury. What remains to be done is to ascertain the value of the land and improvements, and take an account of the rents and profits as a basis for a decree. If these matters are solely cognizable at common law, then, as they exceed \$20 in value, they must, under article 7 of the Amendments to the Constitution of the United States, be submitted to a jury. But they are not, and never were, exclusively cognizable at common law. The mode of procedure prescribed by the statute which creates the right dispenses with a jury, and conforms very nearly to the established chancery practice. That the bill for injunction was well brought is indisputable. Whether the injunction should stand, and what decree should be rendered in the cause, depended upon the taking and stating of several accounts. The jurisdiction having attached on the injunction, the court will retain the cause, and take and state the accounts necessary to a final decree. *Ober v. Gallagher*, 98 U. S. 190, 28 L. ed. 829; *Murray v. Van Gilder*, 56 Iowa, 606. It would be no objection to the exercise of this jurisdiction if it called for adjudication upon purely legal rights, and conferred purely legal remedies, for, where the controversy is one in which a court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved. *Preteca v. Maxwell Land Grant Co.* 50 Fed. Rep. 674, 4 U. S. App. 826; *Holland v. Challen*, 110 U. S. 15, 28 L. ed. 52.

Courts of equity always had concurrent jurisdiction with courts of law in matters of account, where they were too complex for a jury to deal with them understandingly, or where, as in this case, the stating the account is in aid of an equity or right not adequately available at law. In the course of the proceeding, orders and decrees have to be passed, which, if not within the exclusive competency of a court of chancery, are undoubtedly within its jurisdiction. It is obvious that the flexible forms and modes of proceeding of a court of equity are much better adapted to the execution of the law

than is the machinery of a common-law court. This was decided by the Supreme Court of the United States more than sixty years ago in a similar case. *Bank of Hamilton v. Dudley*, 27 U. S. 2 Pet. 491, 7 L. ed. 496. "It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity." *Boyce v. Grundy*, 28 U. S. 3 Pet. 215, 7 L. ed. 657; *Oelrichs v. Spain*, 82 U. S. 15 Wall. 211, 223, 21 L. ed. 43, 44; *Preteca v. Maxwell Land Grant Co. supra*.

The case being one of equitable cognizance, the Federal court, sitting in chancery, will execute the law by the customary chancery methods and modes of proceeding, and, if they are not adequate to the purpose, will devise methods that are. The equity practice in the courts of the United States is not regulated by the state statutes. Nevertheless, in the exercise of its chancery powers, the court below might have conformed to the state practice by directing the marshal to summon three appraisers, and this probably would have been the better way, as it is desirable, when a court of the United States is enforcing a right created by state statute, to follow, as near as may be, the practice prescribed by the state statute for the enforcement of the right secured thereby. But it was equally within the discretion of the court to appoint one or more commissioners, or to refer the matter, as was done, to a master. The appellants brought their suit in apt time, (*Burlington & M. R. Co. v. Dobson*, 17 Neb. 457; *Page v. Davis*, 26 Neb. 671,) and in the proper forum, (*Bank of Hamilton v. Dudley, supra*.)

It is now too late to question the constitutionality of statutes which secure to occupying claimants compensation for their improvements. The reasoning by which they are supported as just measures of public policy, and their constitutional validity maintained, is too trite to require or justify repetition. If authority can ever silence contention, then the validity of the Nebraska statute, as the court construes it, is not open to debate. For a list of the cases, see *Childs v. Shower*, 18 Iowa, 261, 269; *Fee v. Coudry*, 45 Ark. 410, 55 Am. Rep. 560; 10 Am. & Eng. Encyclop. Law, title, *Improvements*. The cases cited by the learned counsel for the appellees have no application to the Nebraska statute. In *Green v. Biddle*, 21 U. S. 8 Wheat. 1, 5 L. ed. 547, an early statute of Kentucky on the subject was held to be in conflict with the terms of the compact between Virginia and Kentucky and void for that reason. Nothing was decided affecting the constitutionality of such laws. In *McCoy v. Grundy*, 8 Ohio St. 468, it was decided that an Act which gives to the occupant the first option to take pay for his improvements, or to pay for the land and keep it, was unconstitutional. Under the Nebraska statute, the first option is given to the owner to pay for the improvements, and keep the property. And the complaint of the owner, in this case, is not that the statute does not give him the option to pay for

the improvements and keep the land,—for it is conceded that the statute does give him that right,—but the complaint is that it does not also give him a further option to compel the occupant to buy the land at its appraised value, or forfeit his possession and all claim for his improvements. In his answers he says that he “desires . . . that the said plaintiff shall proceed according to law to have the value of said property fixed, and duly tender to this defendant the value of said property,” and that failing so to do, he be dispossessed. In the case of *Childs v. Shower*, *supra*, a statute which authorizes a general money judgment against the owner in favor of the occupant for the value of the improvements, and a general execution to enforce its action, was held unconstitutional; but under the Nebraska statute the value of the improvements is simply declared to be a lien on the land, and there is no provision for enforcing it, either by general or special execution. Statutes providing that the value of the improvements may be adjudged to be a lien on the land, and that the occupant may retain the possession until he has been paid the value of the improvements, are held valid everywhere. *Ibid.*; *Fes v. Cowdry*, *supra*; *Claypoole v. King*, 21 Kan. 612; *Stephens v. Ballou*, 27 Kan. 594; *Page v. Davis*, *supra*; *Dworak v. More*, 25 Neb. 741; *Beard v. Danby*, 48 Ark. 188.

In Arkansas the land is not valued, but only the improvements,—the value of which must be paid by the owner before he can dispossess the occupant. The value of the improvements is a lien on the land, to satisfy which the land may be sold. *Mansf. Dig. Ark. chap. 55, §§ 2644, 2645*. This statute, though retrospective in its operation, has always been held to be constitutional. *Fes v. Cowdry* and *Beard v. Danby*, *supra*. And in some states the failure of the owner to pay the assessed value of the improvements upon the land within the time fixed by the statute or the order of the court operates to extinguish his right of property in the land, and vests it in the occupant. *Flynn v. Lemieux*, 46 Minn. 458; *Orsig v. Dunn*, 47 Minn. 59; *Stump v. Hornback*, 94 Mo. 26, 85.

Complaint is made of the clause of the Act which provides that the land shall be valued as of the date of the occupant's entry. It will sometimes occur that the land was more valuable at the date of the occupant's entry than it is at the time of trial. As applied to such cases, is the provision obligatory? And is it only to be set aside when it would advantage the owner to do so? The question comes to this: Has the owner the exclusive right to fix the date for the valuation, and is this a right guaranteed to him by the Constitution of the state? We think not, and, if not, then it is a matter of practice and evidence resting in the discretion of the Legislature or the courts. If the Legislature does not fix the date, the courts must. The courts would probably differ as to what the date should be, and for the sake of uniformity, and to silence contention, it was a wise exercise of legislative discretion to make the rule uniform. The objection that the rule will not always operate equitably, if well

founded in fact, cannot affect its constitutional validity; but it is by no means certain that the rule is inequitable. It is a familiar rule that the actual possession of land is notice to the whole world of the occupant's rights. In contemplation of law, the owner has notice of the occupant's entry upon the land, and his right of action accrues at that time. Having this notice, he is silent, and makes no claim. His moral obligation to speak is great. In the mean time the bona fide occupant, who purchased and paid for the land, goes forward, and makes valuable improvements upon it in the honest belief that he owns it. The owner finally breaks silence, and asserts his claim. After obtaining judgment for the land, he declines to pay the value of the improvements and keep his land, but demands of the occupant the value of the land. Is there any injustice in saying to such an owner, as this statute does in effect: “You were silent while the occupant in good faith was improving the land and adding to its value, and if you now decline to pay for the improvements, made under these conditions, you must be content to have the land valued as of the date you ought, in justice and fairness to the occupant, to have made known your claim.” This is but applying to this class of cases a principle as old as jurisprudence itself. The equity of the statute finds support in another view. It is the actual occupants of the lands of the country who lay out and open the public roads, build the schoolhouses, and erect and support churches; and it is these and such like public improvements that are the chief factors in increasing the value of the lands. As a rule, those who recover the lands from the bona fide settlers have contributed nothing towards these public improvements, and have done nothing to add to the value of the lands. As to them, the increase in value from these and such like causes is an unearned increment. But with the settlers on the lands it is otherwise. Their time and money have been expended in making and maintaining these public improvements, which, while they operate to increase the value of the lands, add nothing to the value of the improvements on the lands when they come to be valued separately from the lands. It is not very obvious, therefore, what superior equity the plaintiff has over the occupant to the increase in the value of the land, produced by the money and labor of the occupant. But the statute is impartial. It fixes as a uniform date for the valuation the date of the occupant's entry upon the land, without regard to the question whether the land was worth more or less at that time than at another. In its practical operation it may sometimes make for the occupant and sometimes for the owner, but it probably comes as near working out just results as any other fixed general rule that could be framed on the subject. At any rate, the Legislature thought so, and that concludes discussion.

The fact must not be overlooked that the improvements are valued as of the date when they are least valuable. The occupant is not entitled to their costs, nor to their value when new, but only to their value at the time of

the trial, which must be measured by the benefits which the owner will receive from them in their then condition. Story, Eq. Jur. § 799; *McMurray v. Day*, 70 Iowa, 671; *Childs v. Shover*, *supra*. While time may add to the value of the land, it is constantly deteriorating and diminishing the value of the improvements.

The state of Nebraska has legislated twice on the subject of the rights of occupying claimants. The first Act was passed in 1878. That Act provided that the occupant should not be thrown out of possession until he had been paid the assessed value of the improvements, unless he refused, upon demand of the owner, to pay the appraised value of the land. Gen. Stat. Neb. 1878, chap. 51, § 1. The owner was given the option to pay the occupant the value of the improvements or to sell the land to the occupant at its appraised value at the date of the judgment; and, if he elected to sell, and the occupant declined to pay for the land within the time fixed by the court, he forfeited his possession and his improvements. Id. § 819. In practice it was found this Act afforded small protection to many occupants. As a rule, the settlers who improved the lands were not opulent. They were most commonly poor men, who invested all their means in the first purchase of their lands and in improving them, and when their titles failed they were without the means to purchase the lands a second time. This was the plight of most of the occupants who stood in need of the protection afforded by an occupying claimant's law, but under this Act there was no protection for them, unless they had money enough to buy the land a second time, and at its increased value. This they did not have, and as a result of their poverty the Act confiscated the improvements to the use of the successful plaintiff in the ejectment suit. This was the state of the law when the Act of February 23, 1883, was passed. That Act was obviously passed for the purpose of affording to the occupant a larger measure of protection than he enjoyed under the Act of 1878. This was effected by amending the statute in several important particulars. Under the Act of 1878 the land was valued as of the date of the judgment. By the Amendment of 1883 it is valued as of the date of the occupant's entry. Cobbey, Consol. Stat. Neb. 1891, chap. 47, § 4383. The first Act provided there should be a judgment in favor of the occupant for the value of the improvements without defining its nature or effect. By the last Act this judgment is termed a "decree," and it is declared "such decree shall constitute and be a lien on said real estate." Id. § 4385. By the first Act, if the occupant failed to pay the value of the land upon the owner's election to convey, he was dispossessed, and lost his improvements. By the last Act, if the occupant declines to purchase the land when a conveyance is tendered by the owner, the occupant still has the right of possession, and cannot be dispossessed until the owner deposits with the clerk of the court the value of the improvements. Id. § 4388. By the Act of 1883 it is provided that "the occupant or claimant shall in no case be evicted from

the possession, or deprived of his right in the premises, except as provided in the two preceding sections. . . ." Id. § 4389. The two preceding sections are sections 4387 and 4388. The first provides that, if the owner elects to pay the value of the improvements, and does so, a writ of possession shall be issued in his favor; and the second that, if the owner elects to sell, and the occupant declines to buy, then the owner must deposit the value of the improvements with the clerk of the court before he can have a writ of possession. The Act as it appears in the general statutes still contains a clause which, taken by itself, would indicate a different policy. Its presence in the statute will now be explained. The Act is a long one. In amending it the old Act was copied in the main, the amendments being effected by striking out short sentences here and there in the sections and inserting others in their place; thus making the changes we have indicated. The last clause of the first section of the Act (sec. 4380) contains an implication to the effect that, unless the occupant pays the value of the land upon demand of the owner, he must be turned out of possession. This clause was in the original Act, and was proper enough there, and in harmony with the other provisions and the policy of that Act; but it is now plainly in conflict with the subsequent sections of the Act as amended in 1883, and with the obvious policy and purpose of those amendments, and was superseded by them.

Briefly, then, the legal effect of the amended Act is to give the occupant a lien on the land for the value of the improvements, and the possession of the land until the improvements are paid for. He does not forfeit his right of possession, or his right to receive pay for his improvements, by declining to accept the owner's offer to sell the land, as was the case under the Act of 1878. Nor does the owner forfeit his land by failing to pay for the improvements. The amended Act was designed to relieve the occupant from a forfeiture of his improvements upon his failure to pay for the land, and not to impose on the owner a forfeiture of his land upon his failure to pay for the improvements. The odious feature which forfeited the interest of one party in the property, if he was unable or unwilling to pay for the interest of the other, is eliminated from the statute. Their rights are reciprocal in the respect that they are nonforfeitable. The owner of the land has the election to pay the appraised value of the improvements and take the property. If he declines to do this within such time as the court shall direct, then the occupant, upon paying into court the appraised value of the land, is entitled to a decree vesting the title in him. Id. § 4389. Beyond this the statute in terms does not go. It makes no provision as to what shall be done when the owner declines to pay the appraised value of the improvements, and the occupant declines to pay the appraised value of the land. Where this is the case, a court of chancery will not decree that either party thereby forfeits his rights. Equity abhors penalties and forfeitures, and will enforce the rights of parties by more rational and

equitable methods. A court of chancery may be compelled to enforce a hard bargain, but never makes one itself. Equality is equity, and, in the absence of a statute expressly giving priority to a decree for the value of the land over a decree for the value of the improvements, equity will treat the parties as having rights in the property in proportion to the value of the lands and improvements respectively, and will divide the property, or the fund derived from its sale, accordingly.

The Occupying Claimant's Law of Iowa, which has been in force for more than forty years, makes the occupant and owner, if neither pays the other, tenants in common in proportion to the value of their respective interests. Referring to this provision of the statute, the supreme court of that state says: "And we think the provision of the Act of 1851, making the parties, if neither paid the other, tenants in common, a most equitable way of adjusting the respective rights of the innocent owner of the property and the bona fide improver of the same." *Childs v. Shower*, *supra*. We agree with that court that the rule mentioned is an equitable and just method of adjusting the rights of the owner and occupant in such cases. Although what are usually termed "equitable considerations" may have induced the Legislature to enact the statute securing to the occupant the right to pay for his improvements, the right, when once established under the statute, becomes an absolute, vested, legal right, of equal dignity with the right of the owner to be paid the appraised value of the land. *Flynn v. Lemieux*, 46 Minn. 458; *Craig v. Dunn*, 47 Minn. 59. Neither is entitled to preference over the other. The statute makes none, and the courts should not arbitrarily discriminate. As was said by the Supreme Court of Arkansas in reference to the Occupying Claimant's Law of that state: "It is a rule for administering justice, and the principle of it is that no one ought to be enriched at the expense of another." *Beard v. Dansby*, 48 Ark. 183.

The Supreme Court of Kansas, in a general discussion of the Occupying Claimant's Law of that state, holds that, if the owner elects to take the value of the land, and tenders a deed, thereupon "the land, in law and equity, becomes the property of the" occupant, "and all the plaintiff is then entitled to is the value of the land." And the court adds: "In just what way he may recover that value the statute, as it now stands, does not prescribe. . . . Under the statute before it was amended in 1878, if the defendant did not pay the value of the land to the plaintiff within a reasonable time,—to be fixed by the court,—the plaintiff might then have his writ of eviction to obtain possession of the land; but under the law as it now stands he is not entitled to any such writ. Under the law as it now stands the plaintiff would probably be entitled to commence an independent action to subject the land with the improvement to the payment of his claim, and to sell his land with the improvements for that purpose, for undoubtedly his claim is a lien, and a prior lien upon the land.

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It is possible, however, that the plaintiff may have some other remedy. It is not necessary, however, in this case, to determine what the plaintiffs' remedy, or their best remedy, is. . . ." *Stephens v. Ballou*, 27 Kan. 584.

The priority of lien in favor of the owner for the value of the land under the Kansas statute, it would seem, if it exists at all, is obtained by making the occupant an involuntary purchaser of the land, and compelling the owner to foreclose as upon a vendor's lien. We do not think this rule is applicable to the Nebraska statute. The spirit of that statute is what the letter of the statute is in Iowa; and where the owner does not pay for the improvements, and the occupant does not pay for the land, they should be regarded, in effect, as tenants in common in proportion to the value of their respective interests, with the sole right of possession in the occupant so long as the joint tenancy continues. How is this condition of things to be terminated? In a court of chancery the solution of this question is not difficult. The court, upon the motion of either the owner or the occupant, will decree the sale of the property, and distribute the proceeds of the sale to the parties in proportion to their respective interests. We agree with the views expressed in the brief of the learned counsel for appellees, that equity, having obtained jurisdiction, will retain it, to do complete justice, and finally settle the rights of the parties, and that to that end the court may decree a sale of the property and the distribution of the proceeds according to the rights of the parties.

We have sought to follow the view of the Supreme Court of the state of Nebraska in its interpretation of this statute as far as it has been called upon to construe it. We recognize the fact that the judicial department of every government is the rightful exponent of its laws, and especially its supreme law; and, should the Supreme Court of Nebraska hereafter put a different construction on this statute, this court will thereafter conform to that interpretation.

The decree of the court below is reversed, and the cause remanded, with instructions to the court to enter a decree confirming the master's report, and declaring that the value of the land at the date of the complainants' entry thereon was \$1,800; that the value of the lasting and valuable improvements put upon the land by the complainants prior to receiving actual notice of the adverse claim of the defendant, after deducting therefrom the net annual value of the rents and profits of the lands received by the complainants after having received notice of defendant's title by service of process, is \$10,180; that said sum constitutes a lien on the land, and that the complainants are entitled to retain the possession of the land until said sum is paid, or the land is sold as provided by the decree; that the defendant has the option to pay the value of the improvements at any time within ninety days after the entry of the decree, and upon the payment thereof into the registry of the court all right and claim of the complainants to the possession of the

land and the improvements thereon shall be thereby extinguished, and the defendant shall immediately be let into the possession of said property; that if said defendant shall decline to exercise his option to pay for the improvements and take the property, the complainants shall, for ninety days after the expiration of the defendant's option, have the option to pay the appraised value of the land, and upon the payment thereof into the registry of the court the defendant shall execute and deliver to the complainants, or deposit in the clerk's office for them, a deed for said land, and, failing so to do, the decree shall operate to vest the legal title to said lands in the complainants; that, if the defendant declines to exercise his option to pay the value of the improvements and take the property within the time specified, and the complainants decline to exercise their option to pay the value

of the land within the time specified, then, upon the motion of either the said defendant or the complainants, the court will direct said land, with the improvements thereon, to be sold by the master, after giving the usual notice, to the highest bidder for cash in hand. The master shall make the purchaser a deed for the property, which shall have the effect to vest in the purchaser all the right, title, estate, and interest of the said defendant and the complainants in said land and the improvements thereon, and said purchaser shall be let into the possession of the same. After paying costs of the suit, the remaining proceeds of the sale of said land and improvements shall be paid to the complainants and the defendants in the proportion that the value of the improvements bears to the value of the land.

NEW YORK COURT OF APPEALS.

Jacob MARK, *Appt.*,

2.

Elizabeth A. L. HYATT *et al.*, *Respts.*

(.....N. Y.....)

1. Damages caused by an injunction erroneously granted in the exercise of jurisdiction where the proceedings have been regular cannot be recovered from the party who obtained and served it, in the absence of an undertaking, unless the prosecution was malicious and without probable cause.

2. Damages resulting from obedience to an injunction which is utterly void, and under which no action has been taken by the plaintiff, cannot be recovered by the defendant, but result from his voluntary and needless act.

3. A person cannot be permitted to allege for one purpose that an injunction was utterly void and in the same action deny such allegation for another purpose.

4. An injunction which merely exceeds the relief demanded by perpetually restraining licensees from manufacturing a patented article without in express

NOTE.—Right to recover damages caused by an injunction.

The law is well settled that no right of action exists for damages sustained in consequence of an injunction except when founded upon an injunction bond or undertaking, unless the injunction was obtained maliciously and without probable cause. *Robinson v. Kellum*, 6 Cal. 399; *Cox v. Taylor*, 10 B. Mon. 17; *Lexington & O. R. Co. v. Applegate*, 8 Dana, 239, 33 Am. Dec. 497; *Hayden v. Keith*, 32 Minn. 277; *Manlove v. Vick*, 55 Miss. 567; *Keber v. Mercantile Bank*, 4 Mo. App. 195; *Iron Mountain Bank v. Mercantile Bank*, 4 Mo. App. 506; *Campbell v. Carroll*, 35 Mo. App. 643; *St. Louis v. St. Louis Gas Light Co.* 32 Mo. 349; *Sturgis v. Knapp*, 33 Vt. 517.

In *St. Louis v. St. Louis Gas Light Co.*, *supra*, the court says: "A suit in which no bond or undertaking is provided for by law or executed by the court as to any damages resulting to the defendant from a legitimate prosecution thereof presents an instance of *damnum absque injuria*, and is like any ordinary suit which leaves the defendant heir to much incumbrance and pecuniary loss, notwithstanding a final judgment in his favor.

For the same reasons the amount of damages, except in cases of malice and lack of probable cause, is limited to the amount of the bond or undertaking. *Lawton v. Green*, 64 N. Y. 328; *Palmier v. Foley*, 91 N. Y. 103; *Pacific Mail S. S. Co. v. Toel*, 85 N. Y. 646.

In *Gorton v. Brown*, 27 Ill. 489, 81 Am. Dec. 245, it is held that where a bond has been given an action thereon is exclusive, and no action for malicious prosecution can be brought.
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But this case stands alone against the decisions of various courts upholding an action for malicious prosecution based on an injunction obtained maliciously and without probable cause. *Cox v. Taylor*, *Keber v. Mercantile Bank*, and *Iron Mountain Bank v. Mercantile Bank*, *supra*; *Mitchell v. Southwestern R. Co.* 75 Ga. 398.

So in *Newark Coal Co. v. Upson*, 40 Ohio St. 17, a malicious injunction is held sufficient to sustain an action for malicious prosecution, although the report does not show whether or not a bond had been given.

In Illinois, New York, Wisconsin, and probably other states, the statutes provide for an assessment of damages in the injunction suit, but it does not appear that in any of these states this statutory provision is construed to change the law as to the right to damages where a bond has not been given; but it seems to be regarded merely as settling the controverted question whether a right to damages could be enforced in the injunction suit, or whether a separate action must be brought therefor.

In some cases it has been said that a court of chancery has inherent power to assess damages in an injunction case, but in no case does this expression seem to have been used with respect to the right to damages, but only with respect to the remedy or proceeding for enforcing the right when it exists.

Right to damages for obeying a void injunction.

In *Robertson v. Smith*, 15 L. R. A. 273, 129 Ind. 422, it is held, after an elaborate review of the authorities, that the plaintiff in an injunction suit is es-

terms merely forbidding it under the license is not wholly void, although it would be in excess of the jurisdiction if regarded as restraining future infringement, but should be construed as a restraint upon manufacture under the contract, and as erroneous simply because open to possible misconstruction, and therefore valid until reversed.

(October 4, 1892.)

APPEAL by plaintiff from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the New York Circuit in favor of defendants in an action brought to recover damages for the alleged wrongful use by defendants of an injunction to prevent plaintiff from manufacturing under a certain patent. *Affirmed.*

The facts are stated in the opinion.

Messrs. McCarthy & Berier, for appellant:

He who obtains an order from a court of general jurisdiction, and procures the same to be served on his opponent in order to take advantage to himself, is estopped to say that this order ought to be disobeyed.

High, Inj. § 1652; Bigelow, Estoppel, 368; *Robertson v. Smith*, 15 L. R. A. 273, 129 Ind. 422; *Walton v. Develing*, 61 Ill. 201; *Bowne v. Mellor*, 6 Hill, 496; *People v. Falconer*, 2 Sandf. 81; *Sterenson v. Miller*, 2 Litt. (Ky.) 310, 18 Am. Dec. 271; *Strosser v. Ft. Wayne*, 100 Ind. 452; *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187; *Cumberland Coal & Iron Co. v. Hoffman Steam Coal Co.* 39 Barb. 16; *Adams v. Olive*, 57 Ala. 249; *Hanna v. McKenzie*, 5 B. Mon. 314, 43 Am. Dec. 122; *Carver v. Carver*, 77 Ind. 498; *Hoy v. Rogers*, 4 T. B. Mon. 235.

A void order of a court which contains a command, impliedly sanctioned by a threat, is

topped from denying his liability upon his injunction bond on the ground that the court had no jurisdiction over the person of the defendant in the injunction suit.

This case somewhat criticises but does not directly overrule *Jenkins v. Parkhill*, 25 Ind. 473, in which an undertaking for an injunction was held void when the injunction was issued without jurisdiction of the subject-matter.

The court, though evidently dissatisfied with the earlier decision, regarded the difference between jurisdiction over the subject-matter and that over the person of the defendant sufficient to distinguish them, and thus to make it unnecessary to pass directly on the question involved in the earlier case.

In *Cumberland Coal & Iron Co. v. Hoffman Steam Coal Co.*, 39 Barb. 16, the want of jurisdiction over the subject-matter of an injunction, which was property situated in another state, while the court had jurisdiction of the parties, was held not to prevent a liability for damages on an injunction undertaking. The injunction plaintiff was held estopped from denying the jurisdiction.

In the same case it is held that one who obeys an injunction before process is served upon him may have relief on his injunction bond the same as if the service had been made.

In other cases the general doctrine has been plainly declared that those who execute an injunction bond on which an injunction is wrongfully issued cannot be released from their obligation upon the bond on the ground that the injunction was issued without authority and might safely have been disregarded. *Adams v. Olive*, 57 Ala. 18 L. R. A.

a trespass *ab initio*; persons to obtain the order, and those who execute it, are jointly and severally liable.

Fischer v. Langbein, 103 N. Y. 89.

An injunction order is enforced as soon as it is served, and it carries with it the implied menace of punishment, in case it shall be disobeyed.

Since it comes from a court of general jurisdiction, and is armed with the vulgar terrors of the law, it is as much duress *per minas* as if the sheriff had locked the defendant's doors, and placed a guard over them.

Koehler v. Farmers & D. Nat. Bank, 21 N. Y. S. R. 361; Bacon, *Abr. Actions on the Case*, F.; *Carew v. Rutherford*, 106 Mass. 1; *Curry v. Pringle*, 11 Johns. 444.

Mr. Henry H. Man, with **Messrs. A. P. Man & W. Man**, for respondents:

Either the superior court had jurisdiction or it had not. In either case there was no cause of action by Mark, one of the defendants in the superior court, against Mrs. Hyatt.

It is not even necessary that a void mandate should be set aside as a preliminary to bringing an action for what has been done under it. *Day v. Bach*, 87 N. Y. 56.

Mark need not have obeyed the injunction if void.

People v. Edison, 20 Jones & S. 58; *Dickey v. Reed*, 78 Ill. 261; *State v. Voorhies*, 37 La. Ann. 605; *Jenkins v. Parkhill*, 25 Ind. 473.

Malicious prosecution is the only remedy for unjustly setting a court in motion. This action cannot be maintained as one for malicious prosecution.

Malice and want of probable cause must concur.

Addison, Torts, p. 219; English ed. chap. 7, § 2; *Marks v. Townsend*, 97 N. Y. 590; *Day v.*

249; *Hanna v. McKenzie*, 5 B. Mon. 314, 43 Am. Dec. 122; *Stevenson v. Miller*, 2 Litt. (Ky.) 303, 18 Am. Dec. 271; *Walton v. Develing*, 61 Ill. 201.

In *Joelyn v. Dickinson*, 71 Ill. 25, it is said that it is improper to adjust the payment of damages for an injunction against the collection of a judgment if the injunction was a nullity and imposed no restriction whatever upon the collection of the judgment; but the court allowed attorneys' fees to the defendant in the injunction, and it clearly appears that the basis of the decision was not a denial of the right to recover damages sustained by obeying a void injunction, but merely a denial that in that case any damages had been caused except the attorneys' fees, for which a recovery was allowed.

In the main case above reported it does not appear that any bond or undertaking for an injunction was given, but the injunction complained of was made a part of an interlocutory decree for an accounting and a release or cancellation of a license for a patent. No malice or bad faith on the part of the injunction plaintiff is found; therefore the decision is directly in line with the whole current of decisions, which deny any right to damages caused by an injunction where no bond has been given, and where there is no such malice and want of probable cause as will sustain a suit for malicious prosecution. The hardship imposed by this rule on a defendant in an injunction where no bond is given, by compelling him to decide at his peril on the validity of the injunction, seems very unjust, and can be avoided only by requiring a bond or undertaking in every case as a condition of granting an injunction.

B. A. R.

Back, 14 Jones & S. 460, and cases cited, affirmed 87 N. Y. 56.

Hence, where damage has been caused by an injunction, the only remedy is upon the statutory undertaking unless the plaintiff alleges and proves all the elements of an action for malicious prosecution.

Lawton v. Green, 64 N. Y. 826; *Palmer v. Foley*, 71 N. Y. 106. See also *Cox v. Taylor*, 10 B. Mon. 17; *Beatty v. Perkins*, 6 Wend. 382; cited with approval in *Hallock v. Dorniny*, 69 N. Y. 238.

It would have been necessary in order to show want of probable cause to prove that Mrs. Hyatt knew that the superior court had not jurisdiction.

Edred v. Faudroy, 16 N. Y. S. R. 83.

Finch, J., delivered the opinion of the court:

The injury alleged in this action, and for which compensation is sought, originated in the operation and effect of a previous judgment obtained by Elizabeth Hyatt, one of the present defendants. In that action she sued the firm of Mark & Ingalls under a contract to manufacture, as her licensees, a patented article. Her complaint set out the terms of that agreement, which showed a license granted by her for the term of her patents and of any reissues thereof; the licensees binding themselves to pay a specific royalty, and to render due and correct accounts of their manufacture. The validity of the patents, and the consequent right of their owner, were thus recognized; and the licensees, while the agreement stood, could not call in question the title of the patentee. Her complaint further alleged that an account had been refused, and payment of the royalties withheld; that the licensees were wholly irresponsible; and asked as relief an accounting and recovery of the royalties due; that the license granted should be delivered up to be canceled, and the licensees be enjoined from further manufacture under the agreement. Of this action the court had full and undoubted jurisdiction, and all the relief asked was clearly within its authority. The plaintiff sought no decree beyond its admitted power to grant. An answer was served, denying most of the material averments of the complaint, and upon the issues joined the case was heard at special term. The court rendered an interlocutory judgment in favor of the plaintiff, which ordered an accounting before a referee, directed a cancellation and revocation of the license, and awarded an injunction, which exceeded the relief demanded in that it restrained the licensees perpetually from manufacturing the patented article, without in express terms merely forbidding it under the license. That judgment was erroneous in part, but not void for want of jurisdiction to hear and determine the action; that existed both as to the parties and the subject-matter. There was power to grant an injunction, but the power was erroneously exercised in not explicitly limiting its operation. That error is claimed to have been in excess of the jurisdiction, outside of and beyond it, and so the injunction was wholly void; but it was

not so treated. A copy of it was served upon the licensees, and they, with full liberty to disregard it, elected not to do so, but to obey it, and deem it valid until reversed. The copy was served upon them on the 1st day of May, 1888. They were not bound to take the risk of disobedience, but, while free to do so, were at liberty to proceed against it by appeal. They chose that remedy. They appealed from the judgment, and on the 5th of June obtained an order staying the effect and operation of the judgment, and leaving them free, pending the appeal, from the restraint of the injunction. They might probably have obtained that order earlier, and so have protected themselves from all substantial loss; but from May 1st to June 5th they claim to have submitted to the injunction, to have discontinued their manufacture, and to have suffered thereby damages, to recover which the present action of trespass was brought. The complaint for that alleged wrong was dismissed on the trial, and the general term have affirmed the dismissal.

It seems to me that the plaintiff founds his argument upon two inconsistent theories, and constructs it by shifting unconsciously from one to the other, as the emergency requires. The judgment against him in the prior suit, so far as it awarded an injunction, was either utterly void for excess of jurisdiction or was merely an erroneous exercise of jurisdiction. It could not be both, for the two things are totally inconsistent, and the truth of the one inevitably involves the falsity of the other. The learned counsel for the appellant argues, first, that he had a right to treat the injunction as operative, as valid, until reversed, and so as merely erroneous, and not wholly void; the consequence following that the damages occasioned were the product of the process, caused by its compulsion, and not by the needless and voluntary act of the party enjoined; that the then plaintiff is bound by that construction, and may not, after having obtained and served the injunction, defend against its consequences by asserting it to have been granted without jurisdiction. To all that I agree, and concede that the authorities cited fully justify the contention. The plaintiff here may hold his adversary to that theory, but in that event must also stand upon it himself, for it cannot be at the same time both utterly void and good until reversed. The result of that reasoning is that, while there may have been damages, there was no trespass. The patentee lawfully and fairly submitted her rights to the decision of the court. While the judgment rendered was in one respect erroneous, neither the party nor the court was therefore a trespasser. Some injury or inconvenience quite often flows from the operation of an erroneous judgment pending the appeal, which ends in a reversal; but there is no trespass, and no trespasser. To some extent the evil is prevented by provisions which stay the execution of the judgment, and authorize a summary restitution; but no action of trespass will lie to recover the damages unless the prosecution is alleged and proved to have been malicious, and

without probable cause. We have held that doctrine quite firmly and clearly in cases of injunctions, declaring in substance that, although the restraining order ought not to have been granted, and was set aside for that reason, yet the damages incurred, where the proceedings have been regular, cannot be recovered in the absence of an undertaking, except upon the basis of a malicious prosecution. *Lawton v. Green*, 64 N. Y. 326; *Palmer v. Foley*, 71 N. Y. 106. Nothing in this case warrants any such action, and it necessarily follows that upon the theory which plaintiff adopted, and on which his claim for damages rests, and to which he resolutely holds his adversary, there was no cause of action established, and the courts below properly dismissed the complaint.

But here the appellant suddenly shifts his ground, and claims that the judgment, instead of being merely erroneous, and valid until reversed, was never valid at all, so far as the injunction was concerned, but void utterly at the moment of its rendition. If that be true, the damages claimed resulted, not from the void process, but from the voluntary and needless act of the appellant in view of its existence. No action was taken under it by the then plaintiff. Neither the person nor the property of the appellant was touched or seized. When a void warrant of arrest or order of attachment is issued, the granting of the process is not necessarily a trespass, and none may exist until it is in some manner executed. It is the arrest or the levy which constitutes the trespass, and not the mere granting of the process. The injunction, if absolutely void, was a nullity. It could not and did not restrain the manufacture. If the appellant ceased work, the act was his own, and both voluntary and needless. It originated in no compulsion, for there was nothing to compel, and nobody

compelling. But he answers that the mere service of a copy of the judgment was a trespass, because the then plaintiff could not be heard to say that the injunction which she caused to be served was void and ineffective. But on the theory now under consideration it is not the defendant who asserts the void character of the process, but the plaintiff himself, driven to it by the necessity of providing some sort of foundation on which to build up a claim of trespass, and he cannot assert it for his purpose, and deny it when it serves hers. But, as already intimated, I do not think the injunction was absolutely void. Jurisdiction in the action was full and complete. This court so held upon the appeal. There was authority to grant an injunction, but the remedy was declared to be needless, and so improper, in view of the revocation of the license by the judgment rendered. *Ilyatt v. Ingalls*, 124 N. Y. 98.

Regarded as restraining a future infringement, the injunction would have been in excess of the jurisdiction; but, in view of the pleadings, of the findings, and of the general relief awarded, it may and should be construed as a perpetual restraint upon a manufacture under the contract, and was erroneous simply because open to possible misconstruction, and needless and superfluous, when construed, as it should be, as not transcending the jurisdiction. And this view of it as a decree voidable, and not void, and valid until reversed, is the view upon which plaintiff acted, by force of which only he can assert damages suffered by compulsion, and which he ought not to be permitted to allege for one purpose, and at the same time deny for another. We find no error in the record, and the judgment should be affirmed, with costs.

All concur, except **Gray, J.**, not voting.

MINNESOTA SUPREME COURT.

RAMSEY COUNTY

v.

MACALASTER COLLEGE.

(.....Minn..... ..)

- *1. A college owns forty acres of land, on which the college buildings are situated. On a part of the tract, near the college buildings, the college has erected several houses as places of residence for the professors or faculty such premises being used for no other purpose. Held, that the premises used for that purpose are within the statutory exemption from taxation.
2. About twenty acres of the land are in a state of nature, partially covered with forest trees and partially swampy, never having been improved or used. It is contemplated that the property will be improved and devoted to

*Headnotes by DICKINSON, J.

the use of the college as a place of recreation at some indefinite future time, such use being, perhaps, needful. Held, that the property is not now exempt from taxation.

(December 1, 1902.)

CASE CERTIFIED from the District Court for Ramsey County to determine the validity of certain taxes which had been assessed against defendant. *Decision of the lower court affirmed in part, reversed in part.*

The facts are stated in the opinion.

Mr. Thomas D. O'Brien, for plaintiff:

Dwelling houses and land are not exempt because gentlemen who hold the positions of college professors live in them.

The evidence shows that the 20.023 acres is simply a tract of land unimproved, owned by the college and contiguous to what may be termed the college grounds proper. This tract

NOTE.—On the subject of the exemption of educational institutions from taxation, see *Auditor-General v. University of Michigan*, 10 L. R. A. 374, and note, 83 Mich. 487; *St. James Educational Inst.* 18 L. R. A.

v. Salem, 10 L. R. A. 573, 153 Mass. 185; *Church of St. Monica v. New York*, 7 L. R. A. 70, and note, 119 N. Y. 91; *Detroit Home & Day School v. Detroit*, 6 L. R. A. 97, 78 Mich. 521.

may in the future be added to the college grounds and may never be. Under such circumstances it is eminently proper that it should be taxed.

Ramsey County v. Chicago, M. & St. P. R. Co. 38 Minn. 587; *Todd County v. St. Paul, M. & M. R. Co.* 38 Minn. 163; *St. Paul v. St. Paul, M. & M. R. Co.* 39 Minn. 112; *Ramsey County v. Church of the Good Shepherd*, 11 L. R. A. 175, 45 Minn. 229; *St. Peter's Church v. Scott County Comrs.* 12 Minn. 895; *Hennepin County v. Grace*, 27 Minn. 508; *Hennepin County v. Bell*, 43 Minn. 844; *Kendrick v. Parquhar*, 8 Ohio, 189; *Methodist Epis. Church Trustees v. Ellis*, 88 Ind. 3; *Vail v. Beach*, 10 Kan. 214.

Mr. H. J. Horn for defendant.

Dickinson, J., delivered the opinion of the court:

This matter, certified to this court from the district court pursuant to statute, presents the question of the taxability of a part of a tract of land owned by Macalaster College, upon which tract the college building and other structures are situated. The entire tract to which reference is made is the east forty acres of a certain quarter section of land, being about one half of a mile long, north and south, and about one eighth of a mile wide, east and west. About six acres of this are within the limits of streets, by which the tract is surrounded. The college is an incorporated educational institution, fitly denominated a college, its curriculum being such as is usually pursued in our secular colleges. This forty-acre tract was donated to the corporation for the purposes of the college, being conveyed to it in fee about ten years ago. That part of the tract comprising the south twenty acres (20.023 acres) is mostly covered with forest trees, and, as was shown on the hearing, was in part swampy. It has not been improved, or put to any actual and necessary use by the college. It may be deemed to have been the intention of the trustees to improve and beautify this part of the grounds when they should be financially able to do so, and to make it an attractive place of resort by the students for recreation and pleasure; but the time when this may be expected to be done was not shown, and seems to be wholly indefinite. This part of the tract was taxed, and the district court sustained the taxation, holding that it was not exempt. A part of the tract off the north end, comprising nearly eight acres, (7.867 acres,) was also taxed, and this taxation was sustained by the district court. On this part of the land the college erected five dwelling-houses (four of which are still standing) for the use of its professors or faculty, so that they might be conveniently located near the main college building. These buildings have never been leased or used for profit, but they have been occupied by the professors without charge for rent. The evidence shows that the college pays to its professors stated salaries and the use of a house. The remainder of the tract, comprising about twelve acres, lying between the parts above referred to, was not taxed, being deemed to be exempt under the Constitution and the statute. On this part of the premises there has been constructed and is in use the main

college building, with dormitories for students, and a library building; and here also is the campus and grounds used by the students for athletic games. The college has not less than 100 students, a large part of whom occupy the dormitories in the college building. There are no fences or other visible divisions of the forty-acre tract. None of the premises have ever been used for profit.

The Constitution (art. 9, § 3) provides that public burying grounds, public schoolhouses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property used for religious purposes, and houses of worship, . . . shall, by general laws, be exempt from taxation." By statute (Gen. Stat. 1878, chap. 11, § 5) it is declared that "all public schoolhouses, academies, colleges, universities, and seminaries of learning, with the books and furniture therein, and the grounds attached to such buildings, necessary for their proper occupancy, use, and enjoyment, and not leased or otherwise used with a view to profit; houses used exclusively for public worship, and the lot or parts of lots upon which such houses are erected,"—shall be exempt from taxation. The question is whether the south twenty acres and the north eight acres, respectively, are within the exemption thus declared by reason of being necessary for the proper occupancy, use, and enjoyment of the college. We will first consider this with reference to the north eight acres, occupied as places of residence by the professors. It is contended that the former decisions of this court in *St. Peter's Church v. Scott County Comrs.* 12 Minn. 895, (Gil. 280); *Hennepin County v. Grace*, 27 Minn. 508, and *Ramsey County v. Church of the Good Shepherd*, 45 Minn. 229, 11 L. R. A. 175, are opposed to this claim of exemption. But those cases are so different from this that they are not of controlling influence as respects the question now presented. The results in those cases were determined by the construction of a different clause of the Exemption Law from that which controls the determination in the matter now before us. The question in each of the cases cited was whether a church, parsonage, or rectory should be construed as included within the language of the exemption statute, "houses used exclusively for public worship," or (as was also considered in the last of these cases) within the language of the Constitution, "church property used for religious purposes." Those decisions might have been different if the language applicable to church property had been, as it is with respect to colleges and institutions of learning, "the grounds attached to such buildings, [churches,] necessary for their proper occupancy, use, and enjoyment." It is, however, settled by these and many other decisions that such exemption laws are to be strictly construed. What, then, is the meaning, as applied to such institutions as are referred to in the law, of the language, "and the ground attached to such buildings, necessary for their proper occupancy, use, and enjoyment, and not leased," etc.? This word "necessary" should not be read in its strictest sense, restricting the exemption to the land actually occupied by such college buildings as are devoted to the purposes of class rooms, lect-

ure rooms, libraries, and the accommodation of students. The language has this broader meaning, viz., "reasonably necessary or appropriate for the proper occupancy, use and enjoyment of the institution." *Hennepin County v. Brotherhood of Gethsemane*, 27 Minn. 460, 462, 463; *Hennepin County v. Grace*, *supra*. What uses may be thus appropriate, within the limits of reasonable necessity, has been left to be determined with reference to the circumstances of each case. Construing the statutory exemption as above indicated, we are of the opinion that it embraces the property in question, devoted to the use of the college as places of residence for the professors. This occupancy by the faculty without rent, and under circumstances rendering their occupancy and use incidental to their relation to the college under contracts for their personal services, the ordinary relation of landlord and tenant was not created. *East Norway Lake N. E. L. Church Trustees v. Froislie*, 37 Minn. 447. Such occupants acquired no estate or interest in the property. Its appropriation to such purposes seems to have been primarily and directly for the benefit of the college although incidentally this may have contributed to the convenience and benefit of these persons. But even their convenience, as affected by the use of these residences in the immediate vicinity of the college, was associated with the performance of duties in behalf of the institution; duties which would seem to render it highly expedient that they should reside near the college. It is unnecessary to advert to the ordinary duties of the professors as instructors, calling them to the class rooms at various hours of the day. Aside from this, while the facts are not as fully presented as may have been desirable, we understand that, as is the case generally in such institutions, the duties of the professors are not confined merely to instruction in the class or lecture rooms, but that they exercise such supervision and personal influence over the daily conduct and life of the students as is necessary during the period of youth. It appears that the students here are of ages from fourteen years upwards. Aside from what relates to mere educational work in its narrow sense, the duties of those to whom it is committed to guide, superintend, control, and influence youthful students, removed from home surroundings, are not only important but constant. No more need be said to suggest to the mind the reasonable necessity that those upon whom rests the direction of affairs in the ordinary government and work of the college should have the advantage of residence in immediate vicinity to the college. A reasonable means of securing this advantage is for the college to provide residences for its faculty and governing officers. When this institution was founded, a few years ago, as the evidence shows, there were no other houses in the vicinity, and there was an apparent and present necessity for the construction of these houses for the use of the college. If, possibly, the need for maintaining them for the same purpose has now become less imperative, (which is not shown,) it may well be deemed still an appropriate use of the property within the limits of

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reasonable necessity, so that the college may always have its faculty located in the immediate vicinity of the institution; otherwise it might often occur that professors and tutors would be unable to find residences, except at such a distance as to impair in some degree their usefulness. We therefore hold that such property is exempt. There is no claim made that the amount of property so used is unreasonable, but only that the use of it is such as not to bring it within the exemption. The following authorities go to sustain the views we have expressed: *Hennepin County v. Grace*, *supra*; *State v. Ross*, 24 N. J. L. 497; *Pierce v. Cambridge*, 2 Cush. 611; *Grinnold College Trustees v. State*, 46 Iowa, 275. While the case of *Pierce v. Cambridge* was not like this, the court expressed the opinion that, under circumstances such as are here presented, the property would be exempt.

As to the twenty acres of unoccupied land, we have come to the conclusion that it is not within the declared exemption. The cases in which the question of the direct taxability of railroad property has been considered, such as *Ramsey County v. Chicago, M. & St. P. R. Co.* 33 Minn. 537; *Todd County v. St. Paul, M. & M. R. Co.* 38 Minn. 163,—and others involving similar questions, have but little bearing upon the question now before us, for the reason that those cases did not relate to the question of exemption from taxation, but rather to the proper method of taxation, the use of the property, actual or contemplated, being regarded as decisive as to whether it should be subject to direct taxation, or whether the proper contribution to the state on account of such property should be regarded as included in the percentage paid on the earnings of the railroad. The question here is as to the absolute exemption of this property under the statute above recited. It may be that, if the twenty acres of land now referred to had been subjected to actual use for purposes of recreation, it might have been exempt. The question would have been as to the reasonableness of the quantity of the land so used, and that would depend to some extent upon various circumstances. But such is not the case. The land is not occupied, used, or enjoyed, and it can hardly be said that, within the meaning of the statute, it is at present "necessary" for the "proper occupancy, use, and enjoyment" of the college. Even if it is not to be said that such language refers to an existing or present need and use, it is at least to be said that it does not naturally refer to or comprehend cases where the use of the property is to be postponed to an indefinite future time. Hence, observing the principle of strict construction, it should not be construed to embrace all property, however extensive, actually owned by the institution, even though it is needed for present use, if, in fact, not being presently useful, it is only intended to make it so at some indefinite future time. The result might be different if the premises were about to be subjected to the occupancy or use for which they are needful.

The determination of the District Court as to the 8-acre tract, is reversed, and as to the 20-acre tract it is affirmed.

ILLINOIS SUPREME COURT.

John V. FARWELL *et al.*, Appts.,
v.

Daniel COHEN.

(138 Ill. 216.)

1. A voluntary transfer by an insolvent of certain specified property in trust to sell enough of it to pay certain specified debts and return the remainder is, regardless of the form of the instrument, an assignment, within the meaning of Act May 22, 1877, conferring jurisdiction on county courts to supervise the execution of trusts growing out of voluntary assignments for creditors.
2. A creditor of the assignor may be assignee in an assignment for benefit of creditors.
3. A voluntary assignment which on its face includes only part of the debtor's property and contains no general terms descriptive of property is not converted into a general assignment of all the debtor's unexempt property by Act May 22, 1877, which provides that an assignment for creditors shall not be void for want of any list or inventory, and that a list or inventory shall not be conclusive, but that the assignee shall take title to "any other property not exempt by law . . . comprehended within the general terms" of the assignment.
4. A partial assignment for particular creditors is included within the provisions of Act May 22, 1877, which provides that an assignment shall include "any other property . . . comprehended within the general terms of the same" and that all debts and liabilities are to be paid *pro rata* "from the assets thereof" and the trust is enlarged by the statute which makes it inure to the benefit of all the creditors.
5. Failure to acknowledge and record an assignment for creditors as required by a statute which contains no negative words declaring it void for such failure will not prevent the assignment from becoming operative.
6. A claim by an assignor and assignee that an assignment for creditors is a trust for certain creditors only as they intended it, estops them from claiming that it is invalid for lack of acknowledgment and recording when it is held to inure under the statute to the benefit of all creditors.
7. A petition by a creditor or some other party in interest is a proper way to call upon the court to declare a deed of trust for certain creditors to be in effect an assignment for all creditors.

(June 10, 1891).*

*A decision was originally reached in this case affirming the decision of the appellate court and an opinion handed down by Chief Justice Magruder embodying the views which appear in his dissenting opinion herewith given. A rehearing was subsequently granted after which the decision was reached as evidenced by the opinion given herewith.

NOTE.—Although the above decision as to the effect of a partial assignment for particular creditors rests upon provisions of the Illinois statute, it is of great practical importance by reason of its subject-matter as well as the establishing of a precedent for the construction of similar statutes elsewhere.

APPEAL by plaintiffs from a judgment of the Appellate Court, Third District, reversing a judgment of the Circuit Court for Vermillion County which in turn affirmed a judgment of the County Court sustaining a demurrer to the answer in a proceeding to have a transaction declared to be an assignment for benefit of creditors and to have the assignees removed and another one appointed and to have the court supervise the distribution of the assets in accordance with the provisions of the statute. *Reversed.*

The facts are stated in the opinion.

Messrs. Smith & Pence, John Maynard Harlan and Kraus, Mayer & Stein, for appellants:

The debtor being shown to be insolvent, if this instrument be in its nature an assignment and not a mere mortgage, it will, under the statute, vest the entire property of the debtor in the assignee, even though in the deed the debtor has failed to enumerate some of his property.

Freydendall v. Baldwin, 103 Ill. 838.

The transaction is marked by all the indicia of a voluntary assignment.

See *Cadwell's Bank v. Crittenden*, 66 Iowa, 240.

The Missouri Statute of 1855, which in this respect is the same as ours, was construed in *Shapleigh v. Baird*, 26 Mo. 825, and it was held that it did not invalidate partial assignments for the benefit of a portion of the creditors of the assignor, but that it had the effect of overthrowing all provisions in such partial assignments, giving preferences among the designated creditors.

The term "voluntary" is applied to assignments to distinguish them from such as are made by the compulsion of the law.

Manny v. Logan, 27 Mo. 528; *Burrill*, Assignment, 4th ed. p. 8, § 2.

Chief Justice Redfield, in *Mussey v. Noyes & Baldwin*, 26 Vt. 478, says: "An assignment which includes all one's attachable property, and which is intended to close up one's business, and does so at once, is clearly a general assignment."

Noyes v. Hickok, 27 Vt. 86; *Holt v. Bancroft*, 30 Ala. 200; *Dana v. Lull*, 17 Vt. 390.

When a debtor has made a general disposition of all his property and effects, and suspended his whole business in consequence thereof, thereby declaring insolvency, his act in so doing constitutes a voluntary assignment under the statute; and it is immaterial whether that act be effectuated by one or more instruments, provided they are parts of one and the same transaction, in and by which the debtor so disposes of his property. The Assignment Statute is remedial in its nature and intended to prevent preferences, and must be liberally construed, in the very nature of things, in order to accomplish the purposes for which it was enacted. The courts look beyond the

edent for the construction of similar statutes elsewhere.

For note on the general question what operates as an assignment for creditors, see *Akers v. Rowan* (S. C.) 10 L. R. A. 707.

mere form of instruments, and in view of the circumstances surrounding their execution construe them according to their real meaning and effect.

Martin v. Hausman, 14 Fed. Rep. 160; *Kellogg v. Richardson*, 19 Fed. Rep. 72; *Clapp v. Dittman*, 21 Fed. Rep. 15; *Perry v. Corby*, 21 Fed. Rep. 737; *Kerbs v. Ewing*, 22 Fed. Rep. 693; *Clapp v. Nordmeyer*, 25 Fed. Rep. 72; *Freund v. Jaegerman*, 26 Fed. Rep. 812; *State v. Morse*, 27 Fed. Rep. 262; *Weil v. Polack*, 30 Fed. Rep. 813; *Crow v. Beardsley*, 68 Mo. 435; *State v. Benoist*, 37 Mo. 501; *Sexton v. Anderson*, 14 West. Rep. 791, 95 Mo. 882; *Downing v. Kintzing*, 2 Serg. & R. 326; *Van Vleet v. Lawson*, 47 Barb. 817; *Holt v. Bancroft*, 30 Ala. 200; *Livermore v. McNair*, 84 N. J. Eq. 478; *Watson v. Bagaley*, 12 Pa. 164, 51 Am. Dec. 595; *Miners Bank of Pottsville's App.* 57 Pa. 193; *Burrows v. Lehndorff*, 8 Iowa, 96; *Cole v. Dealham*, 13 Iowa, 551; *Van Patten v. Burr*, 52 Iowa, 518; *Heinemann v. Hart*, 55 Mich. 64; *Harkrader v. Leiby*, 4 Ohio St. 602; *Dickson v. Rawson*, 5 Ohio St. 218; *Englebert v. Blanot*, 2 Whart. 240; *Mussey v. Noyes & Baldwin*, 26 Vt. 471; *Thompson v. Hefner*, 11 Bush, 359; *Perry v. Holden*, 22 Pick. 269; *Bonns v. Carter*, 20 Neb. 566; *Danner v. Brewer*, 69 Ala. 191; *Winner v. Hoyt*, 66 Wis. 227, 57 Am. Rep. 257; *Page v. Smith*, 24 Wis. 364; *Wilks v. Walker*, 22 S. C. 108, 53 Am. Rep. 706; *Truitt Bros. & Co. v. Caldwell*, 3 Minn. 364, 74 Am. Dec. 764; *Murphy v. Caldwell*, 50 Ala. 461; *Owen v. Arvis*, 26 N. J. L. 22; *Wallace & Krebs v. Wainwright & Co.* 87 Pa. 263; *Johnson's App.* 103 Pa. 373; *Taylor v. Taylor*, 78 Ky. 470; *Sexton v. Anderson*, 95 Mo. 373.

A chattel mortgage may operate as an assignment.

Clapp v. Dittman, 21 Fed. Rep. 15; *Perry v. Corby*, 21 Fed. Rep. 737; *Kerbs v. Ewing*, 22 Fed. Rep. 693.

So of a confession of judgment.

Clapp v. Nordmeyer, 25 Fed. Rep. 71; *Pres-ton v. Spaulding*, 120 Ill. 208.

In *Englebert v. Blanot*, 2 Whart. 240, the court construed a bill of sale to a party to pay himself and three others to be an assignment.

In *Miners Bank of Pottsville's App.*, 57 Pa. 193, the assignor had conveyed or assigned part of his property, to be divided amongst certain creditors named, *pro rata*, there being other creditors, but not sufficient property to pay them. It was held that the act prohibiting preferences in assignments applied to the case, and that the assignment inured to the benefit of all the creditors.

If the facts are such as to show that at the time of making a mortgage, preferring one creditor over another, the debtor must have known he was insolvent, it will be within the statute.

Thompson v. Hefner, 11 Bush, 359; *Mussey v. Noyes & Baldwin*, 26 Vt. 471; *Taylor v. Taylor*, *supra*; *Whitaker v. Garnett*, 3 Bush, 402; *Sels & Co. v. Evans*, 6 Ill. App. 466; *Perry v. Holden*, 22 Pick. 269; *Bonns v. Carter*, 20 Neb. 566.

The form of the transaction is not material.

Johnson's App. *supra*; *Danner v. Brewer*, 69 Ala. 191; *Boyd v. Moore*, 11 Pick. 362; *Loftin v. Lyon*, 22 Ala. 540; *Winner v. Hoyt*, 18 L. R. A.

66 Wis. 237, 57 Am. Rep. 257; *Wilks v. Walker*, 22 S. C. 108, 53 Am. Rep. 706; *Dole v. Olmstead*, 36 Ill. 150, 83 Am. Dec. 397.

The requirement that the assignment be recorded, when read in the light of the analogy of our laws in reference to the recording of an instrument, obviously has reference to the protection of subsequent purchasers without notice.

Myer v. Fales Sons & Co., 12 Ill. App. 351; *American & Co. v. Frank*, 62 Iowa, 203; *Munson v. Frozer*, 73 Iowa, 177.

The vesting of the title is as little dependent upon the acknowledgment of the deed as upon recording.

Sculi v. Reeves, 8 N. J. Eq. 84.

The requirements of acknowledgment and recording are conditions subsequent, not conditions precedent, to the vesting of title in the assignee.

Winn v. Madden, 18 Mo. App. 261; *Clayton v. Johnson*, 36 Ark. 406, 33 Am. Rep. 40; *Price v. Parker*, 11 Iowa, 144; *Wright v. Thomas*, 1 Fed. Rep. 716.

The absence of acknowledging or recording, even in the case of a formal deed of assignment, does not invalidate it.

Nicoll v. Spowers, 7 Cent. Rep. 95, 105 N. Y. 1; *Fuller v. Hasbrouck*, 46 Mich. 78; *Farwell v. Orandall*, 8 West. Rep. 702, 120 Ill. 70; *Perkins v. Zarracher*, 32 Minn. 71; *Warner v. Jaffray*, 96 N. Y. 248, 48 Am. Rep. 616; *Cadwell's Bank v. Cittenden*, 66 Iowa, 237; *Dawson v. Crossen*, 10 Or. 41; *Hardcastle v. Fisher*, 24 Mo. 70.

Messrs. Tenney, Bashford & Tenney and *E. R. E. Kimbrough*, also for appellants;

When an insolvent debtor makes a transfer by which substantially all his property is placed in the hands of one who is to dispose of the same, and from the proceeds pay other creditors of the grantor, the transaction, whatever be its form, is in law an assignment for the benefit of creditors within the true meaning of the statutes regulating such transfers. If its effect upon the debtor's property is substantially what would be accomplished by a regular assignment, it will be held to be one, even though the parties may claim that they intended to have it operate in quite a different manner. The courts give to the transfer the effect which the statute prescribes.

In all the states, which, like our own, merely declare the preferential features void, the courts have been uniform in giving a broad and liberal construction to the statute, in order that its equitable purpose may not be judicially defeated by a narrow and technical reading of its terms.

Harkrader v. Leiby, 4 Ohio St. 602; *Bloom v. Noggle*, 4 Ohio St. 45; *Brown & Co. v. Webb*, 20 Ohio, 389; *Bonns v. Carter*, 20 Neb. 566; *Englebert v. Blanot*, 2 Whart. 240; *Watson v. Bagaley*, 12 Pa. 164, 51 Am. Dec. 595. See also *Fallon's App.* 42 Pa. 235; *Miners Bank of Pottsville's App.* 57 Pa. 193; *Wallace & Krebs v. Wainwright & Co.* 87 Pa. 263; *Lucas v. Sunbury & E. R. Co.* 32 Pa. 453; *Shubar v. Winding*, 1 Cheves, L. 218; *Page v. Smith*, 24 Wis. 368; *Winner v. Hoyt*, 66 Wis. 227, 57 Am. Rep. 257; *Freund v. Jaegerman*, 26 Fed. Rep. 812; *Martin v. Hausman*, 14 Fed. Rep.

160; *Weil v. Polack*, 30 Fed. Rep. 813; *Woonsocket Rubber Co. v. Falley*, 30 Fed. Rep. 808, and the cases cited.

The word "assignment" is used indifferently, to indicate both the transfer and the written instrument by which the transfer is evidenced, and the clear logic of these decisions, and those of this court in *Freydendall v. Baldwin*, 103 Ill. 325; *Hanchett v. Waterbury*, 8 West. Rep. 501, 115 Ill. 220; and *Farwell v. Crandall*, 8 West. Rep. 702, 120 Ill. 70,—is that in the title to the Act, and in the 7th, 18th, and 14th sections, the word is used in the former sense, and refers to the act of the debtor, and not to the evidence of the act.

To have a transfer come within the legal meaning of an assignment for the benefit of creditors, it need not be evidenced by a formal deed, complete in all its parts, and expressly providing for the payment of all creditors. But in all of them will be found, in one form or another, the following principal characteristics of an assignment, viz.:

1. Insolvency on the part of the grantor.
2. A trust in favor of creditors.
3. Power in the trustee to sell the property and pay debts of the grantor, a power which does not create a mere lien on the property for the security of the debts, but provides for a sale and appropriates the proceeds of the sale to their payment.

Burrill, Assignm. 5th ed. §§ 8, 4.

The fact that the debtor appoints a trustee seems, in most instances, to fix conclusively the character of the transaction as a general assignment.

Hurrows v. Lehnendorf, 8 Iowa, 96.

When a conveyance is made to a creditor under an agreement by which he is to sell the property, and out of the proceeds pay his own and other debts of the assignor, he becomes a trustee, and the transfer is an assignment.

Truitt Bros. v. Caldwell, 8 Minn. 364, 74 Am. Dec. 764; *Harkrader v. Leiby*, 4 Ohio St. 602; *Bloom v. Noggle*, 4 Ohio St. 45; *Winner v. Hoyt*, 66 Wis. 227, 57 Am. Rep. 257; *Murphy v. Caldwell*, 50 Ala. 461; *Bonns v. Carter*, 20 Neb. 566; *Lucas v. Sunbury & E. R. Co.* 32 Pa. 438; *Page v. Smith*, 24 Wis. 368; *Ingram v. Osborn*, 70 Wis. 184.

Another distinguishing mark of an assignment is that it does not merely pledge the property as security for the payment of the debts, as in the case of a mortgage; it appropriates it absolutely to their payment by giving the assignee power to raise a fund by sale to pay them.

Burrill, Assignm. § 4; *Crow v. Beardsley*, 68 Mo. 438; *Hoffman v. Mackall*, 5 Ohio St. 124, 64 Am. Dec. 637.

No one of these elements of an assignment is lacking in the instrument contained in this record.

The county court has jurisdiction to vacate unlawful preferences in assignments, when the property is in the possession of the assignee.

Freydendall v. Baldwin, 103 Ill. 325.

In *Hanchett v. Waterbury*, 8 West. Rep. 501, 115 Ill. 220, and *Farwell v. Crandall*, 8 West. Rep. 702, 120 Ill. 70, it is held that the possession of the assignee is the possession of the court, and that he is the officer of the court. This case, then, meets that test of jurisdiction, 18 L. R. A.

actual custody of the *res* by the officer of the court.

It is said that the assignment must be a statutory assignment, that is, it must be executed in substantial compliance with the statute.

But the statute is silent as to the form of the instrument.

Preston v. Spaulding, 120 Ill. 208.

Annexing an acknowledgment to a deed which is not an assignment would not make it one, and the converse of the proposition is also true.

The presence or absence of the acknowledgment can have no effect in determining the character of the instrument.

Although our statute says that every assignment shall be duly acknowledged and recorded, the provision is anything but mandatory in its character.

Where the Legislature requires a thing to be done not in itself essential to the validity of it, and does not in terms specify what shall be the consequence of noncompliance, the court will not make that consequence to be an avoidance of the whole.

Wilberforce, Statute Law, 205; *Stayton v. Hutings*, 7 Ind. 144; *Maxwell*, Interpretation of Statutes, 2d ed. 452; *Nowell v. Worcester*, 9 Exch. 468; *Sedgwick*, Stat. & Const. Law, 316; *Thames Mfg. Co. v. Lathrop*, 7 Conn. 550.

The use of the word "shall" is not conclusive; for that word is held to be directory merely when no right or benefit depends on its use in an imperative sense.

Fowler v. Perkins, 77 Ill. 271.

As to recording, the statute is merely directory, and a failure to record the assignment does not affect its validity.

Myer v. Fales Sons & Co. 12 Ill. App. 351.

In Iowa neither acknowledgment nor record is essential, where the property, as in this case, is delivered to the assignee.

Meeker v. Sanders, 6 Iowa, 61; *American & Co. v. Frank*, 62 Iowa, 202; *Munson v. Frazer*, 78 Iowa, 177; *Dawson v. Coffey*, 12 Or. 513.

Mr. J. B. Mann, with *Messrs. Moses & Newman*, for appellee:

The jurisdiction of the county court is a special statutory and limited jurisdiction. While the powers contended for would require general jurisdiction both at law and in equity.

Farwell v. Crandall, 8 West. Rep. 702, 120 Ill. 70; *Knorville Nat. Bank v. Hanrick*, 67 Iowa, 583; *Wurts v. Hurt*, 13 Iowa, 515.

Smith & K. Implement Co. v. Thurman, 29 Mo. App. 189, shows that inasmuch as the deed did not purport on its face to dispose of all the grantor's property, it is a deed of trust and not an assignment.

See also *Caldwell's Bank v. Crittenden*, 66 Iowa, 237.

The intention of the parties is the paramount question, whether an assignment shall be established or not.

Carson v. Byers, 67 Iowa, 611; *Gage & Co. v. Parry*, 69 Iowa, 605.

No general assignment is declared unless all the property of the assignor is included.

Jaffray & Co. v. Greenbaum, 64 Iowa, 492.

The right to redeem shows the deed to be a mortgage.

Gage v. Chesebro, 49 Wis. 486; *National Ins.*

Co. v. Webster, 83 Ill. 470; *Jones, Chat. Mort.* §§ 19, 22, 285, 323.

A mortgage is not an assignment for the benefit of creditors, which is made to a creditor to secure a debt to him and the debts of other creditors named.

Jones, Chat. Mort. § 355; *Canter v. Rosey*, 63 Wis. 552; *Bagg v. Jerome*, 7 Mich. 145; *Gage v. Chesbro*, 49 Wis. 486; *Jaffray & Co. v. Greenbaum, Caldwell's Bank v. Crittenden*, and *Gage & Co. v. Parry, supra*; *Brooks v. Marbury*, 24 U. S. 11 Wheat. 88, 6 L. ed. 426.

Baker, J., delivered the opinion of the court:

John V. Farwell & Co. filed in the county court of Vermillion county a petition, verified by affidavit, wherein it was stated that they were creditors of George Silverman, of that county, and that he was indebted to them for goods sold and delivered in the sum of \$1,498.68; and that on December 18, 1887, said Silverman executed and delivered to Daniel Cohen an instrument of writing as follows:

"Know all men by these presents, that I, George Silverman, of the city of Danville, county of Vermillion and state of Illinois, in consideration of the sum of thirteen thousand four hundred and sixty-nine and seventy-hundredths dollars, to me in hand paid by H. B. Claffin & Co., M. Cohen, D. Cohen, Simon and Rosenbloom, Mayer Singer, and Sarah Silverman, the receipt whereof is hereby acknowledged, and in consideration of the sum of one dollar in hand paid to me by Daniel Cohen, do hereby sell, assign, transfer, and set over unto said Daniel Cohen all and singular the following goods and chattels, viz.: All the stock of dry goods and carpets, boots and shoes, store fixtures, and every other article of property in and about the store-room known as 'No. 115 East Main Street,' in the city of Danville and state of Illinois, in trust for the uses and purposes following, that is to say: Whereas, I am indebted to the persons hereinafter named in the amount hereinafter mentioned, which are evidenced by sundry promissory notes, as follows: One note dated August 10, 1887, for six hundred and fifty-three dollars, due in six months from date; one note dated August 19, 1887, for seven hundred ninety-two dollars and ninety-two cents, due in four months from date; one note dated August 20, 1887, for six hundred and fifty-four dollars and one cent, due six months after date; one note dated October 2, 1887, for four hundred twenty-one dollars and thirty-six cents, due in three months from date; one note dated October 6, 1887, for seventy-four dollars and fifty cents, due in four months from date; one note dated August 9, 1887, for seven hundred and ninety-one dollars, due in four months from date, all payable to H. B. Claffin & Co.; one note dated December 8, 1887, for five thousand eight hundred and fifty dollars, due one day after date, payable to Moses M. Cohen; one note dated December 8, 1887, for fourteen hundred and fifty dollars, due one day after date, and payable to Daniel Cohen; one note dated December 8, 1887, for seven

hundred and forty-one dollars, payable to Mayer Singer, and due one day after date; one note dated December 8, 1887, for nineteen hundred dollars, due one day after date, and payable to Sarah Silverman; also, the sum of one hundred and fifty dollars, due on an open account to Simon and Rosenbloom. And whereas, I am desirous of securing the payment of said several sums of money: Now, therefore, the said Daniel Cohen shall take, hold, and receive said goods and chattels hereby conveyed, in trust, to sell the same at public sale, in such quantities as he may see fit, after giving at least ten days' notice of the same, by posting up notices of the same in at least five public places in said city of Danville, and out of the proceeds thereof, after paying the expenses of caring for said property and making said sale, to—*First*, pay the several amounts mentioned in said several notes payable to H. B. Claffin & Co.; *secondly*, to pay said note to Daniel Cohen; *thirdly*, to pay the other indebtednesses above mentioned: provided, however, that said trustee shall not sell any more of said goods and property than is sufficient to pay said indebtedness and expenses aforesaid. In witness whereof I have hereunto set my hand and seal this 14th day of December, 1887. George Silverman. [Seal.]"

The petition further stated that the stock of goods so sold, assigned, and transferred to Cohen composed all the property and estate of any value belonging to Silverman, and that the latter at the time of executing the instrument was, and still is, wholly insolvent; that the liabilities of Silverman exceeded \$40,000; and that said goods were insufficient to pay such liabilities, their value being not to exceed \$20,000. It was alleged that the transfer was in fact and in law an assignment for the benefit of creditors to Cohen as assignee, with preferences in favor of the persons in the instrument named, and that thereby Cohen became assignee of Silverman, and subject to all the duties and liabilities of an assignee; further, that he had seized the property, and held possession of the same, but instead of administering the same according to law, under the supervision and direction of the court intended to wholly ignore the court and administer the property solely for the benefit of the persons named in the assignment as beneficiaries without regard to the rights of petitioners and other creditors of Silverman, and without complying with any of the provisions of the laws of Illinois regulating assignments, and in pursuance of such intention had given notice that he would sell said property on December 26, 1887, etc. It was also alleged that Cohen was not a resident of the state, and not a proper person to act as assignee; that he was one of the preferred creditors in the assignment, a relative of the assignor, and that he would not act impartially in the matter; that he was acting solely in the interest and under the direction of the insolvent and the preferred creditors; and that he had filed in the court no bond as assignee nor any schedule or inventory of the property assigned and that he did not intend to do so until compelled by the order of court. The

prayer of the petition was that an order be entered restraining Cohen from disposing of the property without an order of the court, and requiring him to file a schedule of the assigned property, and submit to the jurisdiction of the court, and that he be removed as assignee, and some suitable person appointed to administer the estate under the direction of the court, and that a citation issue against Silverman, etc., and for other relief.

The answer of Cohen to the petition was as follows: "The said respondent, Daniel Cohen, not admitting the jurisdiction of said court in the premises but reserving at all times hereafter the right to question the same, for cause why said petition should not be granted, says that he admits that George Silverman, on the 14th day of December, 1887, executed to respondent the said instrument in said amended petition described. Respondent, further answering, says that he is not sufficiently advised of the financial condition of the said George Silverman to state whether he is insolvent or not, or what the amount of his indebtedness really is or was, but admits that said stock of merchandise does not exceed in value the sum of twenty thousand dollars, nor is he able to say whether said stock constituted all of Silverman's property. Respondent, further answering, denies that either in fact or in law the instrument is an assignment for the benefit of creditors, within the meaning of the laws of the state of Illinois, and denies that the same was by the said Silverman intended to be an assignment, or was by respondent accepted as such, and avers that the same was not acknowledged by said Silverman but, on the contrary, respondent avers that said instrument was executed and delivered by said Silverman, and received by respondent, as a chattel mortgage, or trust-deed in the nature of a chattel mortgage, to secure the payment of the debts therein mentioned. And respondent, further answering, says that at the time of the execution and delivery of said chattel mortgage it was expressly understood and agreed by and between said Silverman and this respondent, and by the creditors mentioned in said instrument, that said Silverman should have the right to redeem said goods and chattels at any time before the expiration of said ten days during which said sale was to be made and at any time before said sale was made, by the payment of said debts in said chattel mortgage mentioned. Respondent, further answering, says that said notes mentioned in said chattel mortgage as due M. Cohen, Mayer Singer, and Sarah Silverman were all and each due, and contained a warrant of attorney, executed on the day of the date of said notes, authorizing the confession of judgments, in term-time or vacation, on said notes, and that said payees of said notes were threatening and intending to cause judgments to be entered up for the amount of said notes, and to issue executions thereon, and levy the same on said stock of merchandise, and that said Silverman was not able to secure a further extension of the time for the payment of said notes, except by the ex-

ecution of said chattel mortgage. Respondent, further answering, admits that he has entered into possession of said goods and chattels, and has advertised the same for sale, but has not sold the same, and that the said goods are now subject to redemption by said George Silverman, or any person entitled to redeem the same, and that he now claims no interest in said goods, and has never claimed or had any interest in said goods, save as trustee or mortgagee under said chattel mortgage. Respondent, further answering, admits that he does not intend to execute a bond as assignee, or to file an inventory or schedule, but expressly denies all jurisdiction of this court in the premises to either compel him to execute said bond, or to file said schedule and inventory, or to remove him from his trust. Wherefore respondent asks that said citation may be dismissed, and that said restraining order, heretofore issued, may be dissolved, and that he may be hence discharged with his costs." Said answer was verified by the affidavit of Cohen.

The county court sustained a demurrer to said answer. The court then found that said Cohen did not intend to inventory and appraise the property assigned to him and enter into bond, and that he refused so to do, and that he had failed and neglected for the period of twenty days after the making of the assignment to file an inventory and valuation and give bond; and thereupon said court removed Cohen as assignee, and appointed John G. Thompson assignee. Upon an appeal to the circuit court, that court sustained a demurrer to the answer of Cohen, and in all things affirmed the judgment and order of the county court. The case was thereupon taken to the appellate court, and there the judgment was reversed, and the cause remanded, with directions to dismiss the petition. The petitioners John V. Farwell *et al.* have brought the record to this court by appeal, and have assigned errors.

The material question in this case is whether or not the instrument which on December 18, 1887, was executed and delivered by Silverman to Cohen is such a voluntary assignment as will, under the Act of May 22, 1877, (Laws 1877, p. 116,) confer jurisdiction and authority upon the county court to supervise the execution of the trusts created by or growing out of such instrument, and the administration of the property thereby conveyed. By the Act, its provisions are made applicable "in all cases of voluntary assignments hereafter made for the benefit of creditor or creditors." In the late case of *Farwell v. Nilsson*, 188 Ill. 45, it was said: "The word 'assignment' had, at the time this statute was adopted, a well-defined meaning, understood by all the people, and it has no different meaning in said Act. According to the common acceptation of the term, it is a transfer, without compulsion of law, by a debtor of his property to an assignee, in trust to apply the same, or the proceeds thereof, to the payment of his debts, and to return the surplus, if any, to the debtor." And in the same case it was said: "The mere form of the instru-

ment is no doubt immaterial, provided the operation of it is to create a trust in the property conveyed for the benefit of creditors, and, if such are the purpose and design of the instrument, then any preference in it, or which, by construction of law, forms a part of it, is in fraud of the statute, and void." In *Preston v. Spaulding*, 120 Ill. 217, it was said: "The statute is silent as to the form of the instrument or instruments by which an insolvent debtor may effect an assignment;" and in one of the earlier cases that arose under the statute, *Hanchett v. Waterbury*, 115 Ill. 220, 8 West. Rep. 501, it was said "that the right and power of a failing debtor to pass the title of his effects to an assignee remain as they did before the statute." In the case of *Weber v. Mick*, 181 Ill. 520, in speaking of the subject of a voluntary assignment for the benefit of creditors, we said that such an assignment was and "always had been understood to be, an instrument voluntarily executed by a failing debtor, by which he assigns to some third person, as assignee or trustee, the whole, or sometimes the bulk, of his property, to be by such trustee distributed among the assignor's creditors in satisfaction of their demands." In *Schroeder v. Walsh*, 120 Ill. 408, 8 West. Rep. 501, this court, in speaking of such assignments and of the Statute of 1877, said: "That Act applies only to conveyances of property to an assignee or trustee, in trust to convert the same into money for the benefit of creditors of the assignor;" and to this statement was added the further clause, "which can now only be made under that law." Since the right and power of the failing debtor to pass title to an assignee remain as they did before the statute, and since the mere form of the instrument is immaterial, provided it operates to create a trust for the benefit of creditors, and since the word "assignments," found in the Act, has no different meaning than that which it had at the time the statute was adopted, and prior thereto, it would seem that the expression, "which can now only be made under that law," signifies, merely, that all voluntary assignments for the benefit of creditors must be carried into execution in conformity with the principles and rights established by that Act and that administration of the trusts may be enforced by the court to which the Act gives jurisdiction over the particular subject-matter of such voluntary assignments.

Waiving for the present the question of the capacity of Silverman to make a voluntary assignment, and the fact that the instrument executed purported to assign certain specified property, and contained no general term that would include other property, and waiving, also, various matters of supposed non-compliance with statutory requirements, we think it manifest, as well from the citations above made from former decisions of this court as from the doctrine laid down in the books, and in cases adjudicated in other courts, that said instrument was an assignment for the benefit of creditors, and not a mere mortgage security or pledge. By it Silverman sells, assigns, transfers and sets over unto Daniel Cohen the goods and chat-

tels therein mentioned; and it provides that said Cohen shall take, hold, and receive the goods and chattels thereby conveyed, in trust to sell the same at public sale in such quantities as he may see fit, and out of the proceeds pay expenses and certain debts in a certain specified order of payment; and it contains a proviso that the trustee shall not sell any more of said goods and property than is sufficient to pay said indebtedness and expenses. Some of the specified debts were due, and some were not due. The instrument, on its face, was an absolute transfer of the whole interest, legal and equitable, in the property. In express terms it created a trust in favor of certain creditors of Silverman other than Cohen. The fact that a debt due Cohen was also provided for did not take from the instrument its character of an assignment for the benefit of creditors. A creditor of the assignor may be the assignee in such an assignment. There is no condition of defeasance providing for the return of the property upon the payment of the debts mentioned. At most, there was express provision for a resulting trust for any excess of assets over liabilities, and that much the law itself implied. A correct definition of an assignment for the benefit of creditors, as we understand the law, is given in the American and English Encyclopedia of Law, and it is this: "A voluntary transfer by a debtor of all or a part of his property to an assignee or assignees, in trust to apply the same, or the proceeds thereof, to the payment of some or all of the assignor's debts, and to return the surplus, if any, to him." See volume 1, pp. 845, 846, and authorities cited.

Since appellee claims title under the instrument of December 14, 1897, and appellants have no case in court except as based thereon, it would seem that the capacity of Silverman to execute the same must necessarily be admitted by both parties, and that the only issue between them in regard thereto can be in respect to its legal effect. The Assignment Act of 1877 is not, in express terms, confined to debtors who either are in fact insolvent or contemplate insolvency. The expression, "assignment for the benefit of creditors," implies insolvency, and an inability on the part of the debtor to provide for the claims of his creditors in the usual way. It is to be presumed that a debtor who is, or thinks he is, solvent, will not transfer his estate, and yield up all dominion over it, for the purpose of having it administered upon under the supervision of a court; and it is unreasonable to suppose that the Legislature contemplated or intended that the provisions of the Act should be applicable to a solvent debtor. In *Hanchett v. Waterbury*, 115 Ill. 220, 8 West. Rep. 501, this court held that said Act was, in its framework and detail, essentially a general insolvent law, and that it was so intended by the Legislature. In *Gardner v. Commercial Nat. Bank of Providence*, 95 Ill. 298, it was held that a solvent debtor could not make a valid deed of assignment for the benefit of creditors. It follows that the allegation of the assignor's insolvency contained in the

petition is material to the case made by the petition, but we think that the statements of the answer, they being taken most strongly against the pleader, sufficiently admit such insolvency.

The questions whether a parol assignment of property, or a constructive voluntary assignment of property, for the benefit of creditors, is a voluntary assignment for the benefit of creditors, within the contemplation of the Assignment Act, are discussed at great length in the briefs and arguments. But, since here the assignment was by deed, though not in the usual form, duly signed, sealed, and delivered, and a trust for the benefit of creditors was created therein in direct and express language, no such questions are involved in the record, and we must decline to consider them.

The instrument here in question transferred to the assignee certain specified goods and chattels, and it contained no general terms which would embrace other property. A general assignment of all property is the most usual species of voluntary assignments. From the fact that the Act of 1877 provides that the debtor shall annex to the assignment "an inventory, under oath or affirmation, of his, her, or their estate, real and personal," an implication, more or less strong, arises that the statute contemplates general assignments only. This assignment is not upon its face a general assignment. If, from the implication above noted, and from any implication that might arise from the use of the term "voluntary assignments," or otherwise from the provisions of the Act, it were deducible that general assignments alone are within the statute, yet the absence of general terms in the deed could be holpen by an averment and proof. In *United States v. Howland*, 17 U. S. 4 Wheat. 108, 4 L. ed. 526, Chief Justice Marshall said: "The deed, then, conveys only the property contained in the schedule, and the schedule does not purport to contain all the property of the parties who made it. In such a case the presumption must be that there is property not contained in the deed, unless the contrary appears. The *onus probandi* is thrown on the United States. . . . The depositions do not aid the deed. The question whether the whole property is assigned is still left to conjecture; and this, being the fact on which the preference of the United States is founded, ought to be proved. Not being proved, the court is of opinion that it is not a case in which it can be claimed." In *United States v. Langton*, 5 Mason, 280, Justice Story said: "I agree at once to the reasoning at the bar, that if the assignment be in fact of all the debtor's property, although it does not so appear upon the face of the instrument, the priority of the United States attaches. The same rule applies if a small part be left out for the purpose of fraudulent evasion of that priority." In the case at bar the petition avers that the stock of goods sold, assigned, and transferred to Daniel Cohen composed all the property and estate of any value belonging to George Silverman. The answer neither admitted nor denied this allegation, but stated that the defendant, Cohen, was

not "able to say whether said stock constituted all of Silverman's property." Without the statute itself operated to convert the partial assignment into a general assignment, the chancery rule which is applicable to the case made it incumbent upon the petitioner to prove said averment, before it could make in his favor; and he did not do so.

Is a voluntary assignment, which upon its face is but a partial assignment, so enlarged by the statute as to make it a general assignment? It would be entirely competent for the Legislature to provide that every voluntary assignment for the benefit of creditors, whether a general assignment on its face, or purporting to be a partial assignment merely, should be deemed and taken to include all the property and estate of the assignor not exempt by law. This statute does not so provide in express terms, and the question arises whether or not it so provides by implication. There are several provisions of the Act which seem to be somewhat indicative of such an intention; but these and all other provisions of the statute must be so interpreted, if it is reasonably possible, as that due effect shall be given to all the provisions of the Act. Section 1 provides that "in all cases of voluntary assignments" the debtor or debtors "shall annex to such assignment an inventory, under oath or affirmation, of his, her, or their estate, real and personal, according to the best of his, her, or their knowledge; . . . but such inventory shall not be conclusive as to the amount of the debtor's estate." Since the statute uses the words "all cases," and predicates of "all cases" the annexing of "an inventory, under oath or affirmation, of his, her, or their estate, real and personal," it affords plausible ground for the claim that by force of the statute all voluntary assignments are general assignments, and cover all property of the assignor or assignors that is not exempt by law. But it is to be noted that section 8 of the Act provides "that no assignment shall be declared fraudulent or void for want of any list or inventory as provided in the first section of this Act." This latter provision, and the omission of any negative words in the clause of section 1 under consideration, indicate that the provision in said clause for a sworn inventory, "in all cases," of "his, her, or their estate, real and personal," is directory only. What is, however, of much more moment is that in section 1, and in the last clause of the same sentence in which is found the provision for such inventory "in all cases," it is expressly stated that "such assignment shall vest in the assignee or assignees the title to any other property, not exempt by law, belonging to the debtor or debtors at the time of making the assignment, and comprehended within the general terms of the same. This is a legislative declaration of the legal effect of, and of the limitation to be placed upon, a voluntary assignment. The expression of one thing is the exclusion of another. It is very manifest that a deed of assignment passes the title of all property specified in the deed, or in the inventory annexed thereto. What other, if any, property or estate does

it transfer? Said last clause answers this question by saying, "any other property not exempt by law, belonging to the debtor or debtors at the time of making the assignment, that is comprehended within the general terms of the assignment." It must be presumed that if it had been the legislative intention that, by force of the Act, the title to all property of the assignor or assignors, not exempt by law, should vest in the assignee or assignees, such intention would have either been expressed in plain and apt words, or that, at the very least, language would have been used which by a liberal interpretation, could be construed to include all such property. Hereafter the Legislature had said, "such inventory shall not be conclusive as to the amount of the debtor's estate, but such assignment shall vest in the assignee or assignees the title to any other property, not exempt by law, belonging to the debtor or debtors at the time of making the assignment," it was not satisfied with the language employed, and added these words of limitation, "and comprehended within the general terms of the same." These words of restriction cannot be ignored. It must be presumed that they were used intentionally and, for a purpose. Their natural and necessary effect is to limit the scope of every voluntary assignment to the property that is either named in the deed, or mentioned in the inventory, or comprehended within the general terms of description found in the assignment.

An argument that the Act makes every voluntary assignment, though partial on its face, a general assignment of all property, is deducible from the provisions in section 8 that the county court may, compel the debtor or debtors "to answer under oath, such matter as may . . . be inquired of him, her, or them," and that "such debtor or debtors may be . . . fully examined under oath as to the amount and situation of his, her, or their estate." But a few suggestions will effectually dispose of such argument. Said provisions are merely permissive, and simply give to the county court a discretionary power, to be exercised only in a case wherein the circumstances of such particular case demand or call for its exercise. When property covered by the particular description found in the deed or the inventory, or comprehended within the general terms of the assignment, is not discovered or delivered to the assignee, the authority delegated in this section 8 may properly be invoked. That under this section the county court is not authorized, in the case of a partial assignment, and in the absence from the terms of the assignment of general descriptions of or calls for property, to hold the assignment to be a general assignment of all property not exempt by law, is plainly indicated by the concluding clause of the section, "that the county court may compel the delivery to the assignee or assignees of any property or estate embraced in the assignment." Upon a careful consideration of all the various provisions of the Act of 1877, we are of opinion that a voluntary assignment, which is upon its face

a partial assignment, and which does not in fact purport to transfer all the property of the debtor, and which contains no general terms descriptive of property, is not, by force of the Act, converted into a general assignment of all the property of the debtor that is not exempt by law.

It not appearing that the assignment at bar is a general assignment, the question necessarily arises, is a partial assignment an assignment within the purview of the Voluntary Assignment Act? In *Weber v. Mick*, 181 Ill. 520, in discussing said Act, we quoted from Burrill on Assignments (sec. 8) this language: "Assignments may be made either to the whole body of the creditors or to particular creditors, or they may be of all or a part of the debtor's property; but, unless a trust is thereby created by the assignor in favor of creditors, such conveyances are not within the class of instruments known as 'assignments for creditors,'" In section 1 of the Act are found these expressions: "In all cases of voluntary assignments," and, "Any other property . . . comprehended within the general terms of the same," (i. e., the assignment). In section 8 occurs this expression: "And may compel the delivery to the assignee or assignees of any property or estate embraced in the assignment." Section 9 provides for an additional inventory of property "under said assignment." Section 11 gives authority to the assignee or assignees "to dispose of all estate, real and personal, assigned." The power delegated by section 12 to the new assignee who succeeds to the trust is, "to execute the trust embraced in such assignment." By section 18 all debts and liabilities are required to be paid *pro rata* "from the assets thereof," (i. e., of the assignment.) These and like expressions in the Act, taken in connection with the context in which they are found, indicate that the General Assembly recognized the fact that in some cases of assignment an assignor would have "other property" which was not comprehended within the terms of the assignment. It is conceded by counsel upon both sides that almost all of the sections of our Assignment Act are literal copies of sections in the General Assignment Law of Iowa. In the Iowa statute, however, the words found in the first section are these: "General assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors." In our statute, in lieu of said language, these words were substituted: "In all cases of voluntary assignments hereafter made for the benefit of creditor or creditors." It must be presumed that these changes in phraseology were for a purpose, and indicative of the legislative will. The Iowa Act operates upon general assignments, and makes every general assignment void that is not for the benefit of all creditors in

*Section 1 of the Act is as follows:

"That in all cases of voluntary assignments hereafter made for the benefit of creditor or creditors the debtor or debtors shall annex to such assignment an inventory, under oath or affirmation, of his, her, or their estate, real and personal, according to the best of his, her, or their knowledge, and also a list of his, her, or their creditors, their real-

proportion to their claims. Our statute regulates "all cases of voluntary assignments," whether such assignments purport to be made for the benefit of all creditors, or only some of them, or merely "one" creditor, and it operates upon the estate, real and personal, that is designated in the instrument of assignment, or in the inventory annexed thereto, or that belongs to the debtor, is not exempt, and is "comprehended within the general terms" of the instrument, and upon such property only; and, instead of rendering the assignment void for preferences, it avoids the preferences, and distributes the assets assigned, *pro rata*, upon all debts and liabilities of the assignor.

Since the Act of 1877 regulates "all cases of voluntary assignments," the assignment now at bar, even if but a partial assignment, is, if otherwise a valid voluntary assignment, to be governed by and administered under the provisions of that Act. This conclusion seems to necessarily follow from a consideration of the provisions of the Act. There is reason and justice and equity in the rule thus established by the statute. To illustrate, if A. is in failing circumstances and insolvent, and is owner of a store-house and fixtures, and a stock of merchandise therein, and of notes and accounts growing out of the business carried on there, and is also the owner of a farm, and of the live-stock and agricultural implements and machinery connected therewith, and of the crops growing thereon, no reason is perceived why he may not be permitted to assign the estate and property first mentioned, and have it converted into money, and the proceeds distributed, under the supervision of the county court, *pro rata*, upon his indebtedness, and he still retain title to the farm and property connected therewith, and continue his business of farming. Of course, the property retained, so far as not exempt by law, would still be liable to sale on execution, if his creditors, or any of them, saw fit to avail themselves of their legal rights in that behalf. An arrangement such as suggested might in very many instances, where there was trust and confidence, be for the pecuniary advantage of both the debtor and his creditors. The disposition made of that portion of the property assigned would, in such case, be eminently just and equitable, and in exact conformity with the substantial principles established by the Voluntary Assignment Law, *i. e.*, that the administration should be under the supervision of a court, and the distribution *pro rata* upon all debts and liabilities. It is difficult to see how the execution of such an assignment is in fraud of the statute or in derogation of its substantial requirements; and, if an insolvent debtor, in fraud of the Act, and for the purpose of creating illegal preferences, assigns a portion of his property to a trustee, he is bound to know that under the law the as-

ignment will work for the benefit, *pro rata*, of all his creditors. That the county court has jurisdiction and authority to administer in case of a partial assignment is consistent with prior announcements of this court that the right and power of a failing debtor to pass the title of his effects to an assignee remain as they did before the statute, but that the power to control the distribution and beneficial enjoyments of his property upon such a transfer of the title is essentially different from what it was before the statute and other like announcements of the law, is in conflict with no former decision of the court, and is also consistent with and justified by the language of the Act itself, and tends to advance the remedy provided by that Act, and effectuate the legislative intention. On the other hand, if a partial assignment to a trustee for creditors is not within the purview of the Act, then, an insolvent and failing debtor may, prior to his retirement from business, transfer a moiety or some substantial part of his property to a trustee, and for the benefit of only one or a few of his creditors, and leave the other moiety or part of his assets subject to process of the courts at the instance of his other creditors, and thus, in reality, make an assignment with preferences, and successfully and with impunity evade and defraud the statute. Our conclusion, then, is that the mere fact that it does not affirmatively appear that the assignment embraced all the property of Silverman does not prevent the jurisdiction of the county court from attaching, or prevent the estate being distributed in that court in conformity with the rule of equality established by the statute.

It is urged that section 1 of said Act provides in express terms that "every assignment shall be duly acknowledged and recorded," etc., and that this assignment was not acknowledged, and was not recorded; and that by reason of such failure to record, and want of acknowledgment, the instrument did not become a voluntary assignment under the statute, and the jurisdiction of the county court to compel the due execution of the trusts supposed to be created by the instrument, and by force of the statute, did not attach. It is to be noted that no negative words are used in the Act declaring the invalidity of assignments not acknowledged and recorded. The general rule applicable, where no negative words are employed in the statute, is thus stated in Cooley's Constitutional Limitations, *78: "Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the Act is performed, but not in the time or in the precise mode indicated, it may still

dence and place of business, if known, and the amount of their respective demands; but such inventory shall not be conclusive as to the amount of the debtor's estate, but such assignment shall vest in the assignee or assignees the title to any other property, not exempt by law, belonging to the debtor or debtors at the time of making the assignment, and comprehended within the general terms

of the same. Every assignment shall be duly acknowledged and recorded in the county where the person or persons making the same reside, or where the business in respect to which the same is made has been carried on; and in case said assignment shall embrace lands, or interest therein, then the same shall also be recorded in the county or counties in which said land may be situated."

be sufficient, if that which is done accomplishes the substantial purpose of the statute." The Iowa statute, from which our Act was largely taken, is much more definite than ours in respect to the matters of acknowledgment and recording; and prior to the adoption of our statute the supreme court of that state held that it was not necessary that a deed of assignment conveying personal property should be acknowledged and recorded, where possession accompanied such conveyance. *Meeker v. Sanders*, 6 Iowa, 61. In *Zimmerman v. Willard*, 114 Ill. 864, the assignment was in fact acknowledged, and the question here at issue was not in the case, and it was merely held that the certificate of acknowledgment then before the court was in substantial compliance with the Act relating to voluntary assignments. In *Myer v. False Sons & Co.*, 12 Ill. App. 351, it was held that an assignment of personal property takes effect at the time of the delivery to the assignee of the deed of assignment and the property; and it was there said by Casey, J.: "When the insolvent debtor makes and acknowledges the deed of assignment, and delivers it with the property to the assignee, what more can he do or is he required to do? He does not retain the deed of assignment in his possession, he has no control over it, and he could not have it recorded. That duty devolves upon the assignee. If the latter is guilty of misconduct or bad faith, or is tardy in the performance of his duty, it should not be said that the rights of the insolvent debtor or the creditors are thereby changed or prejudiced." The Assignment Act was intended mainly for the benefit of the creditors of the insolvent. The creditors of Silverman are not here objecting to the want of a certificate of acknowledgment, or because the deed was not recorded. On the contrary, they are seeking to obtain, under the deed, the beneficial interests that the Legislature intended should be conferred upon them by the statute. The petitioners are creditors of Silverman to a considerable amount; and the record shows that some 21 different firms and individuals, also creditors of Silverman, joined in a supplemental petition, in which they "prayed as in the petition of John V. Farwell & Co." Silverman and Cohen are the defendants to the petition. Silverman executed the deed of assignment to Cohen, as assignee, and delivered it to him, and with it delivered possession of the assigned property; and Cohen took and retained the property by virtue of the deed, and is even now claiming title under it. They have affirmed, and are affirming, the validity of the deed as against the creditors. They cannot be allowed to blow both hot and cold with one breath. They are equitably estopped from now saying the instrument is not the deed of Silverman, or from objecting to it because it was not acknowledged and recorded. No matter what they call the instrument, the law makes it a voluntary assignment. Nor is it a matter of any moment that they supposed it was an instrument for the benefit of a few chosen creditors; for the statute enlarged the trust, and made it inure to the benefit of all the creditors. It was

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the statutory duty, then, of Silverman to acknowledge it, and the statutory duty of Cohen, before accepting it, and taking possession of the property, and assuming the trust created thereby, to see that it was properly acknowledged, and have it recorded. Having failed in the performance of their bounden and statutory duties in that behalf, they should not now be allowed to plead their own shortcomings to the detriment of the rights and equities of the beneficiaries in the trust. The deed made appellee a trustee, and he accepted the trust, and reduced the trust property to his own possession. Under the statute, the creditors were the beneficiaries in that trust. It is manifest that the trustee cannot now set up his own culpable negligence or willful disregard of duty, for the purpose of despoiling his *cestuis que trustent* of their interest in the trust-estate. Suppose the provisions of the statute in respect to the execution, acknowledgment, recording, etc., of the deed of assignment have not been complied with, what then? The creditors are not complaining on that account. The claims of no execution creditor or attaching creditor or stranger to the deed are involved. Who, then, is authorized to take advantage of the acts of omission of the insolvent and his assignee? In *Farwell v. Crandall*, 120 Ill. 70, 8 West. Rep. 702, this court said: "It is an error to suppose that the jurisdiction of the county court depends upon the validity of the deed of assignment. For the purpose of jurisdiction, it is sufficient that there has been an assignment, in fact, for the benefit of creditors. This is conclusively shown by the well-recognized doctrine that a fraudulent assignment is voidable at the election of the creditors only; hence, if the latter do not object, the court may nevertheless go on and administer the assets." Like doctrine should be held in the case now at bar. An assignment already made is a preliminary requisite to the exertion of any jurisdiction whatever by the county court. The sole power of the court is to supervise and regulate the administration of a trust previously created by the act of the assignor. In *Hanchett v. Waterbury*, 115 Ill. 220, 3 West. Rep. 501, it was held by this court that upon the making, filing, and recording of the assignment, with the lists and schedules annexed, the county court wherein such assignment is filed and recorded, by operation of law at once acquires jurisdiction over, and becomes possessed of all the property and estate embraced within the assignment. The duty of filing and recording the assignment, and an inventory and a valuation of the estate assigned, is imposed upon the assignee. But suppose he fails or refuses to perform any or all these duties, does the assignment fall still-born on that account? We think not. The assignee is not the only party interested in the assignment. The assignor has an interest that the property assigned should be paid in satisfaction of his debts. All the creditors of the assignor are interested in the matter of the assignment, and have a legal right to receive their proportionate share of the assets.

Section 14 of the Act confers upon the county court "full authority and jurisdiction to execute and carry out the provisions," of the Act; section 7 provides that the assignee, in the execution of assignments, shall at all times be subject to the order and supervision of the county court, and that said court may by citation and attachment compel the assignee to file reports of his proceedings, and of the situation and condition of the trust, "and to proceed in the faithful execution of the duties required by this Act;" and section 12 provides that in case any assignee shall fail and neglect, for the period of twenty days after the making of any assignment, to file an inventory and valuation, and file bond, as required by the Act, it shall be the duty of the county judge of the county where such assignment may be recorded, on the application of any person interested as creditor or otherwise, to appoint one or more discreet and qualified person or persons to execute the trust embraced in such assignment, etc. The provision of section 1 of the Act is that "the assignment shall be recorded in the county where the person or persons making the same reside, or where the business in respect of which the same is made has been carried on." The expression in section 12, "where such assignment may be recorded," means the county where it is recorded, or if not recorded, then the county where it is legally permissible to record it. The county court referred to in the Act, and the county judge referred to in section 12, are the county court and the county judge of the county in which the assignor resides or in which the business in respect of which the assignment is made has been carried on; and if the residence happens to be in one county, and the *situs* of the business in another, then the jurisdiction attaches to such one of said county courts, and to such one of said county judges, as first obtains jurisdiction of the subject-matter. It may be said, in answer to suggestions made, that there is no intimation in the record or otherwise that the circuit court or chancery court, or any court other than the Vermillion county court, had or claimed jurisdiction of the subject-matter of the assignment here under consideration either before or since the institution of this proceeding, except upon the appeal prosecuted herein to the circuit court from the judgment of the county court, and therefore no question of a conflict of jurisdiction arises, and it will be time enough to dispose of that matter when it does arise. It may also be said that courts are not accustomed to take jurisdiction or to act of their own motion; and it is not to be presumed that the county court or county judge will act in a matter which is not properly brought before it or him. No reason is perceived why the presentation of a petition, such as that found in this record, made by a creditor of the insolvent debtor, or by some other party in interest, is not a proper and competent way in which to call upon the court to act in the premises; that an assignment in fact for the benefit of creditors has been made, that a period of twenty days has elapsed since the

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making of such assignment, and all other facts deemed essential to put the court in motion, many properly enough be shown, *prima facie*, by such petition, verified by affidavit. Assuming that the assignee named in the deed of assignment is a necessary party to any proceeding instituted for the purpose of establishing the trust, and removing him from office, and appointing another assignee in his place and stead, we think a citation may properly issue against him. If, as appears in this record, he has entered upon the execution of the trust to the extent of accepting the deed of assignment, and taking and holding possession of the assigned property, and assuming to exercise the power of selling and disposing of it, he may, although he has not become an assignee *de jure*, under the statute, by complying with its requirements, nevertheless be regarded as an assignee *de facto* or assignee *de son tort*, and brought into court by citation or attachment, under the provisions of section 7 of the Act. This Act, as we have frequently held, is remedial, and should be liberally construed, and so as to remedy the evils intended to be cured, and advance the remedy. When a voluntary assignment is made, and the property assigned has passed into the possession of the assignee, such property is thereby brought within the jurisdiction and under the administrative control of the county court. *Preston v. Spaulding*, 120 Ill. 208. It is true, the making of the assignment must precede the exercise of jurisdiction; but, when a *prima facie* case of a voluntary assignment is exhibited to the court, it then devolves upon such court to judicially investigate such case, and determine whether or not a voluntary assignment has in fact been made, whether or not the particular instrument in question is such an assignment, and whether or not it was executed by the supposed assignor; and in the event it is judicially ascertained that it is such an assignment, then the duty is imposed upon the court to execute and carry out the provisions of the Voluntary Assignment Act in respect thereto. In the very nature of all judicial proceedings, the court in which any such proceeding is instituted must, at the very threshold, meet and determine, either expressly or by necessary implication, this question of jurisdiction.

Our conclusions upon the whole matter are that in the findings, judgments, and orders made and entered by the county and circuit courts there was no substantial error, and that they should be affirmed. Inasmuch as the appellate court reversed the same, such judgment of reversal is erroneous, and should be, and is, reversed. And the cause is remanded to the county court for further proceedings.

Magruder, Ch. J., dissenting:

George Silverman, of Danville, Vermillion county, signed a written instrument, which recited that he was indebted to certain persons and was desirous of securing the payment of such indebtedness and which purported to sell, assign, and transfer a stock of goods and certain personal property in a

store building in Danville, to Daniel Cohen, in trust, to sell the same, and out of the proceeds of sale, pay the indebtedness. Cohen assumed the trust and was proceeding to execute it as directed. The instrument, however, under which he acted, was not acknowledged or recorded, as required by sections 1 and 3 of the Act in reference to voluntary assignments, passed by the Legislature of this state and approved May 22, 1877, and he did not file an inventory and appraisal with the clerk of the county court, nor enter into bond before the clerk of such court, as required by section 3 of the Act. Thereupon appellants, as creditors of Silverman, applied to the county court for the appointment of a new assignee under section 12 of said Act, and obtained an order removing Cohen, and appointing John G. Thompson as assignee in his place.

The instrument in question may be conceded for the purposes of this case to be an assignment, but inasmuch as it was not acknowledged or recorded, either in the recorder's office or the county court, it was not such an instrument as called for or justified the exercise of the power of appointment conferred upon that court by section 12.

A voluntary assignment for the benefit of creditors, as spoken of in the Act of 1877 has no other or different meaning than it had before the passage of that Act. Long before 1877 such an assignment had a well-defined signification in this state and in all other states. According to the common acceptance of the term it is a transfer without compulsion of law by a debtor of his property to an assignee in trust, to apply the same or the proceeds thereof, to the payment of his debts, and to return the surplus, if any, to the debtor. As to the form and contents of it, it has always been understood in this state to be a written deed of conveyance, executed by the assignor as party of the first part, to the assignee, as party of the second part, reciting the grantor's indebtedness and inability to pay, and conveying his property, real and personal, by apt words of sale and transfer to the assignee in trust, to take possession of and sell the same, and to collect the outstanding debts, and out of the proceeds to pay the creditors. Sometimes it provided for preferences, and sometimes not. Schedules were generally attached to the deed, describing the property and naming the creditors.

That such was the understanding as to its general form and character, will appear from an examination of the following cases decided by this court: *Cross v. Bryant*, 8 Ill. 86; *Conkling v. Carson*, 11 Ill. 508; *Kimball v. Mulhern*, 15 Ill. 205; *McIntire v. Benson*, 20 Ill. 500; *Wilson v. Pearson*, 20 Ill. 81; *Bowen v. Parkhurst*, 24 Ill. 257; *Sackett v. Mansfield*, 26 Ill. 27; *Myers v. Kinzie*, 26 Ill. 86; *Finlay v. Dickerson*, 29 Ill. 9; *Pierce v. Brewster*, 32 Ill. 268; *Whipple v. Pope*, 33 Ill. 354; *Field v. Flanders*, 40 Ill. 470; *Gibson v. Rees*, 50 Ill. 383. Such a deed of assignment as is above described, is referred to and held good in *Cross v. Bryant*, *supra*, and in *Sackett v. Mansfield*, *supra*, such an one is thus spoken of by this court: "This deed made an exhibit in the cause, fulfills, in our judgment, 18 L. R. A.

all the requirements of a valid deed of assignment. . . . It is for the benefit of the assignor's creditors," etc.

The first sentence of the first section of the Act of 1877, assumes that the meaning of a voluntary assignment for the benefit of creditors is already well understood and, therefore, no new definition of the term is attempted. A study of the language, in which the various provisions of the law are expressed, will demonstrate that its framers intended to designate just such a deed of assignment as is described in the foregoing decisions.

The assignment contemplated by the Act must be in writing. This is so, because it is required to be acknowledged and recorded, and it is so, whether the requirement to acknowledge and record be directory or mandatory, because the fact that it is spoken of as an instrument that may be acknowledged and recorded shows that it must be in writing.

The assignment contemplated by the Act must be one single instrument of transfer. It is so treated and spoken of in almost every section. The debtor is required to annex to it an inventory of his property, and a list of his creditors, and although the absence of these does not make it fraudulent or void, yet an instrument, to which an inventory and list may be attached cannot very well be constructed out of a number of acts done by the debtor or out of a number of notes, mortgages, or other documents signed by him, and passed out of his hands into the possession of different parties. The assignee is required to give notice of the assignment, by mail, and by publication, to the creditors, and it would hardly be possible to write or print a notice of an assignment which does not come into existence until it is constructed out of acts and circumstances by the determination of a judicial tribunal.

The contents of the assignment mentioned in the Act must be substantially the same as those of the ordinary deed of assignment referred to in the text-books and judicial decisions. It is spoken of in sections 2 and 12 as an instrument in which an assignee is "named" and in section 1, as an instrument by the terms of which title to property becomes vested in the assignee. If it vests title to property not named in the attached inventory, but "comprehended within the general terms of the" assignment, it must certainly contain apt words by which a grantor therein named transfers to a grantee therein named the title to property described in specific terms in the assignment, or in the inventory attached to it. It is spoken of in sections 8 and 12 as an instrument, by which a trust is "confided" and in which a trust is embraced, and in sections 1 and 3 as an instrument made for the benefit of creditors and authorizing the collection of debts and the sale of property.

The Act contemplates no such thing as a constructive assignment.

The thing about the Act, which is new, is the relation which it brings about between the assignment and the county court. By section 18 of article 6 of the Constitution

county courts are made courts of record and are given original jurisdiction in certain specified matters, of which the subject of voluntary assignments for the benefit of creditors is not one, "and such other jurisdiction as may be provided for by general law." Under the latter clause of said section 18, as thus quoted, the Act of May 22, 1877, was passed by the Legislature. Therefore county courts derive their power to deal with voluntary assignments from an Act of the Legislature and not from the specific mention of that subject in the Constitution itself. Hence, the jurisdiction conferred upon them by the Act of 1877 is a special statutory jurisdiction, and must be exercised in the mode prescribed by the statute.

The Act in question makes a previously executed assignment the basis and foundation of the jurisdiction of the county court. An assignment already made is a preliminary requisite to the exercise of any jurisdiction whatever by that court. The sole power of the court is to oversee and regulate the administration of a trust, which has been created independently of it, and without its aid. It acts upon an instrument which has been prepared for it in advance.

The county court is mentioned for the first time in section 8, after the mode of executing the assignment is provided for in section 1, and after the assignee is directed by section 3 to notify the creditors to present their claims to him. The person who is required by section 8 to file an inventory and appraisal with the clerk of the county court is the assignee. An assignee is defined by Bouvier in his law dictionary to be "one to whom an assignment has been made." The existence of an assignee presupposes the existence of an assignment, to which he owes his appointment. He is to file an inventory, etc., of "said estate." The words "said estate" refer back to "the debtor's estate" mentioned in section 1, to which the assignee had obtained title through an assignment made before the time for filing the inventory had arrived. The form of the assignee's bond prescribed by section 8 speaks of a trust that had theretofore been confided to the assignee.

Section 7 provides that assignees shall be subject to the order and supervision of the county court "in the execution of assignments," that is to say, in the performance of the duties imposed by the assignment. The assignment, specifying and defining the duties to be performed, must have been previously executed. The power to decide whether any creditor whose claim is questioned may or may not share in the assigned funds, and to determine how and when such funds shall be distributed, is conferred upon the county court by sections 5 and 6 merely for the purpose of enabling the assignee to carry out more fully and fairly the provisions of the assignment theretofore made. The object of the Act is to secure a more public and honest distribution of assigned effects by placing the assignee under the control of a judicial tribunal, while he is engaged in administering a trust, originally confided to him, not by the court but by the

assignor. Section 14 confers full authority and jurisdiction upon county courts "to execute and carry out the provisions of this Act." Those provisions do nothing more than point out the mode in which the supervisory control here referred to is to be exercised.

Such being the object of the Act, and such being the character of the jurisdiction conferred by it, it nowhere provides that an assignment can be made under the direction of the county court, and nowhere confers upon that court the power to determine whether a particular instrument is an assignment or not, or whether an instrument admitted to be an assignment has or has not been executed by the assignor. That the county court should stop to hear evidence and determine such matters as these was never contemplated by the Act. The delay, created by such a course of procedure would be wholly inconsistent with the summary character of the jurisdiction intended to be conferred. It would hinder that expeditious conversion of the assets into money and that speedy distribution of the funds, which it is the design of the law to secure.

It follows from the views herein expressed that, when the assignment is first brought under the supervisory control of the county court, it should be accompanied by proper evidence of its execution. The court cannot afford to lay its hands upon an instrument alleged to be an assignment, if it be doubtful whether it was made by the debtor or not, or if the fact of its execution must be established by testimony and after a litigated contest. Inasmuch as the making of the assignment must precede the exercise of jurisdiction, proof that the assignment has been made must be present when the jurisdiction attaches, and as soon as it attaches. The certificate of acknowledgment is the best and highest evidence of the execution of the assignment, and is attached to and goes along with it, so that its execution is apparent at once upon the inspection of it.

For this reason the requirement contained in the last sentence of the first section of the Act must be construed to be mandatory and not directory. That requirement is as follows: "Every assignment shall be duly acknowledged and recorded in the county where the person or persons making the same reside, or where the business in respect of which the same is made, has been carried on; and in case said assignment shall embrace lands, or any interest therein, then the same shall also be recorded in the county or counties in which said lands may be situated." The word "shall" is not held to be directory where an advantage is lost, a right destroyed, or a benefit sacrificed, either to the public or to any individual, by giving it that construction. *Wheeler v. Chicago*, 24 Ill. 105, 76 Am. Dec. 786. The advantage to be derived by the creditors from an expeditious administration of the trust created by an assignment will be less apt to be lost, if the assignment is brought into the county court, with a certificate of acknowledgment to show that the debtor made it, and a certificate of record to afford prima facie evidence of its

delivery to the assignee. *Himes v. Keighlingher*, 14 Ill. 469.

The absence of negative words in the requirement above quoted is not conclusive that the statute was not designed to be mandatory. *Cooley, Const. Lim.* *75. Affirmative language may be so strong as to imply a negative. *Potters' Dwarr. Stat.* p. 68; 1 Kent, Com. *467, note B; *Dubuque Dist. Twp. v. Dubuque*, 7 Iowa, 262. The use of the word "every" in the requirement that "every assignment shall be duly acknowledged," is broad enough to imply a negative of any other mode of proof, so far, at least, as the assignment is to be used as the basis of the jurisdiction of the county court. A similar requirement in a New York statute has been held to be mandatory. *Hardemann v. Bowen*, 39 N. Y. 196; *Britton v. Lorens*, 45 N. Y. 51; *Fairchild v. Gwynne*, 16 Abb. Pr. 28.

If an affirmative statute, which is introductory of a new law, direct a thing to be done in a certain manner, that thing shall not, even although there are no negative words, be done in any other manner. *Potter's Dwarr. Stat.* p. 72; *Hardemann v. Bowen, supra*. That the Act of 1877 introduced an entirely new law as to the mode of carrying out the provisions of voluntary assignments, and as to the character of the jurisdiction to be exercised by county courts, there can be no question. But the particular requirement now under consideration introduced a new rule in regard to the acknowledgment and recording of assignments. Its language is, that, in case the assignment embraces lands, it shall also be recorded in the county where the land is situated. By implication, therefore, an assignment which does not embrace lands but personal property only, as in the case at bar, must be acknowledged and recorded.

For the first time in the history of the legislation of this state, a transfer of personal property not designed to be a mortgage or to have the effect of a mortgage, was required by the Act of 1877 to be acknowledged and recorded. Mortgages of personal property had theretofore been required to be acknowledged in a specified manner under the Chattel Mortgage Act, but such had not been the requirement in regard to any other kind of instrument transferring personal property except a chattel mortgage, or trust deed in the nature of a chattel mortgage, etc. *Rev. Stat. chap. 95, § 1*. A voluntary assignment for the benefit of creditors, which embraces nothing but personal property, is neither a chattel mortgage nor a trust deed in the nature thereof. (*Crow v. Beardsley*, 68 Mo. 498,) and yet it must be acknowledged and recorded. Such acknowledgment may be taken anywhere, the limitation in section 1 as to the residence or place of business of the assignor having application to the recording only, and not to the acknowledgment of the instrument. *Zimmerman v. Willard*, 114 Ill. 364. Nor does section 1 require the acknowledgment of an assignment embracing only personal property to be any different from one which embraces both real and personal estate, or real estate only, either as to

the form of the acknowledgment or the character of the officer before whom it is taken. The features here noticed were new, and first appeared in the Act of 1877.

But the great object of all rules of interpretation is to discover the true intention of the law. In arriving at this intention the whole and every part of the statute must be taken and compared together. *Sedgw. Stat. & Const. L.* p. 325; *Dubuque Dist. Twp. v. Dubuque, supra*. What was the intention of the Act as to the effect to be given to the recording of the assignment?

Section 1 requires the assignment to be recorded in the county where the maker of it resides, or where the business in respect of which it is made has been carried on, and also in the county where the land lies, if it embraces land. The place where it is to be recorded, under this section, is unquestionably the recorder's office of the county. But section 3 requires it to be also recorded in the county court. The assignee is therein directed to "file with the clerk of the county court where such assignment shall be recorded" a true and full inventory, etc. In *Hanchett v. Waterbury*, 115 Ill. 220, section 8 is interpreted as providing for filing and recording of the assignment in the county court. The county court, where it is recorded, must be the county court of the county named in section 1, that is, of the county where it is recorded in the recorder's office. This appears from the language used in section 5, where it is provided that the notice to the creditor, whose claim is excepted to, shall be served and be returnable "at the next term of the county court in said county." The words "said county" cannot be construed to refer to any other county than that in which the assignment is recorded in the recorder's office as specified in section 1. It certainly could never have been the design of the Act that the assignment should be recorded in the recorder's office of the county of the maker's residence, and also in the county court of another and different county where his business had been carried on.

It follows that the assignment must first be recorded in the recorder's office before it is filed in the county court. The county court, where it is to be filed, cannot be determined or designated until it is first recorded in the recorder's office. It must be recorded in the county court of the county where it has been placed on record in the recorder's office. Inasmuch as the assignment may be recorded in the recorder's office either of the county where the debtor resides, or of the county where he has carried on his business, then, if it is allowable to first record it in the county court of one of these counties, it might afterward be recorded in the recorder's office of the other county. I conclude, therefore, that the recording of the assignment in the recorder's office is a prerequisite to its record in the county court.

The assignor and assignee are not the only parties interested in the assignment. All the creditors of the former are interested in it. One of the objects of recording it in the recorder's office is to give the creditors notice not only that an assignment has been made,

but notice also of the terms and provisions of the instrument. One of the evils designed to be remedied by the Act was the secrecy of assignments. The object of filing the assignment in the county court is to bring it and the assignee named in it under the jurisdiction and control of the court. The Act nowhere provides for bringing the assignee before the court by the issuance and service of process upon him. As was said in *Hanchett v. Waterbury, supra*, "upon the making, filing and recording of the assignment, with the lists and schedules annexed, the county court, wherein such assignment is filed and recorded . . . at once acquired jurisdiction," etc.

It is very evident that the provisions for the recording of the assignment, as contained in sections 1 and 8, must be mandatory, as the recording in the recorder's office is necessary to designate the court which is to take jurisdiction, and the recording in the court is necessary to confer jurisdiction upon the court so designated. A part of section 12, under which this proceeding was instituted, is as follows: "In case any assignee shall fail or neglect, for the period of twenty days after the making of any assignment, to file an inventory and valuation and give bonds as required by this Act, it shall be the duty of the county judge of the county where such assignment may be recorded, on the application of any person interested as creditor or otherwise, to appoint some one or more discreet and qualified person or persons to execute the trust embraced in such assignment," etc. In order that the court may know that the twenty days have passed, it must know when the assignment was made. Here again the necessity of holding the requirement as to the acknowledgment and recording of the instrument to be mandatory, is apparent. It may not be possible to show by oral testimony when the assignment was made, but such date can easily and at once be determined, if the assignment, with its accompanying certificate of acknowledgment has been recorded as directed in sections 1 and 8.

It will be noted that in section 12 the recording of the assignment is referred to for the third time. The new assignee is to be appointed by the "county judge of the county where such assignment may be recorded." If no assignment has been recorded, the power of appointment does not exist. It cannot be said that the person here referred to is the county judge of the county where it is allowable or permissible to record the assignment. The word "may" is here used in the same sense in which it is used in the last line of section 1, where it is said that the assignment "shall also be recorded in the county . . . in which said land may be situated." It there refers to the possibility that there may be land in more than one county. So in section 12, the assignment may be recorded either in the county where the debtor resides or in that where he has carried on business. The judge of that one of these counties, in which it may happen to be recorded, shall make the appointment.

But it is necessary that there should have been a previous recording of the assignment in both the recorder's office and the county
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court. Otherwise, the court would have no jurisdiction over the assignee and no power to remove him and appoint his successor. Section 12 gives the power to appoint a new assignee in case the old one fails or neglects "to file an inventory and valuation and give bonds as required by this Act," that is by section 3 of the Act. Section 3 requires the assignee to file an inventory and valuation "with the clerk of the county court where such assignment shall be recorded." This language presupposes that the assignment has been recorded in the county court before the inventory and valuation are filed there. The latter are filed in a court where the assignment has already been recorded for the purpose, among other things, of fixing the amount of the bond to be given.

I am, therefore, of the opinion that the power of appointment conferred by section 12 does not exist except in a case where the county court has obtained jurisdiction by the recording of the assignment in that court. If this be not the correct construction then either the Assignment Act is unconstitutional or section 12 is to be treated as nugatory for the want of machinery to carry it into effect.

It is claimed by counsel for appellants that the county judge may appoint a new assignee under section 12, even though the assignment has not been acknowledged or recorded, either in the recorder's office or the county court. If this be so, what follows? Under the construction thus contended for, every assignee in every assignment made in the state is peremptorily compelled to go into the county court and submit himself to the supervision of that court by filing an inventory and appraisal and entering into bonds, or in default of doing so, is subjected to the penalty of being removed by the county judge from his office and supplanted therein by a new assignee. This is vesting county courts with exclusive jurisdiction over the administration of trusts and the removal of trustees, so far as voluntary assignments for the benefit of creditors are concerned. The administration of trusts and the removal of trustees are well established grounds of equitable jurisdiction. By section 12 of article 6 of the Constitution, "the circuit court shall have original jurisdiction of all cases in law and equity." The Legislature has no power to deprive them of this jurisdiction. *Myers v. People*, 67 Ill. 508; *Darling v. McDonald*, 101 Ill. 370; *Howell v. Moores*, 127 Ill. 67. It can only confer upon county courts concurrent and not exclusive jurisdiction in these matters. Therefore, if the construction sought to be put upon the Act by the appellants should be held to be correct, it would impose upon this court the necessity either of declaring the whole Act unconstitutional or of holding section 12 to be void, so as to eliminate it and leave the balance of the Act to stand.

The assignee named in the assignment by the debtor has an interest which he cannot be deprived of without being heard. He has become vested with the title to the property. Before the county court can remove him and appoint some one in his place, as provided in section 12, he must in some way be brought

before the court. If he has filed no assignment therein nor in any way submitted to its jurisdiction before the appointment of a new assignee is applied for, how is the county court to bring him in and get jurisdiction over him? The Act provides no process and furnishes no machinery for that purpose. The citation mentioned in section 7 is to be issued against an assignee already under the control of the court.

It is true that section 14 confers upon the county court "full authority and jurisdiction . . . to execute and carry out the provisions of this Act." But under this general clause, the court would have no power to devise and invent for itself a mode of procedure by which it could stretch out its arms and bring before it the assignee and creditors, all of whom are interested in the appointment of a new trustee, and are necessary parties to an application for that purpose. It is the province of the Legislature to prescribe the mode of procedure to be adopted by courts in bringing parties before them. Chapter 22 of the Revised Statutes, which provides for the exercise of chancery jurisdiction by circuit courts, specifies what sort of a summons must issue and how it must be served and returned and how nonresidents may be brought in by publication, etc. Chapter 37 of the Revised Statutes, wherein county courts are vested with jurisdiction in certain common-law cases, uses these words: "The process, practice, and pleadings in said court in common law cases, shall be the same as in the circuit court in similar cases," etc. The Assignment Act contains no such provisions as these nor any provisions of any kind, as to the mode of exercising the power of appointment conferred by section 12.

In *Burns v. Henderson*, 20 Ill. 264, it was said by Mr. Chief Justice Caton: "Wherever it is possible we must so construe the statutes as to make them harmonize with the Constitution." The construction here given to section 12, namely that it contemplates the appointment of an assignee in the place of one who has already been brought under the jurisdiction of the county court by the recording of the assignment therein, makes that section, as well as the balance of the Act, harmonize with the Constitution.

I think that the judgment of the appellate court, which held the appointment of a new assignee in the place of Cohen to be erroneous, should be affirmed.

Wilkin, J., also dissenting:

In my opinion, the decision in this case gives the assignment statute of this state the effect of an involuntary assignment law, and vests county courts with the jurisdiction of involuntary insolvency tribunals. That Silverman did not attempt or intend to make an assignment under the statutes, and that the instrument executed by him is not such an assignment on its face, is, as I understand, conceded. It seems to me clear that the statute contemplated only a general assignment, viz., an assignment of all the debtor's property for the benefit of all his creditors. I think the illustration given in the foregoing opinion, of a debtor owning a store, etc.,

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and a farm, and making an assignment of the former, and retaining control of the latter, if carried to its logical conclusion will show that the construction placed upon the statute by that opinion would lead to endless confusion, and practically defeat the object of the statute. Besides, such an attempt on the part of a debtor would be unlawful. As I understand the Act, an insolvent debtor cannot make an assignment for the benefit of all his creditors of only a part of his property, (not exempt by law,) to be prorated among them. Treating the instrument executed by Silverman to Cohen as an assignment for the benefit of creditors, it must, in my opinion, be given the effect of a general assignment, to bring it within the jurisdiction of the county court. I find no authority in the statute or elsewhere giving county courts of this state jurisdiction to bring before them debtors who have made conveyances of property to secure creditors, not purporting or intended to be assignments under the statute, and, either with or without extraneous evidence, construe such conveyance into a general assignment for the benefit of all creditors of the grantor, and thus compel him to surrender his entire estate to be administered upon under the jurisdiction of such court; in other words, to force him into insolvency. We have frequently said: "Until a debtor is ready and determines to yield the dominion of his property, and makes an assignment for the benefit of his creditors under the statute, his right to dispose of his estate as he chooses is unaffected by the statute." *Preston v. Spaulding*, 120 Ill. 208; *Schroeder v. Walsh*, 120 Ill. 403, 8 West. Rep. 501; *Field v. Geohagan*, 125 Ill. 63, 14 West. Rep. 387; *Hulse v. Mershon*, 125 Ill. 52, 14 West. Rep. 366; *Hanford Oil Co. v. Chicago First Nat. Bank*, 126 Ill. 584; *Home Nat. Bank of Chicago v. Sanchez*, 131 Ill. 330; *Farwell v. Nilsson*, 133 Ill. 45. That intention, in my judgment, must be manifested by the voluntary execution of a general assignment for the benefit of creditors, in substantial conformity to the statute. I do not hold that the validity of an assignment should be made to depend upon a strict compliance with the statute as to the form and manner of its execution. In this case, however, appellants attempt to bring the conveyance in question within the provisions of the statute, and the estate of Silverman within the jurisdiction of the county court, against his protest, without showing that the instrument upon which they rely for that purpose was executed or intended to be executed in conformity with the requirements of the law. If there is sufficient reason to be found in the statute for the construction of an instrument like the one in question into an assignment under the statute, it must be found in section 13, prohibiting preferences, etc.; and that I understand to be the ground upon which this decision is based. We have often held that section 13 does not prohibit preferences, except when provided for in the assignment itself, or where, as in *Preston v. Spaulding*, *supra*, the preference is made by the debtor after he has determined to make an assignment under the statute, for the

purpose of evading that section, and does, in fact, afterwards attempt to avail himself of the provisions of the Act by making an assignment under it. Had Silverman given preference to the creditors named in the conveyance in question, by transferring, pledging, or mortgaging his effects to them, or if he had confessed judgments in their favor, thus creating liens upon such property, even though he had done so with the avowed purpose of giving preferences, and to evade said section 18, neither the county court nor a court of equity could have interfered on behalf of petitioners or other creditors; the common-law right of a debtor to prefer creditors in either of these ways having been sustained in many of our decisions above cited. But at common law a debtor might not only exercise his right to give preferences in any one of the above-named modes, but he might also do so by a partial assignment, viz., by transferring property to a third person in trust to hold and dispose of for the benefit of the preferred creditors. Burrill, *Assignm.* p. 231, § 161; also *Id.* (5th ed.) p. 226, § 164. Section 18 does not purport to take away that right. As before stated, our statute was manifestly intended to regulate general assignments. It was designed, doubtless, to secure creditors in such assignments against an unequal distribution of a debtor's estate. By availing himself of it, the debtor also obtains important rights and privileges.

A Statute of New Hampshire, in force July 5, 1834, provided that no assignment made for the benefit of creditors should be valid unless it provided for an equal distribution of all the debtor's property among his creditors, in proportion to their claims. It was held in *Meredith Mfg. Co. v. Smith*, 8 N. H. 347, that that act did not apply to an assignment made by a debtor of some part of his property, merely for the purpose of paying some particular debt; and Richardson, *Ch. J.*, rendering the opinion of the court, after stating abuses growing out of the making of general assignments prior to the passage of the statute, said: "And it is manifest that the Statute of 1834 was intended to regulate those general assignments by debtors of all their property, and place, in such cases, all the creditors on equal footing, securing to each his just proportion, according to the amount of his debt, and to guard the creditors against the fraud of having only a part of the debtor's property assigned for their benefit, when contracted to assign the whole. Hence he is required to make oath that the assignment includes all his property not exempt from attachment. It could never have been the intention to prohibit a debtor from assigning any particular property he might possess, for the purpose of paying any particular debt or debts that he might owe." In *Grubbe v. Morris*, 108 Ind. 166, 1 West. Rep. 185, it was held that the Indiana statute concerning general assignments prohibited preferences; but Elliott, *J.*, rendering the opinion, said: "Where there is only a partial transfer of property, as when part only of the debtor's property is conveyed, or where

only one creditor is preferred, and there is no general assignment, a conveyance to a trustee will, according to our decisions, be sustained, as not in contravention of the statute." And he quotes from *Cushman v. Gephart*, 97 Ind. 46, as follows: "This statute only provides for a general assignment of all the debtor's property for the benefit of all his creditors, and when that is attempted the statute must be complied with, or the assignment, without regard to actual fraud, will be held fraudulent and void; but an assignment by a debtor for the benefit of part of his creditors, in order to be held void, must be actually fraudulent." He also points out some of the benefits which accrue to a debtor by statutes governing general assignments. Section 1556 of the Code of Alabama provided: "Every general assignment made by a debtor, by which a preference or priority of payment is given to one or more creditors over the remaining creditors of the grantor, shall be and inure to the benefit of all the creditors of the grantor equally." The supreme court of that state held, in *Holt v. Bancroft*, 30 Ala. 199, that the statute did not interfere with the debtor's common-law right to prefer creditors by a partial assignment; Walker, *J.*, saying: "The object of the statute was to prohibit all discrimination by a debtor making a general assignment in favor of his creditors. It does not aim to deny, and does not deny, to a debtor, the power of securing a creditor's debt by a conveyance of a part of his property. The right of preferring creditors by partial assignments is untouched by the section of the Code quoted. It is not the preference itself, but the preference as a feature of a general assignment, that the statute condemns." The Iowa Code of 1851, § 977, said: "No general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors of assignor, shall be valid, unless it be made for the benefit of all his creditors, in proportion to the amount of their respective claims." It was held in *Lampson & Powers v. Arnold*, 19 Iowa, 486, that this statute did not prohibit or interfere with the right of a debtor, as it existed prior to the statute, to make a partial assignment; holding that the statute applied only to general assignments. Other authorities to the same effect might be cited. These are, as I understand, in harmony with our former decisions construing section 18 of our statute. Our statute neither prohibits preferences, nor interferes with the mode of exercising the right, so long as a debtor does not seek to avail himself of its provision. Until then he may exercise that right in any mode authorized by the common law, and hence may make a partial assignment for that purpose. I have not attempted to elaborate the views indicated in the foregoing dissent. With deference to the opinion of my brethren, I am unable to concur in either the reasoning or conclusion presented in the opinion of Justice Baker. I think the judgment of the appellate court should have been affirmed.

Second rehearing denied.

NEW YORK COURT OF APPEALS (2d Div.).

Robert DEELEY *et al.*, *Respts.*,
v.
John DWIGHT *et al.*, *Impleaded, etc.*,
Appts.

(.....N. Y.....)

A mortgage on chattels afterwards manufactured does not give the mortgagee a sufficient title to sustain an action for conversion.

(March 8, 1892.)

A PPEAL by defendants John Dwight and John E. Dwight from an order of the Gen-

eral Term of the Court of Common Pleas for the City and County of New York granting a new trial upon exceptions heard before it in the first instance which were taken during the trial of an action brought to recover damages for the alleged conversion of certain machinery in which a verdict was directed in favor of defendants. *Reversed.*

Statement by Follett, *Ch. J.*:

In the autumn of 1888, Joseph Gandolfo contracted to sell machinery to be manufactured, and thereafter delivered to the defendants, for \$5,666. In performance of the contract, Gandolfo furnished additions and

NOTE.—Efficacy of mortgage on chattels to be manufactured or acquired as independent articles and not as the increase or fruits of existing property.

The law upon this subject seems to be comprised in a general rule and several exceptions or qualifications, more or less well defined which have in practice if not in theory almost wholly overcome and superseded the rule. Whatever the effect of the mortgage upon the after-acquired property may be the mere attempt to include such property in the mortgage will not render it wholly void. *Jones v. Richardson*, 10 Met. 488; *Gardner v. McKen*, 19 N. Y. 123; *State v. Tasker*, 31 Mo. 445; *Voorhis v. Langsdorf*, Id. 451.

Such a mortgage is not regarded as fraudulent *per se*. *Petring v. Chrysler*, 90 Mo. 649.

And it will bind the property in possession when it is given. *Ross v. Wilson*, 7 Bush, 34; *Wagner v. Watts*, 2 Cranch, C. C. 109; but see *Carpenter v. Simmons*, 1 Robt. 360.

At least it is not absolutely void where there is no arrangement permitting the mortgagor to deal with the goods mortgaged, and no knowledge of such dealing on the part of the mortgagee. *Yates v. Olmsted*, 56 N. Y. 632.

As to the effect of permitting the mortgagor to deal with the property, see *note to Ephraim v. Kelleher, post*. —

The general rule.

The general rule is that no chattel mortgage can be executed which will bind personal property which either is not in existence or does not belong to the mortgagor. *Barnard v. Eaton*, 2 Cush. 303; *Henshaw v. Bank of Bellows Falls*, 10 Gray, 573; *Chesley v. Josselyn*, 7 Gray, 489; *Pettis v. Kellogg*, 7 Cush. 456; *Looker v. Peckwell*, 38 N. J. L. 253; *Jones v. Richardson*, 10 Met. 493; *Fisher v. Syfers*, 109 Ind. 514; *Letourno v. Ringgold*, 3 Cranch, C. C. 108; *Gale v. Burnell*, 7 Q. B. 850; *Chapin v. Cram*, 40 Me. 561; *Williams v. Briggs*, 11 R. I. 476; *St. Louis Drug Co. v. Dart*, 7 Mo. App. 599.

A mortgage on property to be subsequently purchased is void for uncertainty. *Otis v. Sill*, 8 Barb. 118.

It covers only the property then in possession. *Wagner v. Watts*, 2 Cranch, C. C. 109.

A mortgage of a building "and also such tools and other property as is now contemplated to be placed in the building" does not create a lien on the property afterwards placed therein but is void for uncertainty as against a mortgagee of the property whose mortgage is executed after the property is placed therein. *Winslow v. Merchants Ins. Co.* 4 Met. 306, 38 Am. Dec. 368.

A mortgage professing to cover the "scythes, iron, steel, and coal" then owned by the mortgagor, and also "all scythes, steel, iron and coal which

may be purchased in lieu of the aforesaid property," is, as respects the property to be subsequently acquired, void for uncertainty. *Otis v. Sill, supra*.

Where a mortgage was given upon the furniture of a hotel as security for rent, which contained a stipulation that if any of it should be sold and more purchased in its place the latter should stand as security in the same manner, and that the mortgagor should execute a new mortgage thereon, it was held that the after-acquired property would not be bound until a new mortgage was actually executed on it. *Codman v. Freeman*, 3 Cush. 309.

No verbal agreement between mortgagor and mortgagee can substitute future acquired property in place of that primarily covered by the mortgage as the same is from time to time acquired. *Powers v. Freeman*, 2 Lana. 181.

The result of this is that the mortgagee cannot maintain an action at law against a party interfering with the property. *Hamilton v. Rogers*, 8 Md. 301.

The Georgia Code, § 1864, however, permits mortgages upon stocks of goods which shall cover the stock as it changes from time to time.

Effect as between the parties.

Since the mortgagor has agreed to bind his after-acquired property in favor of the mortgagee, and it is right that he should keep his contract, the courts have, when the question has arisen simply between mortgagor and mortgagee and the rights of third persons were not involved, held the property bound and the mortgage sufficient to protect the mortgagee in dealing with the property according to the terms of the mortgage. *Ludwig v. Kipp*, 20 Hun, 235; *Loth v. Carty*, 85 Ky. 501; *Leland v. Collier*, 34 Mich. 418; *Allen v. Goodnow*, 71 Me. 420; *Chidell v. Galsworthy*, 6 C. B. N. S. 470.

The title when acquired inures to the benefit of the mortgagee. *Marshall v. Stewart*, 30 Ind. 191.

As between the parties a mortgage on a stock of goods may cover goods afterwards put in to keep up the stock. *Cadwell v. Pray*, 41 Mich. 307.

Effect of further act to perfect title in mortgages.

In justice one who has received a grant of chattels which the grantor did not at the time possess but which he has subsequently acquired should take title to them. The chief reason for denying such a right is the opportunity which it affords to defraud third persons. If the rights of strangers are protected there is very little reason for refusing to establish the grantee's rights. Therefore the courts quite early determined that if after the chattels came into possession of the grantor some new act took place sufficient to indicate to the world that the title to them had been placed in the grantee he should be protected in their possession even as

performed labor, for which the defendants agreed to pay \$557.50; making the full amount of the indebtedness \$6,233.50, which the defendants paid, as follows: October 23, 1883, check, \$2,250; November 22, 1883, check, \$1,500; December 11, 1883, check, \$2,478.50. The machinery was manufactured by the plaintiffs for Gandolfo, and was delivered to him at various dates in February, March, and April, 1884, for which he agreed to pay the plaintiffs \$4,700. As the different pieces of machinery were delivered to Gandolfo, he delivered them to the defendants, who set them up in their factory. February 21, 1884, before much, if any, of the machinery was manufactured, Gandolfo gave his promissory note, due on demand, to Robert Deeley, one of the plaintiffs, for \$4,700, the agreed purchase price, to secure

the payment of which Gandolfo on that day executed, and delivered to Robert Deeley, a chattel mortgage upon the machinery then manufactured, and that which was afterwards to be made and delivered, pursuant to the oral contract theretofore entered into between them. The mortgage was in the usual form, and recited that the articles are "now in the possession of the said party of the first part in the building of Messrs. John Dwight & Co., First avenue, between 112th and 118th streets, in the city of New York." The mortgage contained the usual clause selling the goods to the mortgagee upon condition, and as security, and that, in case default was made in payment, power was given to take and sell the goods. Afterwards \$1,500 was paid on the note, and May 13, 1885, the mortgagee indorsed a statement

against the claims of third persons subsequently acquired. There has been some diversity of opinion as to the character of the act which was sufficient; but it is generally conceded that possession will complete the mortgagee's title. *Hope v. Hayley*, 5 El. & Bl. 830; *Curr v. Allatt*, 8 Hurlst. & N. 604; *Gregg v. Sandford*, 24 Ill. 1.

Delivery to the mortgagee completes the title. *Chapman v. Weimer*, 4 Ohio St. 481.

The mortgage may be rendered efficacious by the mortgagee's rightfully taking possession of the after-acquired property. *Bennett v. Bailey*, 150 Mass. 257.

Taking possession under a power contained in the mortgage will vest a good title in the mortgagee. *McCaffrey v. Woodin*, 65 N. Y. 465, 22 Am. Rep. 644; *Carrington v. Smith*, 8 Pick. 419.

It is probable that a wrongful possession by the mortgagee would be without avail, but he will be protected in any rightful possession which he is able to secure. *Childell v. Galworthy*, 6 C. B. N. S. 471; *Peabody v. Landon*, 61 Vt. 329; *Rowan v. Sharpe's Rifle Mfg. Co.* 29 Conn. 329; *Walker v. Vaughn*, 33 Conn. 533.

It was held in an early Massachusetts case that evidence that the mortgagee took possession of the goods for the purpose of foreclosing his mortgage is irrelevant and immaterial as against attaching creditors. *Jones v. Richardson*, 10 Met. 458.

But that doctrine would probably not be followed now. It is sufficient if the mortgagee takes possession of the property of his own motion, without any suggestion from the mortgagor and with full knowledge of the latter's insolvency. *Chase v. Denny*, 120 Mass. 569.

Taking possession of the property under an agreement that the mortgagee may sell it to pay his claim and account to the mortgagor for the surplus is sufficient to give the mortgagee a good title as against attaching creditors. *Rowley v. Rice*, 11 Met. 353.

Merely momentary delivery of the property to the mortgagee with immediate redelivery to the mortgagor and subsequent continuous possession by him is not sufficient to perfect the title of the mortgagee as against attaching creditors. *Griffith v. Douglas*, 73 Me. 532, 40 Am. Rep. 395.

Delivery of the property to a common carrier to be transported to the mortgagee is not such a delivery to the latter as to perfect his equitable title. *Parker v. Jacobs*, 14 S. C. 112, 37 Am. Rep. 721.

If the mortgagor, after the property is acquired, surrenders the possession of it by deed or otherwise to the mortgagee it would constitute such new act as to confirm the conveyance. *Farmers Loan & Trust Co. v. Commercial Bank*, 11 Wis. 207, 13 L. R. A.

An indorsement on the back of the mortgage is sufficient to transfer title. *Brown v. Thompson*, 50 Me. 372.

Rights acquired after the mortgagee has taken possession of the property will not defeat his rights. *Kennedy v. National Union Bank of Watertown*, 23 Hun. 494.

If the mortgagee is deprived of possession after having acquired it he may maintain replevin for it. *Thompson v. Foerstel*, 10 Mo. App. 290.

Property contemplated as additions to other property.

The scope of this note does not include the validity of mortgages upon chattels which may be designated as the increase or products of property already in possession of the mortgagor. The subject of a mortgage on crops has already been treated in a note to *Lofrin v. Hines*, 10 L. R. A. 490, 107 N. C. 360, and the remainder of the subject will be treated in another place.

Nor does it include the general subject of railroad mortgages; but there are a few cases which are decided upon principles analogous to those governing those dealing with mortgages upon the increase of property already in the mortgagor's possession which it is deemed best to collect here.

In *Morrill v. Noyes*, 56 Me. 458, 96 Am. Dec. 492, in which the validity of a mortgage upon railroad equipments to be subsequently acquired was involved, the court makes a thorough examination of the question, and adopting much of the reasoning usually applied in case of mortgages of increase of property, it finally states the two following rules for determining the validity of such mortgages:

1. The contract must relate to some particular property described therein which, though not in existence, must be reasonably certain to come into existence, so that the minds of the parties may be in agreement as to what it is to be.

2. The vendor or mortgagor must have a present, actual interest in it, or concerning it. There must be something *in present*, of which the thing *in futuro* is to be the product, or with which it is to be connected, as necessary for its use, or as incident to it, constituting a tangible, existing basis for the contract.

It finally upholds the lien of the mortgage upon the after-acquired railroad equipments upon the ground that the mortgagors had an existing interest in and title to the road, franchises, etc., which were mortgaged, of which the after-acquired property was to be an essential part necessary to its use, to be added to it for the purpose of finishing it.

That case has been followed by a few cases in which mortgages upon a similar class of property have been involved. Thus, a mortgage of the

upon the mortgage that there was then due and unpaid thereon \$4,819.75, and on the same day filed it in the office of the register of the city and county of New York. The mortgage had not been previously filed, and the defendants had no notice of its existence, nor of the plaintiffs' claim, and before it was filed defendants had expended \$5,855.27 in setting it up, in other machinery and improvements to be used in connection with that sought to be recovered.

Messrs. A. P. Ketchum and James A. Seaman for appellants.

Messrs. Forster, Hotelling, & Klenke, for respondents:

Assuming that all or some of the articles mortgaged were not in existence at the time

the mortgage was given, it is still a valid mortgage, as it is a purchase-money mortgage; and as the plaintiffs finished the articles from time to time, the mortgage took effect as to each article immediately upon its completion or at least upon its delivery, as to any one not a bona fide purchaser for value from Gandolfo.

Kribbe v. Alford, 120 N. Y. 519; *Ludwig v. Kipp*, 20 Hun. 265; *McCaffrey v. Woodin*, 65 N. Y. 459, 22 Am. Rep. 644; *Willette v. Brown*, 42 Hun. 140, and cases cited; *Wisner v. Ocum-paugh*, 71 N. Y. 118; *Coats v. Donnell*, 94 N. Y. 168; *Stevens v. Watson*, 4 Abb. App. Dec. 302; *Coman v. Lakey*, 80 N. Y. 319. See *Andrews v. Durant*, 11 N. Y. 85; *Burrows v. Whitaker*, 71 N. Y. 291; *Woods v. Russell*, 5 Barn. & Ald. 942; *Mitchell v. Winslow*, 2 Story, 639.

future-acquired equipments of a mine is valid as against a subsequent mortgagee with notice. *Rube v. Missouri Coal & Min. Co.* 21 Mo. App. 170.

The future equipments of a hotel may be mortgaged. *Wright v. Broher*, 5 Mo. App. 322, 72 Mo. 186.

A mortgage may cover the raw material to be subsequently purchased by a manufacturer and the property to be manufactured therefrom. *Frank v. Playter*, 73 Mo. 676.

The mortgage may cover bricks the production of which is contemplated. *Rutherford v. Stewart*, 70 Mo. 216.

This is analogous to the old English case holding that a mortgage of the cargo of a ship to be taken during an existing voyage is valid. *Langton v. Horton*, 1 Hare, 549.

The exception established by equity.

The principal exception to the rule as above announced, and the one most far-reaching in its results, was evolved and established by courts of equity. The precise limits of this equitable exception are not yet fully defined, although many judges in many cases have labored to give it precise form. To what extent the old rule has been modified or overthrown by this exception can be determined only by a review of the authorities.

In *Mitchell v. Winslow*, 2 Story, 647, which is usually regarded as the leading case in this country, the mortgage was partly on property to be afterwards acquired. After it had been acquired the mortgagee took possession of it, and a little more than a month afterwards the mortgagor made an assignment in bankruptcy and the controversy was between the mortgagee and the assignee in bankruptcy. The court, after reaching the conclusion that the assignee in bankruptcy was subject to the same equities which bound the assignor, stated that "the question is narrowed down to the mere consideration whether or not the mortgage of after-acquired property is valid as against the mortgagor," and, after reviewing numerous authorities, the matter is summed up as follows: "Wherever the parties by their contract intend to create a positive lien or charge upon personal property, whether owned by the assignor or not, or whether then in case or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor acquires title to it against him and all persons asserting a claim thereto under him, either voluntarily or with notice, or in bankruptcy."

It will be noticed that that case, outside of the reasoning of Mr. Justice Story, added very little to the law upon the question, because, first, the mortgagee had actually taken possession of the prop-

erty, which, as shown above, was sufficient to perfect his title; and second, the court states that the question is as to the validity of the mortgage as against the mortgagor. The authorities cited above show it to have been valid, and the case might have been disposed of on either ground without the elaborate equitable argument.

In *Holroyd v. Marshall*, 10 H. L. Cas. 191, which may be regarded as the leading English case upon the subject, a mortgage had been given upon the machinery in a mill and by its terms it was to include all machinery afterwards placed therein by way of addition or substitution. A conflict arose between the claims of the mortgagee and an execution creditor as to the right to property placed in the mill after the execution of the mortgage. The Lord Chancellor said if a mortgagor agrees to mortgage property of which he is not possessed at the time, and he receives the consideration and afterwards becomes possessed of property answering the description in the contract, equity will compel him to perform the contract if it was of a class that could be specifically enforced, and therefore the contract would in equity transfer the beneficial interest to the mortgagee immediately on the property being acquired, and from that time the mortgagor will hold in trust for the mortgagee; and he held that the mortgagee was to be preferred to the judgment creditor, although he had made no attempt to perfect his claim after the property was acquired. He further intimated that although the contract did not relate to specific goods it would attach to anything which was acquired by the mortgagor and which answered the description in the contract. Lord Chelmsford, during the course of his opinion in the same case, said the right of priority of an equitable mortgagee over a judgment creditor though without notice may now be considered to be formally established; and he further said that the notice provided by the recording of the mortgage was sufficient to charge persons who contemplated dealing with the property. In this latter case the mortgage is given precedence over an execution creditor who had simply constructive notice of the mortgage. Carried to its logical ultimate conclusion that case would establish the doctrine that a duly recorded mortgage would be valid as against all the world, even upon property to be subsequently acquired, if the property was described so that it could be readily recognized from the description as soon as it came into the mortgagor's possession, and that equity would protect the rights of the mortgagee against all claimants. It is apparent that such a rule would create immediate conflict between law and equity, and there has been much hesitation in adopting it to its full extent.

Gandolfo and the Dwights also by being in privity with him are estopped by the warranty of title in the mortgage from claiming that he had no title at the time the mortgage was given.

Teff v. Munson, 57 N. Y. 97; *Gardiner v. Suydam*, 7 N. Y. 357; *House v. McCormick*, 57 N. Y. 311; *Jones, Mortg.* § 679; *Jones, Chat. Mortg.* §§ 101, 119; *Judd v. Seekins*, 62 N. Y. 266.

A chattel mortgage is valid without filing as against all persons except creditors having judgments or liens and subsequent purchasers in good faith.

Van Heusen v. Radcliff, 17 N. Y. 588; *Thompson v. Van Vechten*, 27 N. Y. 590; *Kennedy v. National Union Bank of Watertown*, 28 Hun, 496; *Button v. Rathbone*, 126 N. Y. 187.

The term "subsequent purchaser in good

faith" does not include one who takes in payment of a precedent debt, or one who takes in performance of an executory contract of sale made prior to the acquiring possession or of some evidence of title by the vendor, although the price is paid at the time of the contract. It only includes those who part with value at the time the title or property is transferred or delivered and on the faith thereof.

Button v. Rathbone, 126 N. Y. 197; *Van Heusen v. Radcliff*, and *Thompson v. Van Vechten*, *supra*; *Wood v. Robinson*, 23 N. Y. 564; *Weaver v. Barden*, 49 N. Y. 286; *Barnard v. Campbell*, 55 N. Y. 456, affirmed 65 Barb. 286, reargument in same, 58 N. Y. 73, 17 Am. Rep. 208; *Voorhes v. Olmstead*, 66 N. Y. 116; *Dusenbery v. Hulbert*, 59 N. Y. 541; *Kuraheedt v. McCune*, 20 Abb. N. C. 265.

Estoppel was not made out because the de-

The position of the courts is very well summed up in the quotation made in the principal case from *Kribbs v. Alford*, 120 N. Y. 524, where the court explains the different applications of the rule at law and in equity as follows: "Invalidity at law imports nothing more than that a mortgage of property thereafter to be acquired is ineffectual as a grant to pass the legal title. A court of equity, in giving effect to such a provision, does not put itself in conflict with that principle. It does not hold that a conveyance of that which does not exist operates as a present transfer in equity, any more than it does in law. But it construes the instrument as operating by way of present contract, to give a lien, which, as between the parties, takes effect and attaches to the subject of it as soon as it comes into the ownership of the party."

In *Ludlum v. Rothschild*, 41 Minn. 222, the court states the rule as follows: "Whenever the parties by their contract in clear terms express an intention to create a positive lien upon personal property, not then owned but to be subsequently acquired by the mortgagor, whether then in esse or not, the mortgage attaches as a lien on the property as soon as the mortgagor acquires it, as against the mortgagor, and all claiming under him either by voluntary transfer or with notice, precisely as if the property had been in being and belonged to the mortgagor when the mortgage was executed. Of course it is necessary, as in the case of any mortgage, that the property should be definitely pointed out, so that it may be distinguished or identified."

The doctrine that after-acquired property may in equity be subjected to a mortgage lien is applicable only where the contract of the mortgagor to transfer to the mortgagee is such as, under the circumstances, will be subject to a decree of specific performance. The mortgage will not attach to property which has been acquired under such fraudulent circumstances that the vendor may rescind as against the exercise of such right. *Williamson v. New Jersey S. R. Co.* 29 N. J. Eq. 320.

Equity treats a mortgage of property to be afterwards acquired as a contract binding, in consequence to execute the mortgage upon it at the very instant it comes into being, and will enforce specific performance. Or it will consider it as already done if no specific performance is requested and then by virtue of the equitable doctrine of notice bind everyone to respect the equitable lien who knows of it or without knowing of it has got the property without a valuable consideration. *Little Rock & Ft. S. R. Co. v. Page*, 35 Ark. 804.

In *Williams v. Winsor*, 12 R. I. 9, the court says, in reply to the objection that it is inconsistent and unjust, that equity should adopt a different doc-

trine from that at law, that this is only one of the many cases where a party has a remedy in equity where he has none at law, and we can see no greater inconsistency in it than in the fact that a party is at law obliged to adopt a particular form of action.

Applications of the equitable exceptions.

The mortgage was treated as valid without discussion, in *Howell v. Frances* (N. J.) Aug. 18, 1887; *Hulsizer v. Opdyke* (N. J.) April 30, 1888.

It is good between the parties and as against antecedent creditors. *Zaring v. Cox*, 78 Ky. 537.

As between mortgagor and mortgagee the latter will be vested in equity with the title to all the subjects within the scope of the mortgage as soon as they come into existence or become the property of the mortgagor. *McCaffrey v. Woodin*, 65 N. Y. 465, 22 Am. Rep. 644; *Akers v. Rowan* (S. C.) 10 L. R. A. 715.

The mortgage attaches as soon as the property is acquired and is good against a subsequent mortgage upon the same property executed after it is acquired. *Stillers v. Lester*, 43 Miss. 518.

A mortgage on furnishings which are to be placed in a store to fit it for business is good in equity and an equitable lien will attach to them as soon as they are put in which is good against the mortgagor and subsequent mortgagees with notice. *Keating v. Hannenkamp*, 100 Mo. 167.

It is good as against purchaser with notice. *American Cigar Co. v. Foster*, 86 Mich. 368; *Robson v. Michman Cent. R. Co.* 87 Mich. 70; *Davis v. Marx*, 55 Miss. 376.

The equitable lien will not prevail against the claim of antecedent creditors obtaining judgment and levying executions subsequently to the execution of the mortgage. *Parker v. Jacobs*, 14 S. C. 112, 37 Am. Rep. 727.

Equity will protect the right of the mortgagee against subsequent execution creditors. *Smithurst v. Edmunds*, 14 N. J. Eq. 415.

In *Levy v. Welsh*, 2 Edw. Ch. 443, 6 L. ed. 460, an equity case, the vice-chancellor restricted the lien of the mortgage to so much of the property as was in the store at the time the mortgage was given and so much as had been purchased and paid for out of its proceeds.

Where after the execution of the mortgage covering after-acquired property the mortgagor purchased furniture for which he did not pay and a judgment was recovered for the debt and execution levied on such furniture, in a contest between the mortgagee and execution creditor the court said equity will not interpose its assistance to hand over to the mortgagee this property which in all good conscience and justice should go back to the

defendants never made any effort whatever to learn whether Gandolfo had possession of or a title to this machinery when they paid him, and never even at the time of delivery or afterwards made any search for mortgages or any effort to learn whether he had put any lien on it.

Voorhees v. Olmstead, supra; Knights v. Jiffen, L. R. 5 Q. B. 660; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 825, 7 Am. Rep. 841; *Continental Nat. Bank v. National Bank of Com.* 50 N. Y. 575; *Anderson v. Read*, 106 N. Y. 888; *Barnard v. Campbell*, 55 N. Y. 457; *McMaster v. North America Ins. Co.* 55 N. Y.

223, 14 Am. Rep. 239. See *New York Rubber Co. v. Rothery*, 107 N. Y. 810.

Defendants failed to prove, even prima facie, their defense as bona fide purchasers, or that of estoppel, inasmuch as they did not show that John E. Dwight, who was so intimate, and still so suspicious, and who conducted all the dealings with Gandolfo, did not know that he had given a mortgage on it to any one.

Canajoharie Nat. Bank v. Dieffendorf, 10 L. R. A. 676, 123 N. Y. 191; *Seymour v. McKinstry*, 106 N. Y. 230; *Vosburgh v. Dieffendorf*, 119 N. Y. 357; *Stevens v. Brennan*, 79 N. Y. 268.

vendors. *Farmers L. & T. Co. v. Long Beach Imp. Co.* 37 Hun. 98.

But another court has held that the fact that the judgment was for the purchase price of the goods levied on will not give the judgment creditor an equitable right superior to that of the mortgagee. *Page v. Kendig* (N. J.) Feb. 10, 1887.

The lien of the mortgage will not give precedence in equity over that of a landlord for rent. *Beall v. White*, 34 U. S. 382, 24 L. ed. 173.

The mortgagee acquires a better right than an assignee in insolvency. *National Shoe & L. Bank of Auburn v. Small*, 7 Fed. Rep. 637.

It is good against an assignee for creditors. *Williams v. Winsor*, 12 B. L. 9.

Assignees in bankruptcy acquire only the rights which their assignor had. *Price v. Groom*, 2 Exch. 542.

A mortgage on property to be acquired *in futuro* which does not specify any property to which it is to attach will not in equity create a specific lien on the property when it is acquired. *Otis v. Sill*, 8 Barb. 113.

A contract to mortgage after-acquired chattels will not be enforced in equity if no chattels are specifically described the only description being that contained in the general word "property." *Borden v. Croak*, 131 Ill. 76.

After-acquired chattels definitely pointed out as by reference to the place into which they are to be brought may lawfully be mortgaged in equity. *Brett v. Carter*, 2 Low. Dec. 461.

Property which never comes into possession of the mortgagor is not subject to the lien of the mortgage. *Curtis v. Wilcox*, 49 Mich. 425.

The mortgage can attach to the after-acquired property only in the condition in which it comes into the possession of the mortgagor. *Hall v. Mullanphy Plan. Mill Co.* 16 Mo. App. 454.

Where the equitable exception is not recognized.

If the contract can be upheld in equity it is only valid as a contract to assign when the property shall be acquired and not as an assignment of a present interest, and if enforceable in equity at all it can only be enforced as a right under the contract and not as a trust attached to the property. *Ross v. Wilson*, 7 Bush, 84; *Otis v. Sill, supra*.

A mortgage of property in which the mortgagor has no present interest, and which he must acquire if at all independently of any property he now has, is not valid to create a lien which equity will recognize or enforce. *Wilson v. Seibert* (Ky.) 8 Am. L. Reg. N. S. 608.

Where a mortgage was given upon a stock of goods which remained in possession of the mortgagor and was to some extent changed, the court refused to recognize the lien as against an attaching creditor further than upon the property originally mortgaged. *Wedgewood v. Citizens Nat. Bank*, 29 Neb. 165.

A mortgage of property to be acquired *in futuro* 18 L. R. A.

is void and cannot avail against claims of other creditors. *Loth v. Carty*, 85 Ky. 591.

There is no lien either at law or in equity. *Hunter v. Bosworth*, 43 Wis. 591; *Case v. Fish*, 53 Wis. 56; *Titus v. Mabree*, 25 Ill. 257.

The mortgagee derives no available right to the subsequently acquired property as against the creditors of the mortgagor. *Ross v. Wilson, supra*.

In *Blanchard v. Cooke*, 144 Mass. 224, in which a contract rather than a mortgage was under consideration, the court stated quite fully the Massachusetts law on the subject of mortgages of after-acquired property, and concluded that to enable a mortgagee as against an attaching creditor or an assignee in insolvency to hold chattels acquired after the execution of the mortgage there must be a delivery to him or possession must be rightfully taken by him and such possession must be retained until the chattels have been attached or levied upon or until proceedings in insolvency are begun.

Unless the mortgage is recorded or possession taken under it of the after-acquired property the title of the mortgagee will not prevail against that of a subsequent execution creditor. *Gregg v. Sandford*, 24 Ill. 17, 76 Am. Dec. 722.

Some further act by the parties after the property comes into existence is necessary to perfect the title of the mortgagee whether he seeks to enforce his rights at law or in equity. *Moody v. Wright*, 13 Met. 81, 46 Am. Dec. 706.

In *Hunt v. Bullock*, 23 Ill. 325, the court said until possession is acquired by the mortgagee equity will not afford relief but will leave the party to his remedy at law (by action for breach of contract to execute the mortgage). If it was otherwise it would be to decree specific performance of an agreement for the sale of personal chattels which the court will rarely do as a matter of original jurisdiction. The cases which hold that such agreements create an equitable lien are in violation of the rules of equity jurisprudence.

The attitude of courts of law towards the equitable doctrine.

Courts of law cannot, nor are they disposed to, ignore the fact that courts of equity hold mortgages of after-acquired property to be valid, and they should give full effect to the decree in equity based upon the equity doctrine. To refuse to do so would produce interminable confusion. There does not seem to be any safe ground for courts of law but to hold the foreclosure of an equitable lien when made as effective for all purposes and against all persons as the foreclosure of a legal lien would be. *Little Rock & Ft. S. R. Co. v. Page*, 35 Ark. 304.

Where there is no distinction between law and equity it seems that all such mortgages are upheld. *Page v. Gardner*, 20 Mo. 512.

Courts of equity and under our practice courts of law also will recognize the rights of such mortgagee and enforce them as against all persons hav-

It was not necessary that Dwight should have known that Deeley held the mortgage or who it was; it was sufficient if he knew or suspected that a mortgage had been given.

Ellis v. Horrman, 90 N. Y. 466.

The Dwights having paid in advance for this machinery when Gandolfo, who was not in the machinery business, had no apparent title or possession or any indicia of title, were bound under the circumstances when he delivered these machines before expending money on them to have made some effort to learn the facts, and are chargeable with notice of all that such inquiry would have disclosed.

ing notice of them. *Scharfenburg v. Bishop*, 35 Iowa, 66.

After-acquired property may be mortgaged. *Stephens v. Pence*, 55 Iowa, 258.

If the property was in existence at the time the mortgage was executed it may be covered by the mortgage although it was not then the property of the mortgagor. *Hughes v. Wheeler*, 66 Iowa, 642.

It is immaterial that the property mortgaged was not in existence at the time the mortgage was executed. *Fejvary v. Broesch*, 52 Iowa, 88.

But in some jurisdictions at least the right must be enforced by the appropriate legal or equitable procedure as the case may require.

The mortgage can be made effective unless the mortgagee has acquired possession under the mortgage only by a proceeding in equity against the mortgagee or persons claiming under or through him who had notice of the equity of the mortgagee before their title or liens attached. An action at law is of no avail. *France v. Thomas*, 86 Mo. 80.

The title of the mortgagee before possession taken is not such as will sustain an action of replevin. *Gregory v. Tavenner*, 88 Mo. App. 627.

Sufficiency of record notice.

Under the Illinois statute there must be a schedule of the property annexed to the mortgage which cannot be done in the case of property to be after acquired, hence the mortgage is not good as to that. *Davis v. Ransom*, 18 Ill. 402; *Hunt v. Bullock*, 23 Ill. 325.

The record of the mortgage will not charge a subsequent purchaser with notice. *Single v. Phelps*, 20 Wis. 368. See also *Joseph v. Lyons*, L. R. 15 Q. B. Div. 280.

The record of a mortgage is valid only to protect goods which at the time of the mortgage could be delivered and retained. *Griffith v. Douglass*, 78 Me. 582, 40 Am. Rep. 365.

The record of the mortgage is no sufficient notice of a legal incumbrance as to subsequently acquired property. *Jones v. Richardson*, 10 Met. 488.

In contrast with the above, it has been held that the record of the agreement is sufficient notice to bind a subsequent execution creditor. *First Nat. Bank of Alexandria v. Turnbull*, 32 Gratt. 665.

As between the mortgagor or his assignee having constructive notice of the existence of the mortgage and the mortgagee the mortgage will operate to create a lien in equity as to chattels afterward acquired. *Kribbs v. Alford*, 120 N. Y. 524.

The effect of Holroyd v. Marshall in England.

After *Holroyd v. Marshall*, 10 H. L. Cas. 191, was decided an Act was passed in England which purported to abolish the distinction between legal and equitable remedies, and it seems to have been supposed that the combined effect of the decision and statute would be to render mortgages on after-acquired property valid at law. The question was 18 L. R. A.

Dunn v. Hornbeck, 72 N. Y. 80; *Danforth v. Dart*, 4 Duer, 101; *Pringle v. Phillips*, 5 Sandf. 157; *Parker v. Conner*, 93 N. Y. 124.

Follett, Ch. J., delivered the opinion of the court:

An action to recover damages for the conversion of chattels is a strictly legal one, which cannot be maintained unless the plaintiff is entitled to the immediate possession of the property, if in existence. Except as provided by statute, possession by the lienor of chattels on which the lien is claimed is indispensable to support a com-

subsequently considered by the court and it was decided that the Supreme Court of Judicature Acts 1873-75, have not abolished the distinction between legal and equitable interests; they merely authorized the high court to administer legal and equitable remedies and therefore the grant of future-acquired chattels confers only an equitable interest therein upon the grantee, and if when they come into existence but before the grantee takes possession the legal estate and interest therein without notice of the grantee's existing equitable interest become vested in another person the latter is entitled to the future-acquired chattels comprised in the grant both at law and in equity. And it seems that the record is not such notice. *Joseph v. Lyons*, L. R. 15 Q. B. Div. 280.

Where a bill of sale had been granted to one of after-acquired property, and after it came into the mortgagor's possession he granted it to another, the queen's bench division held that the title of the second grantee should prevail. *Brett, M. R.*, said it is true that when the after-acquired property was brought on the mortgagor's premises the condition was fulfilled whereupon the property passed to the mortgagee in equity; but the mortgagor had the legal title and when he granted that legal title to another it cannot be ousted or displaced by the equitable title of the mortgagee of which the second grantee had no notice. The mortgagee is in the same position as the owner of goods who has parted with the property in them through the fraud of another person, and who finds that an innocent person has meanwhile acquired a valid legal title to them, in which case the person upon whom the fraud was perpetrated must suffer the loss. *Hallas v. Robinson*, L. R. 15 Q. B. Div. 288.

Further litigation would seem to be necessary to determine what the extent of the equitable exception is since the rendition of these last two decisions.

It is sufficient when the property becomes specific by being placed in the designated building or otherwise. *Leatham v. Amor*, 38 L. T. 785.

So a mortgage is good upon goods to be brought into a certain store. *Lazarus v. Andrade*, 43 L. T. 30.

A charge of "all my present and future personality" is too indefinite. *Tadman v. D'Epineuil*, L. R. 20 Ch. Div. 768.

"All other the personal estate and effects whatsoever now being or hereafter to be upon or about the mortgagor's dwelling-house, farm, or premises, at R., or elsewhere in Great Britain," is too indefinite. *Belding v. Reed*, 3 Hurlst. & C. 955.

If it was only an agreement to mortgage furniture subsequently to be acquired then it would cover no specific furniture and would confer no right in equity. *Mogg v. Baker*, 3 Mees. & W. 197.

As to the validity of an assignment or mortgage of future earnings, see note to *Sandwich Mfg. Co. v. Robinson* (Iowa) 14 L. R. A. 126. H. P. F.

non-law lien. One having such a lien can maintain trover if the property is wrongfully taken or withheld from his possession, but such an action will not lie to enforce an equitable lien as against the owner of the legal title who remains in possession of the property and has not contracted it to the lienor. The instrument under which the plaintiff claims to recover is in form a chattel mortgage. Gandolfo, who executed it, assumes to transfer the legal title to the machinery to Robert Deeley, the plaintiffs' assignor subject to be defeated upon the payment of \$4,700. But the machinery not having been then manufactured, Gandolfo had no title to it, (*Andrews v. Durant*, 11 N. Y. 85; *Comfort v. Kiersted*, 26 Barb. 472;) and the instrument did not vest the legal title of the machinery in Deeley, nor did it create a legal lien upon the property described therein, (*Gardner v. McEwen*, 19 N. Y. 123; *Jones v. Richardson*, 10 Met. 481; *Pettis v. Kellogg*, 7 Cush. 456; *Otis v. Sill*, 8 Barb. 102; *Conderman v. Smith*, 41 Barb. 404; *Thomas, Chat. Mortg.* § 187; *Jones, Chat. Mortg.* § 188.)

We find no case which holds that the legal title to property not in existence, actually or potentially, can be transferred either by way of sale or mortgage. That an equitable lien may be created on property to be brought into existence is well settled, and an action to foreclose the lien may be maintained. It was said in *Coats v. Donnell*, 94 N. Y. 177: "A contract for a lien on property not *in esse* may be effectual in equity to

give a lien, as between the parties, when the property comes into existence, and where there are no intervening rights of creditors or third persons, seems to be established by several decisions in this court." *Kribbe v. Alford*, 120 N. Y. 519, which is relied on by the respondents, is not in conflict, but in harmony, with these views. It was there said: "Invalidity at law imports nothing more than that a mortgage of property thereafter to be acquired is ineffectual as a grant to pass the legal title. A court of equity, in giving effect to such a provision, does not put itself in conflict with that principle. It does not hold that a conveyance of that which does not exist operates as a present transfer in equity, any more than it does in law. But it construes the instrument as operating, by way of present contract, to give a lien, which, as between the parties, takes effect, and attaches to the subject of it, as soon as it comes into the ownership of the party. Such we deem the rule to be in equity in this state." *McCaffrey v. Woodin*, 65 N. Y. 459, 22 Am. Rep. 644; *Wiener v. Occumpaugh*, 71 N. Y. 118; *Coats v. Donnell*, 94 N. Y. 168, 177; *Hals v. Omaha Nat. Bank*, 49 N. Y. 626, 632.

It follows from these views that plaintiffs failed to establish a legal title, either as general or special owners, and were not entitled to recover.

The order should be reversed, and the judgment entered on the verdict, and affirmed with costs.

All concur.

18 L. R. A.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

J. Kennedy TOD *et al.*

v.

KENTUCKY UNION R. CO. *et al.*ROSSER & COLEMAN, *Appts.* No. 22.W. & A. C. SEMPLE *et al.*, *Appts.* No. 29.

(22 Fed. Rep. 241.)

1. A statute giving a lien for lumber, materials, or teams furnished in the construction of railroads or other works of public or quasi public character is a legislative declaration that prior lien statutes did not cover such cases.

2. Contractors for building a railroad cannot be regarded as "employees" or "laborers" within the meaning of the Kentucky statute giving liens to laborers and employees for their services in carrying on the business of the railroad although the contract is to furnish laborers, tools, and teams by the day for which certain sums per day are to be paid with 10 per cent additional for the use of tools and superintendence.

3. One who has failed or neglected to comply with the requirements of the Kentucky Act of 1888 providing for a lien in favor of persons furnishing labor or material in railroad construction cannot claim a lien under the Act of 1876 giving a more extended lien in favor of laboring men and supply men in numerous kinds of business.

NOTE.—Who are laborers, employees, or servants within the meaning of statutes giving them preferences.

1. Definitions.

The word "laborer" in the statute exempting the wages of laborers from attachment in the hands of employers refers to one who is a manual laborer by profession and occupation. *Heebner v. Chave*, 5 Pa. 117.

"By laborers," says Woodward, J., in *Seiders's App.*, 46 Pa. 57, "we mean those who perform with their own hands the contract they make with their employer."

The court in *Dano v. M. O. & R. R. Co.*, 27 Ark. 567, said that the word "laborer" in the Act of 1868, giving a lien to laborers, was intended to be used according to its common acceptation as defined by Webster, and distinguished from mechanic or artisan as used in other Lien Acts.

The court, in *Smith v. Brooke*, 40 Pa. 147, defined "wages of laborers" to be the earnings of a laborer by manual toil.

Ex parte Meason v. Ashman, 5 Binn. 167, held servant's wages which under the Act of 1794 were to be treated as preferred debts in the settlement of decedent's estates, to be the earnings of such servants only as make part of a man's household—menial servants.

The term "wages of employees" in an order requiring a receiver of a railroad company to pay wages does not include the services of counsel employed for special purposes. *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 34 L. ed. 1023.

Foremen, clerks, and time-keepers in the employ of a railway contractor are not laborers. *Missouri, E. & T. R. Co. v. Baker*, 14 Kan. 563.

One who performs a contract to draw lumber by hiring teams and drivers is not a "mechanic or laborer." *Wentworth's App.* 82 Pa. 471.

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4. The mere fact of furnishing articles or supplies suitable or capable of being used in carrying on a designated business without any understanding or agreement that they should be so applied will not of itself, without actual application in the business, give the furnisher a lien under the Kentucky Act of 1876 upon the property and effects.

(October 4, 1892.)

APPLEALS by intervenors in an action brought in the Circuit Court of the United States for the District of Kentucky for the foreclosure of a mortgage from a judgment denying their right to enforce mechanics' liens against the mortgaged property. *Affirmed.*

The facts are stated in the opinion.

Before Brown, *Circuit Justice*, and Jackson and Taft, *Circuit Judges*.

Mrs. Stone & Sudduth, Dodd & Dodd, A. Barnett, and Thomas C. Bell, for appellants;

The appellants have made out a prima facie case when they proved that they were dealers in railway supplies, and that the supplies furnished by them were just such supplies as the railway company daily needed to enable it to carry on its business, and that they furnished them for that purpose. When this proof was made, the burden was cast upon the appellees to show the use to be different from that thus prima facie established by the appellants.

Rice v. Hodge, 26 Kan. 170. See also *Sturges*

The secretary of a railway company is an officer and his salary is not a sum "due and owing any servant or employé." *Wells v. Southern M. R. Co.* 1 Fed. Rep. 270.

Pennsylvania & D. R. Co. v. Leuffer, 84 Pa. 168, decided that a civil engineer was not included in the class of "laborers and workmen" designated by the statute giving to such persons a lien on improvements by corporations.

In *State v. Bunk*, 55 Wis. 455, it was said that the word "laborer" as employed in the act empowering the governor to expend certain moneys in paying the claims of laborers, etc., for work on a line of railway, should be interpreted in the sense in which it is ordinarily used and understood when applied to men engaged in constructing railways. And it was held that engineers were not included.

The protection of the law giving a right of action for labor debts is limited to one who labors and is not extended to one who merely hires out the labor of others. *Chicago & N. R. Co. v. Sturges*, 44 Mich. 533; *Martin v. Michigan & O. R. Co.* 62 Mich. 458.

2. Who are secured by the Mechanics' Lien Law?

A mechanic is not within the protection of the statute unless he performs manual labor. *Adams v. Goodrich*, 55 Ga. 233.

An overseer and foreman of a body of miners, who performed manual labor upon the mine, is entitled to a lien, under the law of Utah giving a lien for labor. *Flagstaff S. Min. Co. of Utah v. Cullins*, 104 U. S. 178, 26 L. ed. 704.

The foreman of work in a mine is secured by the Lien Law. *Capron v. Strout*, 11 Nev. 304.

The manager of a company was held to be an employé, so that he might have a lien for his salary. *Conlee Lumber Co. v. Ripon Lumber & Mfg. Co.* 66 Wis. 481.

And a foreman in a mill. *Ibid.*

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v. Green, 27 Kan. 287; *Morris County Bank v. Rockaway Mfg. Co.* 14 N. J. Eq. 192; *Watts v. Whittington*, 48 Md. 857; *Singerly v. Doerr*, 62 Pa. 13; *Heckel v. Pettierow*, 6 Ohio St. 251; 1 Best, Ev. § 274.

If the appellants were supply men, and as such furnished the articles in dispute for carrying on the business, then their entire accounts should have been allowed as preferred claims, under the Supply Men's Act upon which they have staked their rights. If, on the other hand, they were contractors within the meaning of the Contractors' Act, then their entire claims should have been rejected as preferred claims, because they have never, and could not have, complied with the conditions necessary to perfect their lien under the Contractors' Act.

The lien provided for in the Supply Men's Act arises by operation of the law for the whole amount due upon the happening of any of the contingencies specified in the Act.

Delaware, L. & W. R. Co. v. Oxford Iron Co. 88 N. J. Eq. 195.

Both prior and subsequent to the passage of the statute the courts of the country have often, in the absence of any statute, formulated and applied the inherent equitable principle which this statute declared and enlarged.

Douglass v. Cline, 12 Bush, 608; *Fosdick v. Schall*, 99 U. S. 252, 25 L. ed. 842; *Milttenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 811, 27 L. ed. 126; *Burnham v. Bowen*, 111 U. S. 780, 28 L. ed. 597; *Union Trust Co. v. Illinois Midland Co.* 117 U. S. 454, 29 L. ed. 970.

The Contractors' Act is clearly and manifestly a statute exclusively for the benefit of contractors and in all of its features is essentially different from the Supply Men's Act.

In *Fosdick v. Schall*, *supra*, the supreme court stated that every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income.

See also *Barton v. Barbour*, 104 U. S. 135, 28 L. ed. 677; *Milttenberger v. Logansport, C. & S. W. R. Co.* and *Burnham v. Bowen*, *supra*; *Thomas v. Peoria & R. I. R. Co.* 36 Fed. Rep. 818; *Finances Co. of Pennsylvania v. Charleston, C. & C. R. Co.* 48 Fed. Rep. 188.

The Kentucky statute merely affirmed and extended this principle to the *corpus* of the property by positive law.

Courtney v. Insurance Co. of North America, 49 Fed. Rep. 309, 4 U. S. App. 140.

The preference given by the statute does not rest on the nature of the debt, but grows out of the character of the creditor and the necessity of the service (or supplies) to the corporation.

Lehigh Coal & Nav. Co. v. Central R. Co. 29 N. J. Eq. 256; *Watson v. Watson Mfg. Co.* 30 N. J. Eq. 590; *Delaware, L. & W. R. Co. v. Oxford Iron Co.* 88 N. J. Eq. 195.

Appellants *Semple et al.* come within the provisions of the supply statute.

Rosser & Coleman were employes within the meaning of the Act of the 20th of March, 1876, and entitled to a lien prior to the bondholders and all others.

And a carriage maker and a blacksmith is a laborer within the statute. *Ibid.*

And a master mechanic, or machinist is a servant or laborer. *Sleeper v. Goodwin*, 67 Wis. 590.

One who acts as overseer and assistant superintendent in the repair of a mill is entitled to a lien. *Willamette F. & T. M. Co. v. Remick*, 1 Or. 169.

House painters are entitled to the preference of the Mechanics' Lien Law. *Martine v. Nelson*, 51 Ill. 422.

A teamster is a laborer but not one who merely furnishes teams to work for the contractor. *Mann v. Burt*, 35 Kan. 11.

A claim for the labor of oxen cannot be included in a charge made by a laborer under a statute giving "to laborers on lumber a lien thereon." *McCrillis v. Wilson*, 34 Me. 286; *Coburn v. Kerawell*, 35 Me. 123.

A carter may have a lien under the Mechanics' Lien Law for hauling away dirt, etc., from a building. *Hill v. Newman*, 38 Pa. 151, 30 Am. Dec. 473.

But in Michigan it has been held that the labor done by a man's team may be fairly regarded as labor done by him within the meaning of the statute. *Chicago & N. R. Co. v. Sturgis*, *supra*.

The Amendment of 1874 to the Minnesota Mechanics' Lien Law, providing that whoever furnishes labor, skill, or material for a railway by virtue of any contract with the owner or any party authorized by the owner or by virtue of any subcontract with the original contractor, shall have a lien, applies to subcontractors generally, and not merely those standing in direct contract relation with the original contractor. *Spafford v. Duluth, E. W. & S. R. Co.* (Minn.) March 8, 1892.

The following have been held not to be entitled to the protection of the Lien Law:

One engaged to cook for laborers engaged in the 18 L. R. A.

construction of a reservoir. *McCormick v. Los Angeles City Water Co.* 40 Cal. 185.

One who furnishes labor and material in placing a lightning-rod on a house. *Drew v. Mason*, 31 Ill. 498, 25 Am. Rep. 238.

An agent employed to pay off laborers. *Edgar v. Salisbury*, 17 Mo. 271.

A laborer has no lien for wages earned on land which he has cleared and prepared for cultivation, under the Laborers' Lien Act of 1868. *Taylor v. Hathaway*, 29 Ark. 597.

An overseer of a plantation is not entitled to the lien of a laborer upon the stock, etc., of his employer. *Whitaker v. Smith*, 51 N. C. 940.

A Georgia Statute of 1858 gave the debts due masons and carpenters a preference. It was held in *Fox v. Rucker*, 30 Ga. 525, that a plasterer was not included in the law.

But under the Massachusetts Mechanics' Lien Law of 1855 a plasterer has a lien. *Parker v. Bell*, 7 Gray, 429.

3. Preferences of claims against insolvent corporations.

Under the Virginia statute giving the wages of the employes of an insolvent corporation preference, the president of an iron manufacturing company, designated as "general manager," is not entitled to such preference. *Seventh Nat. Bank of Phila. v. Shenandoah Iron Co.* 36 Fed. Rep. 436.

A superintendent at an annual salary, attorney-at-law, contractor for part of work who employs others, and salesmen on salary and commissions, are not entitled to preference under the statute. *People v. Remington*, 109 N. Y. 651.

A contractor with a corporation is not an employe of the corporation within the meaning of Indiana Rev. Stat., § 5226, giving a lien to employes for labor done for the corporation. An employe

Such an Act as that under consideration must be liberally construed.

Davis v. Alford, 94 U. S. 545, 24 L. ed. 238; *Flagstaff S. Min. Co. of Utah v. Cullins*, 104 U. S. 175, 26 L. ed. 704; *Stryker v. Cassidy*, 76 N. Y. 50; *Gurney v. Atlantic & G. W. R. Co.* 58 N. Y. 358; *Watson v. Watson Mfg. Co. supra*.

Messrs. Humphrey & Davie and St. John Boyle, for appellees:

Rosser & Coleman cannot maintain a lien under this Act, because they were not employes within the meaning of the Act, nor did they furnish supplies.

The word "employé" is broader than the word "laborer," but it must be limited to one who is entitled to compensation for personal service, and the amount for which a lien is allowed must be limited to the amount of such compensation. The amount due to a contractor on account of the labor of others is not due to him as an employé.

Lehigh Coal & Nav. Co. v. Central R. Co. 29 N. J. Eq. 255; *Balch v. New York & O. M. R. Co.* 46 N. Y. 521; *Louisville, E. & S. L. R. Co. v. Wilson*, 133 U. S. 501, 34 L. ed. 1023; *Vane v. Newcombe*, 132 U. S. 220, 33 L. ed. 310.

Moreover the lien given by the Act of 1876 is limited to such employes as were engaged in the service of the insolvent at the time of the suspension.

Delaware, L. & W. R. Co. v. Oxford Iron Co. 33 N. J. Eq. 196.

There are provided for in these various statutes two distinct and well-recognized classes

of claims,—construction claims, and claims for operation.

Galveston, H. & H. R. Co. v. Cowdrey, 78 U. S. 11 Wall. 459, 20 L. ed. 199.

The claims were for articles furnished by the parties without any contract that they should be used in the one way or in the other.

The words "materials" and "supplies" in the Act of 1876 were never designed to refer to anything except such articles as are consumed in the ordinary conduct of the business of the factory or railroad, such things as oil, coal, wood, etc.

Delaware, L. & W. R. Co. v. Oxford Iron Co. supra.

The burden is upon the person claiming the mechanics' lien to make out his case, and to show that he comes within and has complied with the terms of the statute.

Dodge v. Walsham, 16 R. I. 704; *Chapin v. Perse & B. Paper Works*, 30 Conn. 461, 79 Am. Dec. 265; *Hunter v. Blanchard*, 13 Ill. 324, 68 Am. Dec. 547.

Jackson, Circuit Judge, delivered the opinion of the court:

The questions presented for decision in these cases relate to the respective rights and priorities of different lien claimants upon the property of the Kentucky Union Railway Company, which was chartered under the laws of Kentucky to construct, own, and operate a designated line of railway in said state, about 100 miles in length. Prior to 1883 about fifteen miles of its road was completed and in operation. In order to raise

within the meaning of the statute is a servant, and not a contractor bound only to produce a certain result of labor, and free to dispose of his own time and personal effort according to his pleasure without responsibility to the other party. *Vane v. Newcombe*, 132 U. S. 220, 33 L. ed. 310.

A "superintendent" of a natural gas company, who is not a general manager, or a general agent, or an officer of the company, but whose principal duties are to superintend the construction of trenches and the laying of gas pipes, is a laborer within the meaning of that term as used in Elliott's (Ind.) Supp. § 606, giving a preference to laborers' claims for wages against corporations. *Pendergast v. Yandes*, 3 L. R. A. 849, 124 Ind. 159.

A claimant under N. Y. Laws 1885, chap. 336 (allowing preference to laborers, etc., for wages due from a corporation where a receiver has been appointed) who had been employed by a defunct corporation at an annual salary of \$2,000 with a commission of 2 per cent, to sell goods in China, was not entitled to the preference, either as to salary or commission, within the meaning of the statute. *People v. Remington, supra*.

The statute was designed to secure the wages of those who, as a class, are dependent upon their earnings for their own and their families' support. *Ibid*.

An assistant bookkeeper employed for other services also is an employé, within the meaning of N. Y. Laws 1885, chap. 376, providing for the payment of the wages of employes of a corporation by a receiver thereof. *Brown v. A. B. C. Fence Co.* 52 Hun, 151.

Re Black, 38 Mich. 513, held that the claim of a head miller came within Mich. Pub. Acts of 1887, No. 94, enacting that all debts owing by a corporation at the time of its insolvency shall be preferred claims against the estate of the debtor.

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In *Lehigh Coal & Nav. Co. v. Central R. Co.*, 29 N. J. Eq. 255, the word "laborers" in the Act was construed as the equivalent of "employes;" and one who contracted with the company to furnish the labor of others was held not to come within the word or spirit of the statute.

New Jersey Rev. Stat., p. 138, § 63, provides that on the insolvency of a corporation the wages due the laborers shall be paid prior to any other debt; "and the word 'laborers' shall be construed to include all persons doing labor or service of whatever character for or as workmen or employes in the regular employ of such corporation."

In *England v. Beatty Organ & Piano Co.*, 41 N. J. Eq. 470, it was held that the president of a corporation—who must be a director—was not a laborer within the contemplation of the Act.

And in *Watson v. Watson Mfg. Co.*, 30 N. J. Eq. 568, under the same statute it was held that a drayman who had made a contract with the company to do all its carting in a certain city was entitled to the preference given by the statute, not only for his own labor, but also for the use of his horses.

In *Gurney v. Atlantic & G. W. R. Co.*, 58 N. Y. 367, a receiver had been directed to pay arrearages to "laborers and employes" of the corporation: It was held that this included the claim of an attorney for professional services. In delivering the opinion *Church, Ch. J.*, said: "Aside from the difference of words, there is, I think, a distinction between the above cases [*Ericsson v. Brown*; *Aikins v. Wasson*; *Coffin v. Reynolds, infra*], and this, in the rules of construction, which should be applied. In those cases there was a statute liability created against stockholders, and such statutes are always strictly construed. Again, the courts held that it was the policy of the Legislature to protect those only who are the least able to protect themselves and who earn their living by manual labor for a

funds with which to extend its line eastwardly and westwardly from the completed portion, said railway company, on July 2, 1888, executed a mortgage or trust deed upon its property then owned and thereafter to be acquired to the Central Trust Company of New York, to secure an issue of \$3,000,000 first mortgage bonds. Said mortgage was executed under authority duly conferred, and was properly recorded. The bonds secured thereby were issued and used for the purposes of the company. Thereafter, on July 1, 1890, said railway company executed a second mortgage on the same properties to the Columbia Finance & Trust Company to secure a further issue of \$1,800,000 of its bonds. This mortgage was also duly executed and recorded, and the bonds thereby secured were issued and used by the company. J. Kennedy Tod & Co. subsequently advanced the company \$72,500, under an agreement that said sum should be secured by \$140,000 of said second mortgage bonds, which were to be delivered to said firm as collateral security for said advance, with interest from January 6, 1891. The company failed to comply with its promise to deliver said collateral security, and in February, 1891, said J. Kennedy Tod & Co., in connection with said mortgagees, the Central Trust Company of New York and Columbia Finance & Trust Company, filed their bill in the circuit court for the district of Kentucky against said railway company, alleging that it had become and was entirely insolvent; that diverse persons, whose names were un-

known to complainants, claimed mechanics' liens upon all or a portion of the company's property, which they threatened to enforce, and which, if enforced in separate proceedings, would cause a severance and disintegration of the railroad line, etc.; and praying that the court would appoint a receiver of said company's railway, property, assets, etc.; that it would foreclose said mortgage, and sell said railway, with its properties and franchises, as an entirety, and apply the proceeds to the satisfaction of the debt due complainants, J. Kennedy Tod & Co., and the debts secured by said mortgages, together with other lien debts, according to their respective priorities. A receiver was appointed, and a reference was directed to a special master to take proof and report upon "claims against said railway company incurred for materials and supplies furnished it for its ordinary operation." There was also a general order made in relation to intervening petitions.

The appellants Rosser & Coleman intervened by petition, and asserted claims as laborers and employees of said company to the amount of \$2,806.88, which they contended constituted a lien upon the company's property prior and superior to that of the debts due to and represented by the complainants. They allege in their original petition and the amendments thereto that from about March 5, 1890, until about April 14, 1890, they performed work and labor in construction and repair of the railway company's road, on sections 74, 75, and 76 thereof, in

small compensation, and not by professional services, and this supposed legislative policy exerted a controlling influence upon the courts. In this case it was entirely different. There was no question of policy. It was a scramble for payment of debts, against a defaulting corporation, and the terms of the order were fixed by negotiation and agreement between interested parties."

4. *Who are laborers, servants, or employees under the statutes making stockholders individually liable?*

The case of *Alkin v. Wason*, 24 N. Y. 482, arose under a statute making stockholders of corporations liable for debts owing by the corporation to "laborers or servants." It was held that the statute was designed for the protection of persons belonging to the class commonly known as laborers or servants, and performing manual labor merely, and that a contractor for building a portion of a railway was not within the Act.

And in *Balch v. New York & O. M. R. Co.*, 46 N. Y. 521, it was held that the word "laborer" in the General Railroad Act of 1860 could not be construed to designate one who contracted for and furnished the labor and service of others, or one who contracted for and furnished one or more teams, whether with or without his own services or the services of others. See to the same effect *Atherson v. Troy & B. R. Co.* 6 Abb. Pr. N. S. 329.

So in *Coffin v. Reynolds*, 87 N. Y. 640, it was held that the secretary of a corporation to whom the corporation was indebted for services in that capacity was not a laborer or servant within the statute. This case amounted to an overruling of *Richardson v. Abendroth*, 48 Barb. 168.

In *Conant v. Van Schaick*, 24 Barb. 87, it was held that all persons employed in the service of the company who had not a distinctive appellation, such as officers or agents, were embraced in the 18 L. R. A.

designation "laborers or servants;" and that the engineer, master mechanic, and condutor were as fully entitled to the benefits of the Act "as the man who shovels gravel."

By an Act of 1859 incorporating the New York & Liverpool United States Mail Steamship Company, the stockholders were made individually liable for debts owing by the corporation to laborers and operatives: a consulting engineer was held not to be within the language, or policy, or reason of the law. *Erickson v. Brown*, 38 Barb. 390.

In *Short v. Medberry*, 29 Hun. 89, one who acted as foreman, took part in manual labor required to manufacture stone, kept time of the men, collected bills, etc., was held to be a laborer or servant within the meaning of the Act of 1848 making stockholders individually liable.

In *Krauser v. Ruckel*, 17 Hun. 463, under the same Act, a superintendent of mining works, who hired and paid workmen, purchased supplies, made contracts for the company, etc., was held not to be a "laborer, servant, or operative."

In *Dean v. De Wolf*, 16 Hun. 196, affirmed in 83 N. Y. 626, an assistant to the superintendent of a mining company was held not to be a "laborer or servant."

Lott, Ch. C., in *Hill v. Spencer*, 61 N. Y. 279, in considering whether a general manager fell within the term "servant," said: "The context in which it is used, in the section referred to, being associated with 'laborers' and 'apprentices,' indicates that it was intended to apply to a person employed to devote his time and render his service in the performance of work similar in its general character to that done by those employees."

In *Wakefield v. Fargo*, 90 N. Y. 213, it was said that he who performs services for a corporation for which a stockholder is personally liable "must be of a class whose members usually look to the re-

Lee county, Ky., under a contract which was in substance as follows: That, having in their employ certain laborers, and owning carts, teams, and tools suitable for the purpose, the railway company agreed to employ them, with their said laborers, tools, and teams, by the day, to do work on the aforesaid sections of its road, under the direction and control of its engineer; that they were to be paid certain sums per day for foremen, for laborers, and for teams, consisting of carts and mules, and 10 per cent additional on the amount of said daily sums for the use of their tools, and for their superintendence of the work and hands, and be reimbursed the cost of powder necessary to be used in the work; that either party had the right to stop said work at the end of any day; that while the employment continued petitioners paid their said hands or laborers. It is then alleged that under this contract the railway company became indebted to petitioners in the sum of \$2,806.66, for which it on October 15, 1890, executed to them its promissory note due at four months, which petitioners thereafter indorsed and negotiated to the Clay City National Bank, and at its maturity were required to take up, the maker having failed to pay the same. Petitioners claimed that under said contract they were laborers and employes of the railway company, and as such were entitled to a lien upon its property and the proceeds thereof for the amount due them, which was prior and superior to complainants'. Their petition was demurred to on the ground that it presented no case

entitling them to the lien claimed. This demurrer was sustained, and the petition dismissed. From this judgment said petitioners have appealed.

Their contention for a lien is based on an Act of the Legislature of Kentucky approved March 20, 1876, entitled "An Act to Provide for Liens for Laboring Men and Supply Men," which provided (section 1) that "when the property or effects of any railroad company, or of any owner or operator of any rolling mill, foundry, or other manufacturing establishment, whether incorporated or not, shall be assigned for the benefit of creditors or shall come into the hands of any executor, administrator, commissioners, receiver of a court, trustee, assignee for the benefit of creditors, or shall in any wise come to be distributed among creditors, whether, by operation of law or by the act of said company, owner, or operator, the employes of said company, owner, or operator in such business, and the persons who shall have supplied material or supplies for the carrying on of such business, shall have a lien upon so much of such property and effects as may have been embarked in such business, and all the accessories connected therewith, including the interest of said company, owner, or operator in the real estate used in carrying on said business." By section 2 it is declared that "the said lien shall be superior to the lien of any mortgage or other incumbrance heretofore or hereafter created, and shall be for the whole amount due such employes as such, or due for such materials or supplies,"

ward of a day's labor, or service, for immediate or present support, from whom the company does not expect credit, and to whom its future liability is of no consequence; one who is responsible for no independent action, but who does a day's work, or a stated job, under the direction of a superior. And a general manager is not a 'laborer, servant, or apprentice.'"

A contractor who has built a section of a railroad has no remedy against stockholders under a constitutional or statutory provision making them individually liable for labor performed for the corporation. *Peck v. Miller*, 39 Mich. 566.

Nor has an assistant chief engineer. *Brockway v. Innes*, 30 Mich. 47, 33 Am. Rep. 343.

Nor a traveling salesman. *Jones v. Avery*, 60 Mich. 223.

One corporation cannot be the employe of another corporation, within Ind. Rev. Stat., § 8999, making stockholders individually liable. *Dukes v. Love*, 97 Ind. 341.

One employed by a corporation on a monthly salary, who is part of the time on the road selling goods, making collections, etc., as a drummer, and the rest of the time working in a store, shipping and receiving goods, moving and handling stock, etc., or making sales and collecting bills in the city,—is a "clerk," within the meaning of the Tennessee General Incorporation Act of 1875, § 11, making stockholders individually liable for moneys due "laborers, servants, clerks, and operatives" in case the corporation becomes insolvent. *Cole v. Hand*, 7 L. R. A. 96, 38 Tenn. 400.

A. Laborers whose earnings are exempted from attachment or garnishment.

One engaged to superintend the erection of a building is a "laborer or other employe" within the meaning of the Act of 1854, exempting the wages 18 L. R. A.

of such person from attachment. *Moore v. Heaney*, 14 Md. 559.

Iowa Code, § 8074, provides that the earnings of a debtor for his personal services at any time within ninety days next preceding the levy are exempt from execution and attachment.

McCoy v. Cornell, 40 Iowa, 457, held that professional men as physicians were included in this provision.

The Practice Act of California exempts from execution "his horses, etc.," "by the use of which a teamster or other laborer habitually earns his living." A teamster within this statute is defined to be one who is engaged in the business of hauling freight for other parties, by which he habitually supports himself and family. He need not drive the team in person but must be personally engaged in the business of teaming habitually for the purpose of making a living. By "other laborer" is meant one who labors by and with the aid of his team. *Brusie v. Griffith*, 34 Cal. 303, 91 Am. Dec. 695.

In *Heebner v. Chave*, 5 Pa. 115, it was held that the Act of 1845, which prohibited the attachment of laborers' wages, secured the fruits of his work to the manual laborer only, and did not embrace the earnings of a contractor.

Seymour v. Over River School Dist., 53 Conn. 502, held that a school teacher was not a public officer within the meaning of the statute exempting the salary of public officers from attachment.

The "boss" of a department of a factory, having the employment and discharge of the hands who work under him, who is not required to do manual labor, but to use his experience and knowledge in the direction of the operatives, cannot be regarded as a "journeyman mechanic" or "day laborer" within the statute exempting the wages of such persons from garnishment. *Kyle v. Montgomery*, 73 Ga. 343.

etc. The third section provides for the *pro rata* distribution of the net earnings at the end of each calendar month among lienholders, when the trustees or other persons having the administration of such property "shall continue the operation of the business." The fourth section provides that when the company, owner, or operator shall suspend, sell, or transfer such business, or when the property or effects engaged in such business shall be taken in attachment or execution, so that the business shall be stopped or suspended, the said lien shall attach as fully as is provided by section 1, and in such case may be enforced by proceedings in equity. The fifth section directs how the suit shall be brought, and provides "that such suit shall be begun within sixty days after the right of action shall accrue."

When this Act was passed there was in force the prior Statute of 1858, now chapter 70, Ky. Gen. Stat., which gives a person who performs labor or furnishes material in the erection, altering, or repairing a house, building, or other structure, or for the improvement in any manner of real estate by contract with or by the written consent of the owner, a lien thereon and upon the land on which such improvement may have been made: provided, the claimant, within sixty days after he ceases to labor or furnish material, files in the office of the clerk of the county court of the county in which such building or improvement is situated, a statement of the amount due him, with a description of the property intended to be covered by the lien, sufficiently accurate to identify

it, and the name of the owner, and stating whether the materials were furnished or the labor performed by contract with the owner: and provided, further, that action shall have been brought to enforce the lien claimed within six months from the day of filing the account in the clerk's office as aforesaid.

By an Act of the Kentucky Legislature approved March 27, 1888, entitled "An Act to Create a Lien on Canals, Railroads, and Other Public Improvements in Favor of Persons Furnishing Labor or Materials for the Construction or Improvement thereof," called the "Contractors' Act," it is provided (section 1) "that all persons who perform labor, or who furnish labor, materials, or teams for the construction or improvement of any canal, railroad, turnpike, or other public improvement in this commonwealth by contract, express or implied, with the owner or owners thereof, shall have a lien thereon and upon the property and franchises of the owner or owners thereof for the full contract price of such labor, material, and teams so furnished or performed, which said lien shall be prior and superior to all other liens theretofore or thereafter created thereon." The third section declares that no lien provided for by the Act shall attach unless the person who performs the labor or furnishes the material or teams shall, within sixty days after the last day of the last month in which the labor was performed or materials or teams were furnished, file in the county clerk's office a statement in writing, verified by affidavit, of his account or claim, substantially as required under the Act of 1858;

This case criticised the decisions in *Caraker v. Mathews*, *Butler v. Clark*, and *Claghorn v. Saussy*, *infra*, as extremely literal if not loose constructions of the statute.

In *Caraker v. Mathews*, 26 Ga. 571, a statute of this sort was extended to overseers of plantations; in *Butler v. Clark*, 46 Ga. 468, to a shipping clerk; in *Claghorn v. Saussy*, 51 Ga. 576, to the forwarding clerk of a railway company; in *Hightower v. Slaton*, 54 Ga. 108, 21 Am. Rep. 273, to a teacher in a public school.

Lamar v. Chisholm, 77 Ga. 306, held a clerk or bookkeeper to be a day laborer within the statute.

Wages of a clerk for a railway company also come within the statute. *Smith v. Johnston*, 71 Ga. 748.

The wages of a private secretary to the president of a company are exempt from garnishment under the statute. *Abrahams v. Anderson*, 80 Ga. 670.

A railroad conductor is not one whose wages are exempt from garnishment under Ga. Code, § 3554, as "the daily, weekly, or monthly wages of a journeyman, mechanic, or day laborer." *Miller v. Dugas*, 77 Ga. 886.

In *Epps v. Epps*, 17 Ill. App. 196, it was held that the words "laborer or servant," in the statute did not include a traveling salesman. "A laborer" said the court, "is popularly understood to be a person who performs manual labor not requiring special knowledge or skill, and a 'servant' is understood to be one who is employed to perform an inferior and mental service."

In *Brierre v. Their Creditors*, 48 La. Ann. 423, it was held that a traveling salesman who received for his pay a share of the profits of the firm was not a clerk within La. Rev. Civ. Code, art. 3191, granting a privilege in favor of "the salaries of 18 L. R. A.

the clerks, secretaries, and other persons of that kind."

One who sells goods by sample, as an agent, is not a "laboring man" whose wages are exempt from garnishment, under Minn. Gen. Stat. 1878, chap. 68, § 310, subd. 11. *Wildner v. Ferguson*, 42 Minn. 112.

But the wages of a telegraph operator are within the statute. *Boyle v. Vanderhoof*, 45 Minn. 31.

a. Seamen.

In *Eddy v. O'Hara*, 182 Mass. 56, Gray, Ch. J., citing *Wentworth v. Whittemore*, 1 Mass. 471, and *Taber v. Nye*, 12 Pick. 105, said: "Although the question has not been directly adjudged, seamen's wages have never been considered exempt from attachment by trustee process in the commonwealth." And in this case no definitive opinion was expressed.

Very shortly after, however, in *White v. Dunn*, 134 Mass. 271, it was held that the wages of seamen engaged in the coastwise trade of the Atlantic coast were subject to attachment by the trustee process.

And this is the rule in Maine, and it makes no difference that the wages have been collected and placed in the hands of an attorney as trustee. *Ayer v. Brown*, 77 Me. 195.

A federal court, however, has held that the wages of seamen are exempt from attachment for their debts basing the exemption on the peculiar need of protection to the seamen and not on statutory provisions. *McCarty v. New Bedford*, 4 Fed. Rep. 618.

As to right of architect to a mechanic's lien, see *Hughes v. Forgeron* (Ala.) 16 L. R. A. 600, and note.

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and by section 4 it is provided that proceedings for the enforcement of such liens "must be begun within one year from the filing of the claims in the county clerk's office, as required by the third section of this Act." These three Acts comprise the legislation of the state upon the subject of statutory liens in favor of persons performing labor or furnishing material and supplies, and, under well-settled rules, should be construed together in their proper interpretation and application. When thus considered it seems clear that they were intended to provide for three distinct classes; the Act of 1858 covering the ordinary case of labor performed or material furnished in the erection, alteration, or repair of houses or buildings, or other improvement of real estate; the Act of 1876 applying to the case of services rendered or supplies furnished in or for the carrying on of certain designated business occupations, when they suspend, or their property or effects pass by assignment, by operation of law, or by order of court into the hands of some trustee, commissioners, or receiver for administration and distribution among the creditors of the owner or owners thereof; and the Act of 1888 embracing the case of labor performed, or materials or teams furnished, in the construction or improvement of certain works of a public or quasi public character. This latter Act may properly be regarded as a legislative declaration that the prior statutes did not cover the case of labor performed or materials furnished in the construction or improvement of railroads. It was indeed decided by the Supreme Court of Kentucky, after the passage of the Act of 1876, that neither under that statute, nor the General Mechanics' Lien Law of 1858, was there any lien against or upon a railroad for work performed thereon or materials furnished. *Graham v. Mt. Sterling Coal Road Co.* 14 Bush, 425. This denial of a lien upon railroads under the then existing statutes created the necessity for and led to the passage of said Act of 1888.

It admits of little or no doubt that appellants' petition presents a case within the purview of this latter Act; their labor or that of the hands in their employ having been performed, and their teams having been furnished, in the construction and improvement of certain sections of the defendants' railroad, which would have entitled them to a lien if they had complied with the requirements of said Act in filing a statement of their claim in the proper clerk's office for record, and bringing suit for the enforcement of the same within the time provided. They failed to allege any such compliance, and are clearly not entitled to any lien under either said Act or that of 1858. Having lost their lien under said Act of 1888, they now claim that they should be regarded as employés and laborers of the railway company, within the provision of section 1 of the Act of 1876, and as such be given a priority of lien for the amount of their debts. This position cannot be sustained. If the Act of 1876 has any application to labor performed in the construction or improvement of a railway, such as that set forth in the appellants' pe-

tition, the lien would exist, not in their favor, but in favor of the laborers in their employ, who actually performed the service. But we think it very manifest that said Act of 1876 has no reference to construction work such as appellants performed with their hands and teams. It has relation alone to certain specified industries or enterprises as existing and established concerns engaged in carrying on business, and the lien therein provided for is given, not to the contractor who constructs the road or erects the plant, but to those persons, other than president, chief officer, director, or stockholder, who furnish materials or supplies, or render service in "the carrying on of such business." The lien given such employés or furnishers of materials and supplies, in the contingency designated, is to be "on the property and effects embarked in the business." The persons in whose favor it is created are not required to file any notice or claim of lien, or take any preliminary steps as a prerequisite to the enforcement of such lien, which is more extensive in its operation than that conferred by either the Act of 1858 or 1888. As well stated by the learned judge who decided the case in the lower court, "it is clear that no lien is created at the time the labor is performed or the material furnished, but it only arises upon the stoppage or suspension of the business, either by the act of the party [owner] or by operation of law, and is given as a statutory preference in the distribution of the effects and assets of the business." In other words, the Act in its legal effect and operation provides that those who furnish material or render service as employés in carrying on the business of certain designated industries and enterprises shall, upon the stoppage or suspension of such concerns by operation of law, or act of the owner, have a prior lien upon all the owner's property and effects embarked in such business for the amounts due them. The lien thus created by the Act of 1876 is essentially different from that provided for by the General Mechanics' Lien Law of 1858, or by the Contractors' Act of 1888. It arises or comes into existence upon the contingency of the insolvency, embarrassment, or discontinuance of the business which the employé or furnisher of supplies has assisted in carrying on, and attaches upon all the property and effects of the owner embarked therein, and applicable for distribution among creditors. Under the other Acts the lien arises upon the commencement of the work, or relates back to that time, if the requirement as to filing notices or statement thereof is complied with by the claimant. The Acts of 1858 and 1888 apply respectively to cases of labor performed and material furnished in the erection or repair of houses, buildings, and other improvements on real estate, and in the construction or improvement of public or quasi public work, such as railroads, turnpikes, canals, etc.; while the Act of 1876 applies to labor performed and material furnished in the operation of companies or concerns already built or constructed. The Act of 1888 gives a lien for labor performed or material furnished in the construction of certain works of

a public or quasi public character,—that is, in the establishment of such concern. The Act of 1876 confers a lien for labor performed and supplies furnished in keeping such designated establishment a going concern. The manifest purpose of this Act of 1876 was to provide such security to laborers and supply men as would induce them to continue established and going concerns in operation as long as possible. This construction harmonizes said Act and presents a consistent system of legislation on the subject of statutory liens. It would be most anomalous to provide a double lien. It cannot be assumed that the Legislature intended that a contractor, who had failed or neglected to comply with the requirements of the Act of 1888 in perfecting his lien, should nevertheless still have and be allowed to assert a more extended lien, under the Act of 1876, upon all the property and effects of the owner embarked in the business. We think it clear that the appellants Rosser & Coleman should be regarded as "contractors" under the Act of 1888, and not as "employees," under and entitled to the benefit of the Act of 1876. Neither the fact that their employment was a daily one, nor that their compensation was to be ascertained and settled by the method agreed upon, in any way affected or changed the character of their services, which were rendered as contractors. They cannot properly be regarded as "employees" and "laborers," within the purview of the Act of 1876.

In *Vane v. Newcombe*, 182 U. S. 220, 38 L. ed. 810, the plaintiff having contracted with the company to erect certain telegraph wires on the company's poles, and furnished the labor of himself and others in doing the work, claimed a priority lien, under a statute of Indiana which gave a lien to employees of corporations. The Supreme Court said: "It seems clear to us that Vane was a contractor with the company, and not an employee, within the meaning of the statute. We think the distinction pointed out by the circuit court is a sound one, namely, that to be an employee, within the meaning of the statute, Vane must have been a servant, bound in some degree, at least, to the duties of a servant, and not, as he was, a mere contractor, bound only to produce or cause to be produced a certain result,—a result of labor, to be sure,—but free to dispose of his own time and personal efforts according to his pleasure, without responsibility to the other party." The lien was accordingly denied; and in *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 34 L. ed. 1023, it was said that an employee implies continuity of service, and excludes those employed for a special or single transaction. In construing the New Jersey statute, which gave laborers of corporations in case of an insolvency a lien upon corporate assets for the amount of wages due them, the supreme court of that state held that the right conferred was strictly personal, inhering alone in the person who actually performs the labor or service, and that he who furnishes the labor or services of others under a contract to do the whole business of a corporation, or a particular branch of it, was neither within the letter nor spirit of 18 L. R. A.

the Act. It was further held by said court that the wages, to be within the protection of the statute, must be due to a person in the employ of the corporation at the time when it became insolvent; that only those in the employ of the corporation at the time of its insolvency were within either the words or policy of the statute. *Delaware, L. & W. R. Co. v. Oxford Iron Co.* 88 N. J. Eq. 196. We think the first of said propositions is the proper view to be taken of the Act of 1876. Whether the last proposition of the New Jersey decision is correct, it is not necessary in this case to decide, as said appellants do not bring themselves within the provisions of said Act. Our conclusion, therefore, is that the petition of Rosser & Coleman was properly dismissed.

The appeals of the supply claimants, W. & A. C. Semple, Fairbank, Morse & Co., and Andrew Cowan & Co., involved in record No. 29, heard with the case No. 22, depend upon the construction of the Acts of 1876 and 1888 already considered. Said claimants severally furnished supplies and material to the railway company, suitable for either the construction of its unfinished line, or for carrying on the operations of its finished portion. There was no contract, agreement, or understanding, express or implied, between the parties as to how the supplies furnished should be applied. A portion of them were used and employed in the construction of the unfinished parts of the company's road, and a portion were used in carrying on the company's business, or in operating the finished part of its line. For such portion of the supplies so furnished as were used and applied in and towards the construction of the road, the claimants would undoubtedly have had a lien under the Act of 1888 if they had filed the proper notice of their claim. They did not, however, comply with the requirements of said Act, and now insist that they have a lien, under the provisions of the Act of 1876, for the whole amount of their claims, without regard to how the supplies were apportioned as between construction and the carrying on of the business of the company. So far as anything appears from the testimony, there was no breach of duty or bad faith on the part of the company or its officers in applying portions of the supplies and materials furnished to the construction of unfinished portions of the road. It was in fact left to the discretion of the company and its officers what disposition should be made of the supplies and materials furnished by the claimants, who made no inquiry and gave no directions as to how they were or should be used or applied. It was affirmatively shown by complainants that certain portions of the said supplies and material had actually been used in construction. The court below allowed a lien for such portion of the claims as were for supplies furnished and used for the operation of the railway or in carrying on its business upon and over its completed line, and denied the lien for such portion of the supplies or material as were used and applied in its construction, and for which a lien could have been maintained under the Act of 1888. This action of the

court is claimed to have been erroneous. No question is raised as to the correctness of the supply claimants' debts as against the railway company. The controversy presented is between such supply men and the mortgagees, whose contract lien antedates the creation of the former's claims. In this contest for priority we consider it well settled that the burden of proof is upon the claimants to establish whatever is necessary to confer a preference on their part.

In *Davis v. Alford*, 94 U. S. 545, 24 L. ed. 283, it is said that those who assert a statutory lien upon real property, and claim priority over mortgagees and others who have acquired rights and interests in the property, must furnish strict proof of all that is essential to the creation of the lien. It is further said in that case that the court cannot presume, in the absence of proof, that the requirements of the statute have been complied with. Under no fair construction of the Act of 1876 can it be asserted that the mere fact of furnishing articles or supplies, suitable or capable of being used in carrying on a designated business, without any understanding or agreement that they should be so applied, will of itself give the furnisher a lien upon all the property and effects embarked in such business, without reference to their actual application. The object and purpose of the Act, as already explained, as well as the language employed in conferring the lien, require that the supplies should be furnished,—at any rate, be used,—“for the carrying on of such business.

If the complainants had not shown affirmatively that the rejected portions of the several claims were used and applied in and towards the construction of unfinished parts of the road, the burden would have still rested upon the claimants of establishing the fact, as against prior mortgages, that the supplies furnished were either purchased for or were actually used in carrying on the business of the railway company, so far as it was an established and going concern. We are not called upon in this case to determine the question whether, if supplies should be furnished for the express and understood purpose of carrying on the business of any of the designated companies, and should thereafter be

diverted to other use by the purchasers, the furnishers would have a lien under the statute, for there was no agreement or understanding, express or implied, as to the specific purpose for which these supplies were furnished, or as to where they were to be used. Under such circumstances the furnisher claiming priority of lien has devolved upon him, at least, the duty of showing that the supplies were actually used for carrying on the business, in order to bring himself within the meaning and intent of the Act. The several claimants have failed to do this, so far as the rejected portions of their respective claims are concerned. The rejected items were used in construction. They were covered by the Act of 1888, especially in the absence of any agreement or understanding that they should be applied in carrying on the business of the company. The furnishers could have asserted a lien for the same if they had complied with the provisions of that Act. This they failed to do. The Act of 1876 was not designed to give the same party a double lien, or an election as to which statute he would claim under. We think there was no error in the special master's apportionment of the several claims, as between construction and operation. Nor was there any error in the lower court's failure to give the claimants judgment for their respective debts against the railway company. No such personal judgment was sought, nor properly involved in the proceeding. On the question of interest on such portion of these claims as were allowed, there has been no action on the part of the lower court in either allowing or disallowing such interest; hence there is nothing in this question for review in this court. Our conclusion on the appeals presented by record No. 29 is that there were no errors in the action of the lower court upon the claims of the several appellants, and the judgments of the lower court thereon are affirmed. Said cause No. 29 will be remanded to the circuit court for the district of Kentucky for further proceedings in the administration and distribution of the property, franchises, and effects of said railway company in conformity with the opinion of this court in respect to the aforesaid claims.

NEVADA SUPREME COURT.

STATE of Nevada, *ex rel.* S. SUMMERFIELD, District Attorney of Ormsby County, *Resp't.*,

v.

Willis G. CLARKE, *App't.*

(.....Nev.....)

*1. The office of notary public is a civil office of profit, under this state, within the

* Headnotes by BIGLOW, J.

NOTE.—On the question who are public officers, see *note* to *McCormick v. Pratt* (Utah) 17 L. R. A. 22.

18 L. R. A.

meaning of section 9 of article 4 of the Constitution of Nevada.

2. Under that section the receiver of public money in a United States land office is ineligible to the office of notary.

3. That section applies to appointive as well as to elective officers.

4. Section 32 of article 4 of the Constitution, as it formerly stood, requiring the Legislature to provide for the election of certain state and county officers, “and other necessary officers,” refers, by the words quoted, to officers *quoadem generis*, with those enumerated, and not to other classes of officers.

(December 10, 1892.)

A PPEAL by respondent from a judgment of the District Court for Ormsby County in favor of relator in a proceeding instituted to oust respondent from the office of notary public on the ground that he was possessed of an incompatible office as receiver of public moneys in the United States Land Office. *Affirmed.*

The facts are stated in the opinion.

Mr. Robert M. Clarke, for appellant:

It is denied that a notary public is a "civil officer under the state of Nevada."

It is not a civil office within the definition of that term according to the courts or law dictionaries.

Anderson, Law Dict. p. 728; *Hussey v. Smith*, 99 U. S. 24, 25 L. ed. 815; *United States v. Monat*, 124 U. S. 807, 31 L. ed. 464.

The word "civil" when used in connection with "office" means pertaining to administration of government.

Anderson, Law Dict. p. 185.

A civil office is one that involves the exercise of some public function or power of government. One who is not charged with the performance of a public duty involving the exercise of a power of government is not a "civil officer under this state."

Anderson, Law Dict. p. 185; *Hussey v. Smith*, *supra*.

The Constitution includes only elective offices, and has no application to an appointive office, such as "notary public."

Nev. Const. art. 4, § 8, 32.

This view is strengthened by the etymology of the word "eligible" which, strictly defined, means "fit to be chosen," "capable of being chosen."

Webster, Dict. p. 385; 6 Am. & Eng. Encyclop. Law, 447.

If the position of notary public is a "civil office under the government of this state" within the meaning of art. 4, § 9, of the Constitution, it must be filled by election, and cannot be filled by appointment.

Nev. Const. art. 4, § 82; *State v. Arrington*, 18 Nev. 412.

In many of the states of the Union, the Constitutions of which limit the right to hold office to men, excluding women, the Legislature provides that women may hold the position of notary public, and in such states it has been decided that the law is valid.

A woman may be a member of a school board (*Opinion of Judges*, 115 Mass. 602), postmistress, or pension agent (*Re Hall*, 50 Conn. 131, 47 Am. Rep. 625), overseer of the poor.

Re v. Stubbs, 2 T. R. 395; Mechem, Pub. Off. § 73.

Mr. S. Summerfield, for respondent:

Notaries public are amongst the most ancient of civil officers, and have always been recognized and regarded as such by the "law merchant," a branch of the common law.

Notaries public are civil officers by appointment in the same sense that elective officers are civil officers.

Nev. Gen. Stat. par. 1636.

The words "civil officers" as used in constitutions are meant to contradict distinguish from the words "military officers."

Anderson, Law Dict. p. 185, § 8.

The argument that "the Constitution includes only elective offices and has no applica-

tion to appointive office" because a strict definition of the word "eligible" means "capable of being chosen" is in direct contravention to the definition of this court which has extended the meaning of the word "eligible" to "capable of legally holding."

State v. Clarke, 3 Nev. 570; *People v. Leonard*, 73 Cal. 230.

As to who are "officers," see —

2 Bl. Com. 36; 7 Bacon, Abr. 220; *United States v. Maurice*, 2 Brock. 102; *Shelby v. Alcorn*, 36 Miss. 273, 72 Am. Dec. 169.

As to the official character of notaries public, see —

Governor v. Gordon, 15 Ala. 72; *Kirksey v. Bates*, 7 Port. (Ala.) 529, 31 Am. Dec. 722.

Bigelow, J., delivered the opinion of the court:

While the appellant was legally exercising the office of notary public in this state, he was appointed receiver of public money in the United States land office at Carson City. The court below held that those two offices were incompatible, under the provisions of section 9 of article 4 of the Constitution of Nevada, which reads as follows: "No person holding any lucrative office under the government of the United States, or any other power, shall be eligible to any civil office of profit under this state: provided, that postmasters whose compensation does not exceed five hundred dollars per annum, or commissioners of deeds, shall not be deemed as holding a lucrative office."

The appellant, however, contends that the office of notary is not a "civil office of profit, under this state," within the meaning of this section, and this is the only question presented in the case. The words "office" and "civil office" have several meanings. The sense in which they are used in any particular place can usually be determined by a reference to the context and the subject-matter of the instrument. Sometimes they would include the president and trustees of a corporation, executors, deputies, etc., but no such meaning can be attached to them here. They only refer to such officers as are connected with the civil administration of the government, and were doubtless intended to include all such, to the exclusion of military officers. In construing the words "civil officers," as used in the Constitution of the United States, *Judge Story* says: "The sense in which the term is used in the Constitution seems to be in contradistinction to 'military.'" 1 Story, Const. § 791. Again, in the next section, he says: "All officers of the United States, therefore, who hold their appointments under the national government, whether their duties are executive or judicial, in the highest or in the lowest departments of the government, with the exception of officers in the army or navy, are properly 'civil officers,' within the meaning of the Constitution." It has been frequently held that a notary is a public officer. *Kirksey v. Bates*, 7 Port. (Ala.) 529, 31 Am. Dec. 722; *Governor v. Gordon*, 15 Ala. 72; *Smith v. Meador*, 74 Ga. 416; *Keeney v. Leas*, 14 Iowa, 464. He is also recognized and called an "officer" in our statutes, is to be appointed for a definite term, is required to take the official oath, to give a bond the same as other officers, to keep

a record of his official acts, and for his services may charge certain fees, which are regulated by law. Clearly, he is an officer.

Then, is he a civil officer? As there are but two principal divisions of officers—civil and military—known to our system of state government, it must be that all that do not come within one class are included in the other. As a notary is not a military officer, he must be a civil one. By statute, he occupies a position in the civil administration of the government, and one that is quite important. He is charged with duties to the public at large that constitute him a public or state officer. *State v. Kirk*, 44 Ind. 401, 15 Am. Dec. 239; *Howard v. Shoemaker*, 85 Ind. 111. The opinion of the judges in *Re House Bill No. 166*, 9 Colo. 623, is, upon this point, on all fours with the case in hand. It was there held that the office of notary was a "civil office," within the meaning of that term as used in the Constitution, and that consequently a bill authorizing the appointment of one to that position who was not a qualified elector was unconstitutional. See also *Mechem*, Pub. Off. § 1 *et seq.*; Id. § 24; *Shelby v. Alcorn*, 86 Miss. 273, 72 Am. Dec. 169. In fact, we do not understand it to be particularly contended that a notary is not a public officer, nor even that he is not a civil officer, but rather, notwithstanding he may be such, that it was not the intention of the makers of the Constitution to include that office in the prohibition contained in this section. This position is based, first, upon the proposition that the office of notary does not come within the mischief intended to be guarded against, and consequently should not be held within its terms. In construing a constitution, the same as any other instrument, we are not always to be guided by the letter of the Act. We are to seek for the meaning that the words were intended to convey, and endeavor to carry out the intention of those adopting it. But a fundamental principle in all construction is that, where the language used is plain and free from ambiguity, that must be our guide. We are not permitted to construe that which requires no construction. It is possible that, when the convention adopted this section, they did not have the office of notary in mind, and that, if they had, it would have been excluded; but, on the other hand, it is also possible that it would not have been excluded, for there is really as much reason for including this office as that of many other minor positions which are admittedly covered by this section. At any rate, it was within the power of the Constitution makers, whether sufficient reason did or did not exist

for their doing so, to include this office. The language they have used clearly does include it, and, under the circumstances, that is the end of the controversy. We are not permitted to speculate further as to what their real intentions were. *Cooley*, Const. Lim. 69; *Ludlich*, Interpretation of Statutes, § 6; *Sturges v. Crowninshield*, 17 U. S. 4 Wheat. 204, 4 L. ed. 520; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 217, 6 L. ed. 75.

It is also contended that the word "eligible" only refers to elective officers, and consequently does not include those who held by appointment; but we are of the opinion that it was intended, as used here, to include both. It has been several times decided that the word includes capacity to hold, as well as to be elected to, an office, and, if such is the case, no distinction can be drawn between elective and appointive officers. If the incumbent is ineligible to hold an office, it can make no difference whether he obtained it in the first instance by election or appointment. If the Constitution read that certain persons shall not hold any civil office of profit, instead of shall not be eligible to such office, it would be clear that this point was untenable, and, as it appears that that is what it really means, the same result follows. *State v. Clarke*, 3 Nev. 566, 570; *State v. Murray*, 28 Wis. 96, 99, 9 Am. Rep. 459; *Carson v. McPhetridge*, 15 Ind. 327, 831; *People v. Leonard*, 73 Cal. 230, 233.

As a further reason for the belief that notaries public were not intended to be included in this section of the Constitution, it is urged that, if so, they must, under section 82 of article 4 of the Constitution, which requires the Legislature to provide for the election of certain state and county officers "and other necessary officers," be elected, instead of being appointed; and the case of *State v. Arrington*, 18 Nev. 412, is referred to as sustaining this position. This result might be conceded without militating particularly against the view we have taken, but we do not think it follows that such must be the case. By the Amendment of 1889, section 82 was changed so that the words "other necessary officers" no longer appear; but, even as it originally stood, they apply only to officers similar to those previously enumerated in the section, and not to legislative officers, officers of the militia, and other officers belonging to different classes from those mentioned. *Endlich*, Interpretation of Statutes, §§ 405-409; *Edgecomb v. His Creditors*, 19 Nev. 149, 152.

No error appearing in the judgment, it must be affirmed, and is so ordered.

Murphy, J., concurs.

OREGON SUPREME COURT.

N. J. BLAGEN, *Resp't.*,

v.

D. P. THOMPSON *et al.*, *Appts.*

(.....Or.....)

1. An executory contract by a corpora-

NOTE.—For note on the subject of damages for breach of contract including loss of profits, see *Taylor Mfg. Co. v. Hatcher* (Ga.) 8 L. R. A. 587. 18 L. R. A.

tion to sell franchises with a stipulation to secure and transfer additional rights of way cannot be construed as part of the same contract with an executed sale of stock of the corporation made by persons in their individual capacity.

2. The loss of the profits or gains of a contract for land which the purchaser is obliged to surrender because of the failure to

construct a motor railway in accordance with a contract made with him by a third person who knows that his object in the latter contract is to enhance the value of the land may be included in the damages for breach of the contract to build the road.

3. **The surrender and cancellation of a contract for the purchase of land** will not prevent the purchaser from recovering the damages sustained by the breach of a contract with him for the construction of a motor railway, the purpose of which is to enhance the value of such land.
4. **The measure of damage for breach of contract to build a motor railway** to connect with the business portion of a city a tract of land which one of the parties has just purchased with the view of fitting and selling it for residences is the difference between the value of the land on the day the road should have been completed, not less than the agreed purchase price, and what its value would have been on that day with the road completed and in operation.
5. **The rule that damages which are uncertain or contingent cannot be recovered** does not apply to an uncertainty as to the value of the benefit or gain to be derived from performance but to an uncertainty or contingency as to whether any such gain or benefit would be derived at all.
6. **Opinion evidence as to what the value of land would have been** if a railway had been constructed in accordance with a contract is admissible on the question of damages for breach of the contract.

(December 12, 1892.)

A PPEAL by defendants from a judgment of the Circuit Court for Multnomah County in favor of plaintiff in an action brought to recover damages for the alleged breach by defendant of a contract to build a motor railway. *Reversed.*

Statement by **Bean, J.:**

This is an action to recover damages for breach of contract. The facts are that on March 26, 1890, a written contract was entered into between plaintiff and J. H. Lambert and wife, by the terms of which he purchased of them about 255 acres of land near the town of Milwaukee, and some three or four miles south of Portland, for the sum of \$150,000; he paying to them the sum of \$10,000 in cash, and agreeing to pay the further sum of \$15,000 on or before October 7, 1890, and the remainder of the purchase price on or before five years from the date last named. This property was purchased by plaintiff for the purpose and with the design of subdividing it into lots and blocks, and selling it for suburban residences. About the same time plaintiff, desiring to build a motor line from East Portland to the property, for the purpose of making it accessible and otherwise developing the same, purchased, for \$5,000, all the subscribed stock of the Portland, Sellwood & Milwaukee Railway Company, a corporation organized to build such road, and the owner of certain franchises and rights of way on certain streets in East Portland and Sellwood, and along the county road between said towns, and commenced to

have the route of such road surveyed and located for the purpose of constructing a motor railway to and across the land so purchased by him of Lambert. On the same day this survey was commenced, certain other surveyors, acting for defendants, who claimed a right to build a road along the same route, appeared upon the ground, and commenced to survey another line along the county road, covering the line staked out by the Portland, Sellwood & Milwaukee Railway Company. Plaintiff then sought an interview with defendants, and negotiations were begun between them which finally resulted in a written proposition, of date April 4, 1890, from defendants to the Portland, Sellwood & Milwaukee Railway Company, that if it would transfer to them its rights and franchises to construct and operate a motor line on certain streets in East Portland, and the right of way as surveyed by it from East Portland to the Lambert farm, except over two or three pieces of land, without any restrictions as to charges over said motor line, (except as to residents and property owners on lands of Lambert near Milwaukee which is limited to twenty tickets for \$1, and to be completed by October 31, 1890,) they would pay to it, when the franchises and rights of way should be transferred free from all incumbrances, the sum of \$6,000, (that being the amount plaintiff had paid for the stock and the company had expended for work on the proposed road,) and the costs of all labor in grading and clearing the right of way since April 1, 1890. This proposition was accepted by the company, and on April 5, 1890, a written contract was entered into between it and the defendants, by which the company was to sell and the defendants to purchase, on or before May 19, 1890, all its franchises and rights of way for said motor line, for the sum of \$6,000 and the cost of all labor performed by it upon the road, in grading and clearing the right of way, until the defendants should take charge of the construction of the road. The defendants also agreed in said contract to complete and have in operation the said railway, along the line of survey as made by the said company, from its terminus in East Portland to the south line of the Lambert place, by October 31, 1890, and to furnish transportation to residents and property holders on said place, to and from Portland, to the south line of the Lambert place, at the rate of twenty tickets for \$1, and to stop at three places on said land, to be designated by Lambert or his assigns; and the corporation agreed, on its part, to secure and convey to defendants, on or before the time fixed in the contract, said rights of way and franchises, without restriction, except as aforesaid, from the south boundary line of East Portland to the south line of the Lambert place, excepting the rights of way through two or three pieces of land, which the defendants were to secure for themselves. This executory contract between defendants and the corporation seems never to have been carried out, but for some reason it was thought best, in place of transferring to defendants the franchises of the company, as agreed upon, to sell and transfer to them all the stock in the company; and consequently,

on May 12, 1890, the contract, for the breach of which this action was brought, was entered into between defendants and plaintiff, Lambert, Brown, and Cake, who held certain stock in the corporation in trust for plaintiff, by which the latter sold to the former all the stock of the company, and agreed upon demand to transfer the same on the books, which contract, omitting the signatures of the parties, is as follows:

"Memorandum of agreement made between D. P. Thompson, J. H. Smith, and W. E. Post, the parties of the first part, and N. J. Blagen, J. H. Lambert, C. W. Brown, H. M. Cake, and B. F. Smith, the parties of the second part, witnesseth, that in consideration of \$6,589.30, to them in hand paid, the receipt whereof is hereby acknowledged, and in consideration of the covenants of the said D. P. Thompson, J. H. Smith, and W. E. Post, herein contained, the parties of the second part hereby sell, assign, and transfer their stock in the Portland, Sellwood & Milwaukee Railway Company, and agree to, upon demand, assign their stock upon the books of said company, to the said D. P. Thompson, J. H. Smith, and W. E. Post, hereby declaring that they own the number of shares as follows: N. J. Blagen, 1,403 shares; J. H. Lambert, 200 shares; C. W. Brown, one share; H. M. Cake, one share; B. F. Smith, — shares. And the said D. P. Thompson, J. H. Smith, and W. E. Post hereby agree, in consideration of the above, that they will construct, in a first-class manner, complete, and have in operation, a steam railway motor line along the route surveyed by the said railway company, from its terminus in the city of East Portland to the south line of J. H. Lambert's place, by the 31st day of October, 1890, (delays caused by unavoidable injunction proceedings excepted.) *Second.* That they will furnish transportation to residents and property holders in the said tract of land known as the 'Lambert Place,' by a railway motor line along the route surveyed by the said railway company to the city of Portland, from any stopping places or stations established on the said Lambert place on the line of the said motor road, and from the city of Portland to any of the stopping places or stations on the said Lambert place, at the rate of twenty tickets for one dollar, and that all trains shall stop at three places or stations on the said Lambert place, to be designated by the said J. H. Lambert or his assigns. *Third.* That they will carry out and fulfill all the obligations imposed upon the said Portland, Sellwood & Milwaukee Railway Company by the written and express terms of franchises granted to said company. In witness whereof, the parties to these presents have hereunto set their hands and seals this 12th day of May, 1890."

The plaintiff and his associates fully complied with the terms of this agreement on their part to be performed, and did on July 7, 1890, duly transfer on the books of the corporation all their stock to defendants, and the same has been ever since retained by them. The defendants wholly failed and neglected to build said motor line, or any part thereof,

and on September 1, 1890, the city of East Portland, by ordinance, revoked the franchises theretofore granted by it to the Portland, Sellwood & Milwaukee Railway Company to construct its road upon the streets of the city. Meanwhile, however, plaintiff, relying upon the contract of defendants to build the road, had caused a large portion of the Lambert place to be cleared off and surveyed into lots and blocks, and had sold about 100 lots for the aggregate sum of \$18,693.35; the purchasers paying therefor in cash a small part of the purchase price, and agreeing to pay the remainder thereof, to wit, \$14,797.25, in deferred installments. Under these circumstances, the second payment from plaintiff to Lambert was about to fall due, and perceiving that defendants did not intend to build the road within the time agreed upon, and could not do so, because the franchises granted by the city of East Portland had been revoked, and that consequently he could sell no more lots, and would probably be bankrupt, unless he could induce Lambert to release him from his contract of purchase, he applied to Lambert for a release and cancellation of his contract, and did on September 30, 1890, obtain such release, upon the best terms possible, which was the forfeiture of the cash payment of \$10,000 and the surrender to Lambert of all notes received by him for deferred payments on lots sold. After the time in which defendants agreed to construct and have in operation the motor line had expired, plaintiff procured from Lambert, Brown, and Cake an assignment to him of all their rights under the contract of May 12, 1890, and of their right of action against defendants for the breach of said contract, and thereafter commenced this action to recover \$146,001.96 damages. In his complaint he avers that at the time of entering into the contract of May 12, and as a consideration and inducement for the execution thereof, the defendants were informed and well knew that he had purchased the Lambert land with the intention of subdividing the same into lots and blocks, and of causing said railway motor line to be constructed from Portland to and across the land, in order to enhance the value thereof, and to enable him to sell the same for a profit which would thereby accrue to him, and that relying upon the promise and agreement of defendants, as contained in said writing, he cleared, surveyed, and platted a portion of the land, and disposed of the lots mentioned; that, if the road had been built as agreed upon, the land would have been worth on October 31, 1890, the sum of \$323,657.15, but, by reason of the failure of defendants to keep and perform their contract and construct said road, he was disabled from completing his contract with Lambert for the purchase of the land, and was forced to and did lose the sum of \$17,189.66 paid on the purchase price, and was unable to sell any more of the property, by which he was further damaged in the sum of \$128,862.30, which would have been the net profits on the remainder of said lots and land on 31st day of October, 1890, if defendants had built the motor line as they agreed to do. The defendants allege

in their answer, as an excuse for not building this road as they agreed to do, that the contracts of April 5th and May 12th were executed for the same consideration and to accomplish the same purpose and impose the same obligations and liabilities upon the defendants, and that neither the plaintiff nor the corporation has received or transferred to them the rights of way mentioned in the contract of April 5th, and therefore, without any fault or neglect on their part, they were and are wholly unable to build the road as provided in said agreements. The trial in the court below resulted in a verdict and judgment in favor of the plaintiff for the sum of \$25,000, from which defendants appeal, and assign error in the admission of testimony and the giving and refusal of certain instructions by the trial court.

Messrs. J. F. & E. B. Watson for appellants.

Messrs. E. C. Bronaugh, W. D. Fenton and Cake & Cake for respondent.

Bean, J., delivered the opinion of the court:

1. It is contended by counsel for defendants that the contract of April 5, 1890, between the Portland, Sellwood & Milwaukee Railway Company in its corporate capacity and defendants, in which the corporation agreed to procure the rights of way therein mentioned, should be construed and treated as part of the contract of May 12, 1890, entered into between defendants and plaintiff and his associates in their individual capacity, so as to hold them responsible for the failure, if any occurred, on the part of the corporation, to fulfill its agreement as to procuring such rights of way. When two written contracts are entered into between the same parties concerning the same subject-matter, whether made simultaneously or on different days, they may, under some circumstances, be regarded as one contract, and interpreted together. *Dean v. Lawham*, 7 Or. 422; *Kruse v. Prindle*, 8 Or. 158; *Bishop*, Cont. § 165.

But the two contracts in question here are not between the same parties, nor concerning the same subject-matter. The one is an executory contract, made by a corporation in its corporate capacity, for the sale to defendants of certain franchises then held and owned by it, and containing a stipulation on its part to secure and transfer to them additional rights of way over certain other designated portions of the route of the proposed motor line; and the other is an executed contract of sale of the stock of the corporation, made by plaintiff and associates as natural persons, and acting in their individual capacity. The two contracts are therefore entirely separate and distinct, between different parties and concerning a different subject-matter. In one a corporation is a party, in the other, private individuals. By the one, the corporation agrees to sell and transfer to defendants certain property belonging to it, while by the other the defendants purchased of plaintiff and associates certain property belonging to them as in-

dividuals; and while it may be true that plaintiff and his associates were the stockholders, directors, and officers of the corporation at the time the contract of April 5, 1890, was entered into, yet they did not assume any personal responsibility in that contract, or become obligated as individuals to procure these rights of way. Nor does the fact that the consideration paid by defendants for the stock was the same in amount as agreed by them to be paid for the franchises of the corporation in any way change or affect the liabilities or obligations of the parties, as contained in the written contracts. Defendants in place of requiring the corporation to comply with its contract to procure and transfer to them the stipulated rights of way, saw proper, by the consent of the corporation, to purchase and become the owners of all the stock, thereby obtaining control of the corporation and its property, with all its liabilities and obligations, among which was the agreement to procure and transfer the rights of way for the motor line, which was just as binding on the corporation after as before defendants became the owners of the stock. We think, therefore, the court below was clearly right in holding that the two contracts were not to be construed as one contract, and in instructing the jury that, under the contract sued on, plaintiff was under no obligation to procure or furnish the rights of way in question, or answer for the default of the corporation, if any occurred, in so doing.

2. It is also claimed by counsel for defendants that the loss sustained by plaintiff, if any, and sought to be recovered in this action as damages, arose, not directly from the breach by defendants of their contract of May 12, 1890, but indirectly out of the failure of the plaintiff to fulfill his contract with Lambert for the purchase of the land, which he claims to be collateral to the contract sued on, and that such damages are too uncertain, remote, and speculative to be recovered in this action. This question is presented by a demurrer to the complaint, exceptions to the admission in evidence of plaintiff's contract with Lambert, and to the giving and refusal of certain instructions by the trial court, which we shall not undertake to notice in detail, but for convenience shall consider together.

The difficulty in the determination of the question thus presented, and in like cases, lies, not so much in the ascertainment of the law of the subject, as in its application to the facts of the particular case. The broad general rule in such cases, as we gather it from the authorities, is that the plaintiff may recover such damages, including gains prevented as well as losses sustained, as may reasonably be supposed to have been within the contemplation of both parties at the time of the making of the contract, as the proximate and natural consequences of a breach by defendants; and in determining what may reasonably be supposed to have been within the contemplation of the parties, as the natural consequences of a breach, all the facts surrounding the execution of the contract known to both parties may be considered,

even if these be such as would not necessarily enter into it, if unknown to the defendant. It is on this principle that an injured party is allowed to charge the other with loss on collateral contracts on proving notice, which, in the absence of such notice, would not be considered within the contemplation of the parties. 1 Suth. Damages, 79; 1 Sedgw. Damages, § 149; *Hadley v. Baxendale*, 9 Exch. 841; *Hammond v. Bussey*, 57 L. J. Q. B. 58; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Booth v. Spruyten Duyvil Roll Mill Co.* 60 N. Y. 487; *Hammer v. Schoenfelder*, 47 Wis. 455; *Messmore v. New York Shot & Lead Co.* 40 N. Y. 422.

These and other authorities on this question are carefully collated and discussed in 1 Sedgw. Damages, § 144 et seq., and in 5 Am. & Eng. Encyclop. Law, title *Damages*, and we shall therefore attempt no review of them, but shall only refer to the admirable statement of the rule by *Mr. Justice Selden* in *Griffin v. Colver*, *supra*, "that the injured party is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract,—that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed." Now, in the case at bar, the damages sustained by plaintiff, and sought to be recovered, if any, are, it seems to us, in view of the known facts surrounding the execution of the contract, such as may reasonably be supposed to have been within the contemplation of the parties at the time the contract was executed, as the proximate and natural consequences of a breach by defendants and may be recovered in this action. From the terms of the contract itself, as well as from all prior negotiations between the parties, it clearly appears that the defendants must have known at the time they purchased plaintiff's stock in the corporation, and agreed to build the road by a stipulated time, that the object to be accomplished by the building of the road, so far as plaintiff was concerned, was to enhance the value of the Lambert land so that he might derive some profit therefrom. The proposition of defendants made to the Portland, Sellwood & Milwaukee Railway Company, of which plaintiff was the president and sole stockholder, on April 4, 1890, to purchase the rights and franchises of the company, and in which they proposed to build the road by October 31, 1890, on its face, shows that the Lambert land was to be specially benefited by the proposed road; for the franchises were to be transferred without restrictions as to charges over the motor line, except as to residents and property owners on such land, which was to be limited to twenty tickets for \$1. These same special privileges as to the Lambert land were carried through all subsequent negotiations and contracts between the parties, and clearly indicate that the sole object

plaintiff had in view in making the contract was to enhance the value of such land; and defendants must have known that the natural and probable result of a failure on their part to build the road would be to prevent such enhanced value.

The complaint alleges, and the evidence tends to prove, both from the contract itself and the circumstances surrounding its execution, that defendants knew at the time they made the contract to build the road that plaintiff either owned or had some interest in the Lambert land, and that his object in securing the franchises and commencing to build the proposed road was to enhance the value of such land, and derive a profit therefrom; and under such circumstances, and with knowledge of the object and purpose of the proposed road, defendants agreed and contracted with plaintiff and his associates to purchase their stock in the company holding such franchises, and build the road, within a stipulated time, to such land, and have failed to do so, in consequence of which plaintiff was unable to complete his contract for the purchase of the land, but was compelled to cancel it, and was thereby prevented for realizing the profits or gains which would have accrued to him had the contract been performed. Under such circumstances the loss of such profits or gains may be reasonably supposed to have been within the contemplation of the parties at the time the contract was made, as the reasonable and probable consequences of the breach, because they must be taken to have known these consequences. As the gains prevented or losses sustained by plaintiff by the failure of defendants to build the proposed road are represented by the profits which he would have received if such road had been built, and he enabled to keep his contract with Lambert for the purchase of the land, defendants are responsible for such losses, if they are chargeable with notice. As *Mason, J.*, said in *Messmore v. New York Shot & Lead Co.*, *supra*, "it affirms nothing more than that, where a party sustains a loss by reason of a breach of a contract, he shall so far as money can do it, be placed in the same situation, with respect to damages, as if the contract had been performed." Nor does the fact that plaintiff surrendered and canceled his contract for the purchase of the land after the franchises under which defendants proposed to build the road had been revoked by the city of East Portland prevent him from maintaining this action.

If, after it became apparent that defendants would and could not build the road according to their contract, and on account thereof plaintiff found himself unable to comply with his contract with Lambert, and purchase the land, he had a right, in order to save himself from greater loss, to make such terms with Lambert for the cancellation of the contract as he could, and then bring this action against defendants to recover such damages as he may have sustained by reason of the failure on their part; and this brings us to the measure of damages in this case. The court below held, and so instructed the jury, that the damages claimed in this case

are damages connected with the land, and accrued to whoever may have owned the land at the time the contract of defendants should have been fulfilled, and that since Lambert, who was the owner of the land at that time, had assigned to plaintiff his right of action for a breach of defendants' contract, he could maintain the action, and recover whatever damages may have accrued to the land, and on this theory instructed the jury that the measure of damages is the difference between the value of the land on October 31, 1890, with the road built and in operation, and its value without the road. In this, we think, there was error, both in holding that plaintiff could in this action recover any damages which may have accrued to Lambert, and in giving the rule for the measure of the damages. This action is not brought to recover Lambert's damages, if any, nor does the complaint aver that he was in any way injured by defendants' breach of their contract to build the road, but it is prosecuted to recover the gains prevented or losses sustained by plaintiff; and the evidence and measure of damages would materially differ in the two cases, assuming, but without deciding, that Lambert ever had a cause of action for a breach of defendants' contract. Lambert did not in fact own the stock which he assigned to defendants, but held it in trust for plaintiff; and when he executed the contract of May 12, 1890, he was acting for and in behalf of plaintiff; and the assignment of his right of action for a breach of this contract only operated to transfer to plaintiff that which in fact already belonged to him, and enabled him to maintain this action unembarrassed by any apparently outstanding right of action in Lambert or the other parties to the assignment; and for this purpose it was competent evidence. But this action is maintained in plaintiff's own right, to recover such damages as he may have sustained; and the effect upon the value of the land, of defendants' failure to build the road, is only material as it affects the measure of damages and the amount he is entitled to recover. The rule for the measure of damages, as stated by the trial court, is erroneous, as applied to the facts of this case, because it fails to take into account the fact that plaintiff had agreed to pay for the land a stipulated sum, which, so far as he was concerned, fixed its minimum value; and his loss, if the land was not actually worth what he agreed to pay for it,—and there was evidence to that effect,—could certainly only be the difference between the price he was to pay under his contract and what its value would have been on October 31, 1890, with the road built and in operation. The prejudicial effect of the rule adopted by the trial court is apparent when it is considered that plaintiff was to pay for the land \$588.23 an acre under his contract with Lambert, and he himself testified that the land was not worth, at the time he contracted for its purchase, to exceed \$500 an acre, without a motor line or the prospect of one. So that the difference between its value, according to his testimony, without a road, and what he agreed to pay for it, was within about 18 L. R. A.

\$2,500 of the verdict in this case. The true rule for the measure of damages for a breach of the contract sued on, as applied to the facts of this case, in our opinion, is the difference in the value of the Lambert land on the 31st day of October, 1890, without the road,—not less in amount, however, than the price plaintiff agreed to pay for it,—and what its value would have been on that day, with the road completed and in operation. This appreciation in the value of the land, if any, was, it seems to us, clearly within the legal, if not the actual, contemplation of the parties, at the time the contract was made; and the loss of this increased value is the proximate and natural consequences of defendants' breach, and is the fairest and closest approximation of the actual pecuniary loss sustained by plaintiff which the law is capable of furnishing. This view as to the measure of plaintiff's damages seems to be fully supported by the adjudged cases. *Mobile & M. R. Co. v. Gilmer*, 85 Ala. 422; *Louisville, N. A. & O. R. Co. v. Sumner*, 106 Ind. 55; *Watterson v. Allegheny Valley R. Co.* 74 Pa. 208; *Wilson v. Northampton & B. J. R. Co.* L. R. 9 Ch. App. 279; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 385; *Houston & T. O. R. Co. v. Molloy*, 64 Tex. 607.

As defendants failed and neglected to build the road within the stipulated time, or at all, it may be difficult for plaintiff to prove with exactness what would have been the value of the land with the contract fulfilled, but such uncertainty does not prevent him from recovering such damages as he may be able to prove. He is only required to give such evidence as the nature of the case will permit, bearing upon the matter of his damages, and legally tending to prove such value. *O'Brien v. Home Benefit Soc.* 117 N. Y. 810; *Huse & L. Ice & Transp. Co. v. Heinze*, 103 Mo. 245.

Where one violates and entirely repudiates his contract with another, the damages sustained by the injured party are, as Earl, J., said, "nearly always involved in some uncertainty and contingency. Usually they are to be worked out in the future, and they can be determined only approximately upon reasonable conjecture and probable estimates. They may be so uncertain, contingent, and imaginary as to be incapable of adequate proof; and then they cannot be recovered, because they cannot be proved. But when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain." *Wakeman v. Wheeler & W. Mfg. Co.* 101 N. Y. 209.

The rule that damages which are uncertain or contingent cannot be recovered does not embrace an uncertainty as to the value of the benefit or gain to be derived from the performance of the contract, but an uncertainty or contingency as to whether such gain or benefit would be derived at all. It

only applies to such damages as are not the certain result of the breach, and not to such as are the certain result, but uncertain in amount. Now, in this case, it is certain, under the facts as he claims them to be, that plaintiff has sustained some loss as the proximate and natural consequences of the breach of defendants; and under such circumstances the law will adopt that mode of estimating the damages which is most certain and definite, and it seems to us the rule we have suggested most nearly meets the requirements of the law.

3. It is also claimed that the trial court erred in the admission of certain opinion evidence as to what the value of the Lambert place would have been on October 31, 1890, if defendants had complied with their contract, and built the motor line as they agreed to do. A number of witnesses were called by plaintiff, who were qualified to speak from business experience, from familiarity with the values of real estate in and about Portland, and the effect upon such values of the construction and operation of suburban motor lines, as well as from a knowledge and familiarity with the situation, location, character, and quality of the Lambert place, and were permitted by the trial court, against defendants' objection and exception, to give their opinions as to what that place would have been worth on October 31, 1890, had defendants fulfilled their contract, and constructed the motor line in accordance with their agreement. Two objections are urged to the competency of this testimony: *First*, that the fact sought to be proved is so remote and speculative as not to be a proper item of damages in this case; and, *second*, it is not a matter upon which opinion or expert testimony is admissible. In the view we have taken as to the proper measure of damages in this case, as already indicated, it is only necessary for us to consider the last objection stated.

It is undoubtedly true, as a general rule, that a witness is only permitted to testify as to facts within his own knowledge, and not to inferences or opinions. But to this rule there are certain exceptions; and one of these exceptions is that when the value of real estate, which is always largely a matter of opinion, is in controversy, persons who are acquainted with the property in question, and know the value of real estate in the same neighborhood, are competent to give their opinion as to its value. "These opinions are admissible," says Gray, J., "not as being the opinions of experts, strictly so called, for they are not founded on special study or training or professional experience, but rather from necessity, upon the ground that they depend upon knowledge which any one may acquire, but which the jury may not have, and that they are the most satisfactory, and often the only attainable, evidence of the fact to be proved." *Swan v. Middlesex*, 101 Mass. 177. Indeed, the courts are practically unanimous in following this rule. Rogers, Expert Testimony, § 155; Lawson, Expert Ev. 435; 8 Sedgw. Damages, § 1294; 1 Suth. Damages, 786, 798; 1 Rice, Ev. 335. Nor do we understand that counsel

for defendants seriously controverts the rule as above stated; but he contends that such evidence must be confined to the present or past value of the land, and not to its value under other and wholly different circumstances, and in support of his contention relies upon a series of New York cases, all of which are founded on *Roberts v. New York Elev. R. Co.*, 128 N. Y. 455, 18 L. R. A. 499, which was an action by an abutting owner to restrain the operation and maintenance of an elevated railroad in the street in front of his property. The trial court allowed and permitted a witness who was familiar with the plaintiff's property, and its value, to testify as to what, in his opinion, the property was damaged by the presence of the structure and operation of the road, and as to what it would be worth without the road; but on an appeal the evidence was held to be incompetent and inadmissible, but by a divided court. The majority opinion is based entirely upon the previous decisions in that state; and, after a careful and exhaustive review and examination of them, Mr. Justice Peckham, speaking for the majority of the court, concluded, under the rule in that state, that while a competent witness might give his opinion as to the present or past value of real estate, because it is founded on facts that now exist or once existed, he could not testify as to its value under other or wholly different circumstances, because such evidence is uncertain and speculative, and would invade the province of the court or jury, whose duty alone it is to determine the amount of damages. Mr. Justice Gray, in an able and learned dissenting opinion, in which Chief Justice Ruger concurred, maintained that the evidence was competent, both on principle and the authorities of that state; and while the opinion of the majority of the court is in harmony with the former adjudications of New York, yet, as an original question, we are inclined to think the better reason, as well as weight of authority from other states, is with the minority opinion. This question has never been finally adjudicated in this state, although we understand the practice at the various circuits has been to admit such evidence; and we are therefore for the first time confronted with the question as to whether, in cases where the amount of recovery depends upon the difference in the value of land in its present condition and what it would be worth under different circumstances, such as the location of a railroad, street, or public highway over it, the opinions of witnesses qualified to speak upon the subject is admissible in evidence as to what the land would be worth in its changed condition. It seems manifest that such evidence, from a well-informed and intelligent witness, would materially aid and assist the jury in arriving at a just conclusion, and without its assistance the verdict would ordinarily be the merest speculation. The situation, location, and character of the land, and of the proposed improvement or burden, may be accurately and minutely described, and yet the jury be wholly unable from such evidence alone, to form an intelligent opin-

ion as to the probable effect upon the value of the land of such proposed improvement or burden. As was said by Elliott, J.: "Of what assistance to a jury composed of clergymen, merchants, and bankers would be a description of the minutest accuracy without some estimate of value by a competent witness? Possibly it would enable such jury to form a crude conjecture. It would do but little more." *Post v. Conroy*, 92 Ind. 467. And in the language of Skinner, J., in *Illinois & W. R. Co. v. Von Horn*, 18 Ill. 259, "to describe to a jury a piece of ground, however minutely, with its supposed adaptations to use, advantages, and disadvantages, and demand of them, upon this information alone, a verdict as to its value, would be merely farcical; and this, indeed, is all that can be done to enable them to arrive at a conclusion as to the value, unless the witnesses are allowed to state their judgment or opinion, together with the facts upon which such opinion is founded." If, as the authorities all agree, skilled evidence is admissible to prove the value of land in its present condition, why should it be deemed inadmissible to prove its value under different circumstances? In the one case it is competent on the ground of obvious necessity, and because no more definite knowledge is to be had; and for the same reason, it seems to us, it should be admitted in the other.

It is suggested that such evidence is speculative and unreliable, but the same objection can be urged, with equal force, to the admission of expert or skilled evidence in any case; and, if we hold this evidence incompetent on that account, it seems to us we would be shutting the door against the admission of opinion evidence in all classes of cases, for, if the objection is valid in the one instance so it is in all. The jury are not bound to take such evidence as true, but must exercise their own judgment in determining from it and all the other facts in evidence before them what the real merits of the case are. They are only required to give it such weight and effect as they may think it deserves, in view of all the facts and circumstances of the case. The witness may and should be required to detail to the jury, so far as possible, the facts and circumstances upon which his opinion is founded, so they may judge of its value as evidence; and from these and all the other evidences in the case, together with the opinion of the witness, if they think it deserving of any weight, their verdict should be formed.

It is also claimed that such evidence invades the province of the jury, where the amount of damages depends entirely, as in the case at bar, upon the question of value. But this question is not directly presented by this record, for the evidence admitted was not the opinions of the witness as to the amount of plaintiff's damages, but their opinion as to the probable value of the Lambert place with the motor line built and in operation on October 31, 1890; and in no case that we have been able to find, except the one from New York, have the opinions of witnesses as to value been excluded be-

cause the questions of damages and value were identical. In many of the states, in such case, a witness is not allowed to state his opinion as to the amount of damages, but only as to the value of the land before and after the contemplated improvement or burden, leaving the subtraction to be made by the jury; but Mr. Rogers says the weight of authority as well as reason is in favor of allowing the witness to express his opinion as to the amount of damages, as it is but a mere mathematical calculation. Rogers, *Expert Testimony*, 389, where the authorities on both sides are collated. And this seems to be the rule in this state; for in *Portland v. Kamm*, 10 Or. 383, which was a proceeding to condemn land for a street, this court held (Watson, Ch. J., delivering the opinion) that it was competent to ask a witness the following question: "What, in your opinion, is the damage to that portion of the tract of land belonging to defendant, Kamm, which lies within 100 feet of the proposed street, by reason of the laying out of said street?" This case would also seem to recognize the rule that the opinion of a competent witness should not be confined to the past or present value of land, but may be given as to its value under other and different conditions; for the inquiry of the witness was not as to the present value of the Kamm land, but what would be its condition after the opening of the proposed street. A careful examination of the books and cases has satisfied us that in a case like the one at bar, where the amount of damages depends upon the value of the land with and without the contemplated improvement, a witness competent to speak upon the subject may state his opinion of the value of the land with and without the proposed improvement. Judge Redfield, in speaking of the competency of opinion evidence in similar cases, says: "One may enumerate some of the leading facts upon which such an opinion is based; but, after all, the testimony as to facts is excessively meager, without the opinion of the witness either upon the very subject of inquiry, or some one as near it as can be supposed. Hence, in those courts where the opinion of witnesses in regard to the value of property, real or personal, is not admitted, it leads to sundry shifts and evasions in the course of the examination of witnesses upon that subject, which, while it is not a little embarrassing in itself, at the same time illustrates the inconsistency, not to say absurdity, of the rule." 1 Redf. Railroads, 289. And in *Mills on Eminent Domain* (sec. 165) it is said that "the general rule is that witnesses shall not testify how much the property is damaged, or give their opinion as to the amount of damages. They may testify as to the value of property, and as to the value of property before and after the improvement, but not as to the effect of the change in adding to or taking from such value. The extent of damages is to be proved by facts, and estimated by the jury. Hence a witness cannot be asked the value of the land with the strip taken out. Notwithstanding the array of authorities above cited, there seems to be a growing tendency to allow wit-

nesses to give an opinion on the amount of damages. It can hardly be seen how the jury can with any greater fairness arrive at the amount of damages by subtracting for themselves the present value from the former value than by allowing a witness to do the same thing." Mr. Pierce, in his work on Railroads, (p. 227,) says: "Opinions are admissible as to the amount of damages or benefit resulting to an estate from the construction and working of a railroad. The amount may also be calculated by comparing the valuation of the property before and after the taking as made by the witnesses,—a method which is relieved by the objection that the amount of the damages is the issue to be found by the jury." In support of the text the author cites cases from most of the states of the Union. In the case of *Yost v. Conroy*, 92 Ind. 464, which was an action to condemn land for a public ditch, it was held, in a well-considered opinion by Judge Elliott, that the opinion of one acquainted with the land, as to its value with and without the ditch, was proper evidence. So in *Swan v. Middlesex*, 101 Mass. 173, on the question of the injury to an estate by taking part of it to widen a street, it was held competent for a witness to testify as to "what, in his opinion, would be the effect, upon the value of

the estate in question, of widening the street and cutting off the land and tree." And in *Snow v. Boston & M. R. Co.*, 65 Me. 280, which was a proceeding to condemn land for railway purposes, it was held competent for persons acquainted with the land to state their opinions as to its value, or the amount of damages done, if all the land is not to be taken. The following authorities, in addition to those already cited, are also in point, and may be referred to in connection with this discussion: Whart. Ev. § 450; 1 Rice, Ev. 335; *Hosher v. Kansas City, St. J. & C. B. R. Co.* 60 Mo. 803; *Indianapolis, D. & S. R. Co. v. Pugh*, 85 Ind. 279; *White Deer Imp. Co. v. Sassaman*, 67 Pa. 415; *Lehmicks v. St. Paul, S. & T. F. R. Co.* 19 Minn. 464 (Gil. 406); *Sexton v. North Bridgewater*, 116 Mass. 200; *Trucker v. Massachusetts Cent. R. Co.* 118 Mass. 546; *Keithsburg & E. R. Co. v. Henry*, 79 Ill. 290; *Snyder v. Western U. R. Co.* 25 Wis. 60; *Tate v. Missouri, K. & T. R. Co.* 64 Mo. 149.

In applying the view we have taken of the law of this case upon a new trial, the other questions suggested at the argument will perhaps be avoided, and therefore need not be considered at this time.

Judgment of the court below is reversed, and a new trial ordered.

GEORGIA SUPREME COURT.

MILLER & CO., *Piffs. in Err.*,
v.

GEORGIA RAILROAD & BANKING CO.

(.....Ga.....)

1. It is competent for a common carrier whose customers, at their option, have the privilege of unloading for themselves the vehicles in which their freights are shipped, to adopt and enforce a reasonable regulation as to the time within which the vehicles may be unloaded free of any expense for storage, and to fix a reasonable rate per day at which storage will thereafter be charged for the use of such vehicles so long as they remain unloaded.
2. A rate of \$1 per day for each railroad car thus devoted to the use of storing freight is not necessarily unreasonable because cars are of different sizes and vary in capacity, nor because a fraction of a day is charged for as a whole day, nor because the customary rate of storage in warehouses or elevators is much lower; nor is it, as matter of law unreasonable for any cause.
3. A particular common carrier, though a corporation, makes a regulation its own by adopting it and acting upon it, irrespective of the source from whence it is derived;

*Head notes by SIMMONS, J.

and therefore, that it was promulgated by a person or board of persons representing a combination of such carriers would make no difference

4. As between the carrier and customers who have notice of the regulation before shipments are made, the regulation is operative, whether indicated upon bills of lading or not, and whether the shipments are made to the order of the consignor, with the customary direction to notify the customer, or directly to the customer himself.
5. In construing the phraseology of a regulation expressed in this language: "It being understood that said car or cars are to be placed and remain accessible to the consignee for the purpose of unloading during the period in which held free of demurrage, and that, when the period for such demurrage charge commences, they are to remain accessible to the consignee for unloading purposes."—the course and exigencies of business are necessarily to be regarded; and hence the cars, after their arrival at destination, though not kept accessible at every moment of time, are to be treated as being and remaining accessible if the carrier is always ready to render them so within the shortest practicable time—not longer than a few hours—after being notified that the customer is ready to unload.

(December 7, 1891.)

ERROR to the City Court of Richmond County to review a judgment in favor of

NOTE.—It is very remarkable that not more cases have been decided as to the right of a railroad company to collect demurrage for cars not unloaded within the time allowed by the rules of the 18 L. R. A.

business, since the custom to make such charges is general and must have been exercised in multitudes of instances. The few decisions on the subject are cited and reviewed in the above opinion.

plaintiff in an action brought to recover compensation for the storage of certain grain and produce by plaintiff in its cars in which such grain and produce was permitted to remain after it had reached its destination and been tendered for unloading. *Affirmed.*

At the trial the defendants requested the giving of the following instructions, which the court refused:

1. Plaintiff cannot by rule fix upon any rate of storage or demurrage unless it is reasonable, and in arriving at what would be a reasonable charge the jury are permitted to examine what are the customary charges for the storage of grain.

2. In the absence of an express contract, or a stipulation for demurrage charges in the bill of lading, the consignee is not liable for demurrage.

8. Before the plaintiff could recover demurrage for the use of the cars, it would have to prove that the detention prevented its making profits by the use of the cars. The plaintiff must show a loss of service of the cars and the amount of damage by detention, in order to recover for demurrage.

4. Under the charter of the plaintiff it is not authorized to make charges for storage, except by rules established by the board of directors; and if you find that the rule under which the plaintiff makes the charge for storage or demurrage in this case was adopted and promulgated by any association or person other than the board of directors of the plaintiff, the same is illegal and does not entitle plaintiff to make any charge for storage or demurrage. (Plaintiff read the twelfth section of its charter (Act of 1853), authorizing it to charge for storage and to fix reasonable rates; defendants relied on section first of the Act of 1853, claiming that such rules could only be promulgated by the directors, and that the evidence disclosed that the rule was established and published by the Southern Railway & Steamship Association, (of which the plaintiff was a member), and was therefore invalid and illegal as contravening both the charter and the general law.)

5. If the jury believe that the known, certain, general and universal custom and practice of plaintiff and common carriers in the state and county prior to November, 1889, was not to charge either for storage in cars on the tracks or for demurrage in car or cars, then that custom becomes binding on carriers, shippers and consignees, and could not be changed by mere notice on the part of the carrier to the consignee that demurrage would be charged.

6. As a matter of law the plaintiff is not entitled to charge for demurrage on cars remaining loaded on its tracks. If the plaintiff desired the use of the cars, or to return those containing the grain, it was at liberty to unload the grain into its warehouse, or the warehouse of a third person, or into the elevator, and if it failed to do so it cannot make defendants liable for the detention of cars. Plaintiff, by the exercise of its legal rights, could have unloaded the cars, charged and collected storage, and avoided the detention of the cars, and if it failed so to do it cannot thereby render defendants liable for demurrage charge.

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7. Demurrage in law is limited to the charges for the detention of ships. Railroad companies are not allowed to charge therefor.

8. The freight charges of a railroad include all usual expenses and charges for the goods from the time they are shipped until the relation of common carrier ceases by the delivery, or actual storage, of the goods. As long as the goods are left in the cars they are not stored, but the plaintiff holds them as common carrier.

9. Grain and ponderous articles may be delivered without being unloaded actually, but the relation of common carrier of grain in bulk continues until the goods are actually unloaded and stored, or until the car is placed at the usual place of delivery, or at a point accessible to the consignee where they can conveniently unload.

10. If the jury find from the evidence that, forty-eight hours after the notice was served, any or all of the cars mentioned were in the depot-yard of plaintiff at a point at which they were inaccessible to defendants, and thereafter they paid the freight, and subsequently to the payment of the freight the cars had to be hauled or carried by plaintiff from the yard to the usual point where the cars were delivered to the defendants, then I charge you the relation of common carrier continued up to the time when the cars were carried to the point of delivery; and the plaintiff is not entitled to recover either storage or demurrage for the time prior to the placing of cars at such a point. Nor would it be entitled to charge for the detention or use of the cars, until a reasonable time for unloading had elapsed after the car had been placed at such a point.

11. So long as the cars containing the grain have to be moved by the railroad company, or hauled or carried from one place to another, so as to be delivered to defendants, the relation of common carrier exists, and the railroad company has not become a warehouseman as to the goods therein and cannot charge for storage or for demurrage on the cars.

The parts of the charge of the court assigned as error are as follows:

"A regulation of the railroad company that such freights in bulk or otherwise, as to which it is the custom for cars to be unloaded by the owners of the property, shall be charged one dollar per car for each day such car is not unloaded, at the expiration of forty-eight hours, which forty-eight hours shall commence at ten o'clock A. M. of the day after notice of the arrival of the car is given to the owner of the property, is a reasonable regulation and binding upon the customers of the railroad company who have notice of the same.

"If the jury shall find that it was a regulation of the railroad company at the time to charge for storage or demurrage at the rate of one dollar per day for each car when freight like the defendants' was not unloaded in forty-eight hours after the commencement of the notice to the defendants, and if the jury shall find that the plaintiff gave the defendants notice of such regulation, and of the arrival of the cars containing defendants' freight, then the defendants are bound thereby, and the plaintiff is entitled to recover in this action at the rate of one dollar per day for each car

which plaintiff shows to you was covered by the regulation.

"I charge you that the rule and regulation was a valid one, that it was reasonable, and that if the railroad complied with its part of it by delivery at a point accessible to the consignee, or if it substantially complied, or what might be termed constructively complied, by notifying the consignee that the goods had arrived, and that it actually had them in position for prompt delivery, and that the defendants delayed complying with that rule, then they would be liable for the charges."

Further facts appear in the opinion.

Mr. Joseph R. Lamar, for plaintiffs in error:

Railroads cannot collect demurrage.

Chicago & N. W. R. Co. v. Jenkins, 103 Ill. 5:8; *Burlington & M. R. Co. v. Chicago Lumber Co.* 15 Neb. 391.

The right to collect demurrage is a matter of contract.

Chicago & N. W. R. Co. v. Jenkins, *supra*.

Demurrage is confined to maritime law.

Ibid.

Ordinarily it can only be collected from the consignor.

Gage v. Morse, 12 Allen, 410, 90 Am. Dec. 155.

In cases where it can be collected from the consignee it is because the bill of lading so provides.

5 Am. & Eng. Encyclop. Law, 543, notes, 2, 3, citing many authorities.

The action is not *ex contractu* but *ex delicto*, and damages have to be proved in order to be recovered.

Williamson v. Barrett, 54 U. S. 13 How. 111, 14 L. ed. 73; *Hutchinson*, Carr. 474.

The bills of lading were in usual form and gave no reason for the price of freight being fixed at the rate named.

If it was the custom for the consignee to unload promptly there was no more binding force in that custom than in the other custom of the railroad to make no charge for the delay in unloading.

The bill of lading said nothing about who was to unload. The law did; it required the carrier to unload.

Southwestern R. Co. v. Felder, 46 Ga. 438; *Pegler v. Monmouthshire R. & O. Co.* 6 Hurlst. & N. 644; 2 Rorer, Railroads, 1224, 1225; *Vincent v. Chicago & A. R. Co.* 49 Ill. 33; *Chicago & N. W. R. Co. v. People*, 56 Ill. 365, 8 Am. Rep. 690; *Hutchinson*, Carr. § 371.

Every moment of detention for which plaintiff sues in this case is for alleged detention before the cars were put on track 88 and while in the carrier's possession.

Until placed on track 88 the car was in plaintiff's possession as carrier, and "freight charges of railroad includes all charges, from time goods are shipped until relation of carrier ceases by actual delivery, or storage, or placing of car at usual point of unloading."

Pegler v. Monmouthshire R. & O. Co. supra; 2 Rorer, Railroads, 1233; *Pittsburgh, C. & St. L. R. Co. v. Nash*, 43 Ind. 423.

Liability of carrier as such continues until the goods arrive at destination and are there unloaded and deposited in a place of safety and held ready to be delivered on demand.

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Southwestern R. Co. v. Felder, supra.

In case of ponderous articles the liability of carrier continues until the car is placed on track at point where articles are usually unloaded.

Rorer, Railroads, 1233.

Proof of usage that car was at risk of consignee will not relieve carrier of liability, as nothing short of a special agreement can have that effect.

Id. 1281.

There is a difference between arriving and nearly arriving. The carrier's obligation is not only to carry but to deliver, and even in maritime law the lay days within which consignee is allowed to unload do not begin to be counted when the ship enters the harbor, but when she reaches the wharf. A car in the midst of a train 250 yards from a point accessible and usual for unloading has nearly arrived but not more so than a ship in the harbor.

5 Am. & Eng. Encyclop. Law, 547; *Hodgdon v. New Haven & H. R. Co.* 46 Conn. 276, 33 Am. Rep. 21; *Mobile & G. R. Co. v. Prewitt*, 46 Ala. 63, 7 Am. Rep. 586; *Rice v. Hart*, 118 Mass. 201, 19 Am. Rep. 433.

Where consignee had notice of arrival in yard, and, finding it inconvenient to be unloaded, the car was ordered to be moved to a more accessible spot and in course of moving was, without negligence, burned, the carrier was held liable as such.

Independence Mills Co. v. Burlington, C. R. & N. E. Co. 72 Iowa, 585, 2 Am. St. Rep. 258.

Mr. Joseph B. Cumming, for defendant in error:

A common carrier has also, under proper circumstances, the character, duties, and rights of a warehouseman.

Schouler, Bailm. 510, 516.

In Georgia, when the transit of the goods is ended—that is to say, when the goods are brought to their destination, unloaded from the cars and deposited in the railroad company's depot—the railroad company ceases, as to those goods, to be a carrier, and becomes a warehouseman, with the duties and rights which attach to the business of a warehouseman.

Southwestern R. Co. v. Felder, 46 Ga. 438.

The carrier, when he rightfully becomes a warehouseman, is entitled to be paid as such, and the compensation which he receives as such is in addition to his compensation as carrier.

Hutchinson, Carr. § 373; *Norway Plains Co. v. Boston & M. R. Co.* 1 Gray, 263; *Miller v. Mansfield*, 112 Mass. 260.

Common carriers have the right to make reasonable regulations for the conduct of their business.

Ga. Code, § 2069; *Schouler*, Bailm. 379.

The rule under which the charges sued for are made is a reasonable regulation, and can be sustained on that ground as well as on the ground that it is a reasonable warehouseman's charge.

Demurrage is "an allowance, which marine law makes by way of indemnity to the carrier, when the vessel has been detained unreasonably long in loading or unloading the cargo through the fault of the customer."

Schouler, Bailm. 540; *Philadelphia & R. R. Co. v. Northam*, 5 Myers, Fed. Dec. title Carrier,

§ 913. See also *note* near top of page 122, 9 Am. & Eng. R. R. Cas., commencing with the word "Inconvenience."

There would seem to be no ground of reason, why the safe keeping of property in cars should not be paid for as well as the safe keeping of property in warehouses.

See *South & North Ala. R. Co. v. Wood*, 66 Ala. 167, 9 Am. & Eng. R. R. Cas. 419; *Miller v. Mansfield*, 113 Mass. 260.

Simmons, J., delivered the opinion of the court:

The Georgia Railroad Company sued Miller & Co. for the sum of \$892, besides interest, the declaration containing two counts, as follows: (1) "On the 1st of January, 1890, and on various days thereafter up to the time of filing this complaint, petitioner stored on its tracks in said county certain carloads of corn, wheat, grain, and other produce, at the special instance and request of said Miller & Co., by means whereof said Miller & Co. became indebted to your petitioner for said storage at the rate of one dollar per day for each and every of said carloads, amounting to the aforesaid sum of \$892." (2) "Your petitioner further shows that said Miller & Co. are further indebted to your petitioner in the sum of \$892, besides interest, for that heretofore, to wit, before the 1st day of January, 1890, your petitioner, who is a common carrier of goods and merchandise, made and put in operation a reasonable rule or regulation for the conduct of its business, of which rule or regulation said Miller & Co. had notice, by virtue of which said Miller & Co. became liable to pay to your petitioner the sum of one dollar for every day commencing forty-eight hours after notice of arrival, on each and every carload of property stored by your petitioner on its tracks or elsewhere. Your petitioner shows that after said 1st day of January, 1890, and up to the time of filing this complaint, your petitioner has so stored a large number of carloads of property, a schedule of which is hereunto annexed; by means whereof said Miller & Co. have become indebted to your petitioner in the sum of \$892, besides interest. Your petitioner shows that said Miller & Co. fail and refuse to pay said sum," etc. The rule or regulation here referred to is as follows: "Demurrage Rules. Concerning Loaded Cars to be Unloaded by Consignees. Bulk meats, bulk grain, hay, cotton seed, lumber, lime, coal, coke, sand, brick, stone, wood, and such other freights, in bulk or otherwise, as it may be a stipulation of the rates thereupon, or contract for the transportation thereof, or where it is the custom, for the cars to be loaded and unloaded by the owners of the property, which is not unloaded from the cars containing it in forty eight hours, not including Sundays or legal holidays, computed from ten o'clock A. M. of the day following the day of arrival, shall be subjected thereafter to a charge for demurrage of one dollar for each day or fraction of a day that said car or cars remain loaded in the possession of the company by whom to be delivered as the last carrier at interest; it being understood that said car or cars are to be placed and remain accessible to the consignee for the purpose of unloading during

the period in which held free of demurrage, and that, when the period of such demurrage charges commences, they are to remain accessible to the consignee for unloading purposes."

The jury found in favor of the plaintiff, and the defendants made a motion for a new trial, which was overruled, and they excepted.

Without undertaking to discuss separately and in their order the numerous grounds of the motion, it is sufficient to say that, in addition to the general objection that the verdict is contrary to law and the evidence, they complain in substance as follows: (1) That as matter of law a railroad company is not entitled to charge "demurrage" or storage on cars remaining unloaded on its tracks, and hence the rule in question is invalid, and the defendants are not subject to the charges recovered; (2) that the charge fixed by this rule is unreasonable; (3) that the rule was not promulgated by the proper authority, but emanated from a combination of persons other than the board of directors of the Georgia Railroad; (4) that the regulation is inoperative, because not indicated upon the bills of lading; (5) that the cars were not accessible during the whole period for which demurrage was charged.

1. It is the undoubted right of a common carrier to adopt and enforce, as between itself and its customers, any reasonable regulation for the conduct of its business, the purpose and effect of which are the protection of the carrier and the benefit of the public. The rule in question, we think, falls clearly within the scope of this power. It seeks to prevent the diversion and detention of cars from the legitimate work of transportation, as well as to secure compensation for service not otherwise paid for, by prescribing, in case where by contract or custom the carrier is under no duty to unload the cars, but they are to be unloaded by the customer, a rate *per diem* in the nature of a charge for storage, to begin at a certain time after the cars have been delivered to the customer or placed at his disposal for unloading. Such regulation cannot be regarded as unreasonable so long as a reasonable time is allowed for unloading, and so long as the charge for the use of the cars beyond that time is not excessive. The law compels the carrier to receive the goods of the public, and to transport and deliver them within a reasonable time. Code 1892, § 2073; 2 Am. & Eng. Encyclop. Law, title, *Carriers*, p. 787. To do this it is necessary that the means of transportation shall be under the carrier's control, and that, after the duty of carriage has been performed, its vehicles shall not be converted into storehouses, at the will of consignees, to remain such indefinitely, and without compensation. If no check could be placed upon such detention, it is plain that the business of transportation would be at the mercy of private interest or caprice, and that carriers thus hampered in their facilities, and unable to foresee the time or extent to which their vehicles would be diverted from the work of carriage, could not provide properly for the demands of traffic, or perform with dispatch their legitimate function. It would place upon the carrier the burden and expense of supplying numerous vehicles not needed for the hauling of freights, thus requiring it to provide extra facilities, as

well as to render extra service, without compensation beyond that received for transportation. It would result in the accumulation of cars on the carrier's tracks, and the obstruction in a greater or less degree of the movement and unloading of trains. Not only would loss ensue to the carrier, but consignees and shippers in general and the people at large must suffer seriously from this hindrance to the due and regular course of transportation. In this matter the public have rights paramount to those of any individual or class of individuals, and the business of the common carrier must be so conducted as to subserve the general interest and convenience. Especially is this true as to railroad companies, in view of the important franchises granted them by the public, and the use and control thus acquired of highways upon which the commerce of the country is so largely dependent.

The need of regulations of the kind in question is well illustrated by the evidence in this case. The general manager of the plaintiff testified that, before this rule was adopted, consignees were often dilatory in removing freight from the cars in which it was shipped, and "the cars were detained day after day, and days lengthened into weeks, until our transportation work was subjected to immeasurable embarrassment. The transportation of the company was well-nigh paralyzed,—not for lack of cars, for we had plenty, but because our cars were converted into warehouses. The trouble grew, and finally culminated in a threatened blockage throughout the country. It has been a part of our experience to be threatened with suit by the shipper for not moving the freight promptly. We are supposed to always have cars ready to transport any freight that is offered. We endeavor to make proper arrangements to do so; but the trouble was that, when A. had freight to ship, B. had our cars, and we could not get them."

It was contended by counsel for the plaintiff in error that the railroad company could unload the cars into a warehouse or elevator, and thus avoid detention. On the other hand, counsel for the railroad company contended that in the cases provided for by this rule—that is, where it is a stipulation of the rates or contract for transportation, or is the custom, for the cars to be loaded and unloaded by the owners of the property—it would be a breach of contract if the company were to unload, which would subject it to at least nominal damages. We do not think it material, as affecting the right to make a charge of this character, that the goods remain in cars instead of being put into a warehouse. It is well settled that the carrier, in addition to its compensation for the carriage of goods, has the right to charge for their storage and keeping, as a warehouseman, for whatever time they remain in its custody after reasonable opportunity has been afforded the owner to remove them. *Hutchinson, Car. § 378; Southwestern R. Co. v. Felder, 46 Ga. 488.* And we think, where the carrier's duty ends with the transportation of the car and its delivery to the customer, and no further service is embraced in the contract, the carrier, after a reasonable time has been allowed for unloading, is as much entitled to charge for the further use of its car as it would

be for the use of its warehouse. We know of no good reason why it should be restricted to the latter method of storage. There is no law which inhibits the use of cars for this purpose, or which requires unloading and removal of the goods to some other structure before any charge for storage can attach. This method of storage may in many cases be as effectual as any other. Indeed, it may serve the customer's interest and convenience much better to have the car placed at his own place of business, where he may unload it himself, or where it may be unloaded by purchasers as the goods are sold, thus saving drayage and other expenses, than to have it unloaded by the carrier, and the goods stored elsewhere at the customer's expense. And a customer whose duty it is to unload, and who, failing to do so within a reasonable time, accepts the benefit of storage in a car, by requesting or permitting the carrier to continue holding it unloaded in his service, and subject to his will and convenience as to the time of unloading, cannot be heard to complain of the method of storage, and to deny the right to any compensation at all for this service, on the ground that some other method was not resorted to. He may insist that the rate fixed shall not be unreasonable or excessive, but the law cannot be invoked to declare that no compensation whatever shall be charged for such extra service.

It was contended by counsel for the plaintiff in error that "demurrage"—which is the designation given to this charge by the rule in question—is allowed only in maritime law, and cannot be demanded by a railroad company in the absence of a stipulation therefor in the bill of lading; and in support of this view the cases of *Chicago & N. W. R. Co. v. Jenkins, 108 Ill. 588, and Burlington & M. R. Co. v. Chicago Lumber Co., 15 Neb. 891,* are cited. In the former of these cases it is said: "The right to demurrage, if it exists as a legal right, is confined to the maritime law, and only exists as to carriers by seagoing vessels. But it is believed to exist alone by force of contract. All such contracts of affreightment contain an agreement for demurrage in case of delay beyond the period allowed by the agreement, or the custom of the port allowed the consignee to receive and remove the goods. But the mode of doing business by the two kinds of carriers is essentially different. Railroad companies have warehouses in which to store freights; owners of vessels have none. Railroads discharge cargoes carried by them; carriers by ship do not, but it is done by the consignee. The masters of vessels provide in the contract for demurrage, while railroads do not; and it is seen that these essential differences are, under the rules of the maritime law, wholly inapplicable to railroad carriers." The decision in the Nebraska case does not go into any discussion of the question, but merely cites and follows the holding of the Illinois court. In our opinion, the reasoning above quoted is inconclusive. We see no satisfactory reason why carriers by railroads should not be entitled to compensation for the unreasonable delay or detention of their vehicles as well as carriers by sea. What we have already said, we think, is a sufficient answer to the reason assigned, that railroads have ware-

houses in which to store freights. And the reason that "railroads discharge cargoes carried by them," and "carriers by ship do not, but it is done by the consignee," of course cannot operate as to the cases provided for by this rule, which by its terms applies only where the unloading is to be done by the owners of the property. Nor is it settled that the right to demurrage in maritime law exists only by express contract. In this country the courts have repeatedly declined to follow the rulings of the English common-law courts on this subject, and have held that the shipowner has a lien upon the cargo for demurrage, notwithstanding the absence of any stipulation therefor in the bill of lading. 5 Am. & Eng. Encyclop. Law, title, *Demurrage*, p. 546; Port. Bills of Lading, § 356. See also *Huntley v. Dows*, 55 Barb. 810, and *Haugood v. 1310 Tons of Coal*, 21 Fed. Rep. 681, and cases there cited.

But we are not controlled by the principles which govern as to demurrage under the maritime law. The adoption by the railroad company of the term "demurrage" as a designation for this charge does not require us to resort to that law as a standard for testing the validity of the rule. We are to look to the real substance and effect of the rule, rather than to analogies suggested by the technical designation which the carrier in this instance has seen fit to adopt. To hold that, because the conditions of carriage by sea are different, no charge under this name can be enforced by a carrier by land, or that, if allowed, it must be governed by the rules of the marine law, would be to adopt a narrow and merely technical view, ignoring well-recognized grounds of public policy and the right of the carrier to prescribe reasonable rules and regulations for its own safety and the benefit of the public. The instances are few in which regulations similar to the one in question have been passed upon by the courts. The only cases we have found in which the right of a railroad company to make a charge of this kind is denied are the ones above referred to. On the other hand, the right is sustained by the supreme court of Massachusetts. *Miller v. Mansfield*, 112 Mass. 260. See also a full and able discussion of the question by Toney, J., of the law and equity court of Louisville, Ky., in a decision which has appeared since the judgment in the present case was announced. *Kentucky Wagon Mfg. Co. v. Louisville & N. R. Co.* (Louisville, Ky. L. & Eq. Ct.) 11 Ry. & Corp. L. J. 49, note.

2. We cannot, as matter of law, say that the rate of one dollar per day for each car is unreasonable. It is not necessarily unreasonable because the cars vary in capacity, nor because a part of a day is charged for as a whole day. Nor can we hold that the customary rates for storage in warehouses and elevators must be the measure of compensation where the storage is in the cars on the tracks of a railroad. Indeed, if it be a legitimate object of this rule to prevent the diversion of cars from the work of carriage, it would seem but proper that the charge for their use when detained as a means of storage should not be such as to encourage customers to adopt that means, instead of the more regular and usual methods. Moreover, there was no evidence to show that the rate

fixed by this rule was higher than those customary for storage of other kinds. On the contrary, there was evidence tending to show that storage in a car, at the rate fixed by the rule, might be much less expensive than storage elsewhere; the general manager of the railroad company testifying that the modern car carries from 50,000 to 80,000 pounds, and that storage in the company's depot of a carload of 50,000 pounds would amount to \$1.25 per day. He testified further: "The rate of \$1 per day does not compensate us for the detention of the cars, and it was simply to induce the shipper to unload that the rule was passed."

3. That the rule was promulgated by a person or board of persons representing a combination of carriers did not impair its effect as a regulation of this particular company. A common carrier, though a corporation, makes a regulation its own by adopting it and acting upon it, irrespective of the source from whence it is derived.

4. Where a regulation of this character is known to the customer before the contract for transportation is made, it is to be presumed, in the absence of any evidence to the contrary, that the parties contracted with reference to it, (*Miller v. Mansfield*, *supra*;) and it is operative whether indicated upon bills of lading or not, and whether the shipments are made to the order of the consignor, with the customary direction to notify the customer, or directly to the customer himself.

5. The plaintiff's mode of delivery of the cars to the defendants was to place them on a certain track "designated as belonging to the Augusta & Summerville Railroad," and known as "Track 38," from which point they went "into the possession of the Central Railroad," upon whose side track, in another part of the city, the defendants' place of business was situated. Cars were not delivered on track 38 until the freight was paid and the bill of lading surrendered. Until then they were inaccessible for unloading, being kept elsewhere in the plaintiff's yard. After payment of the freight the defendants could at any time have their cars moved where they would be accessible, but sometimes it would take from one to five hours after the freight was paid before they could be placed at the point of delivery. It was contended that the time thus required for placing the cars in position should not be included in computing the time which should run against the defendants under the rule in question, the rule containing this language, to wit: "It being understood that said car or cars are to be placed and remain accessible to the consignee for the purpose of unloading during the period in which held free of demurrage, and that, when the period of such demurrage charges commences, they are to remain accessible to the consignee for unloading purposes." Certain instructions of the court on this subject, and the refusal to charge thereon as requested by the defendants, were the basis of several assignments of error, which will be found set out in the reporter's statement. Taking the whole charge, in connection with the evidence, we think the law applicable to this part of the case was fairly presented. The court, having instructed the jury in substance that, if the defendants had

notice of this rule or regulation, and the goods were shipped under a contract that they were to be unloaded by the consignees, and the plaintiff notified the consignees of the arrival of the cars and of its readiness to deliver the goods, and the consignees did not receive and unload them within the time stipulated by the rule, the defendants would be liable for the charge fixed by the rule for the detention of cars, added the following: "The railroad will have complied with that rule and regulation if you find from the testimony that it placed these cars at a point where they were accessible to the consignees, and allowed them to remain there during the time fixed by the railroad when they would be free from demurrage, or where it gave notice that it was ready to place them in such position. The mere giving notice, if there was evidence that it was not ready to place them in that position, would not avail; but if you find that the cars were in a position where they could be placed in an accessible place, and the road offered to place them, by sending notice that it was ready, then that would be a substantial compliance with the rule and regulation. But if the consignees elected to delay and not receive them, they would be liable for the charges under the rule." Also: "If you are satisfied from the testimony that the cars, up to the time of actual delivery or taking possession, were inac-

cessible, that the railroad could not comply with its offer, and that the delay was not the fault of the defendants, then no demurrage under this rule could be enforced, and your verdict would be for the defendants." We think the instructions complained of as to substantial compliance with the rule, read in connection with the instructions above quoted, give a reasonable and proper interpretation of that part of the rule which relates to delivery at a point accessible to the consignee. In construing its phraseology, the course and exigencies of business are necessarily to be regarded; and hence the cars, after their arrival at destination, though not kept accessible at every moment of time, are to be treated as being and remaining accessible if the carrier is always ready to render them so within the shortest practicable time—not longer than a few hours—after being notified that the customer is ready to unload. There is no evidence in the record that the cars were not at all times accessible, in this sense, or that there was any undue or unnecessary delay in placing them in position for unloading, after notice from the defendants that they were ready to receive them.

6. The evidence is sufficient to uphold the verdict.

Judgment affirmed.

NEW YORK COURT OF APPEALS.

Re FINAL ACCOUNTING OF EXECUTORS OF Balthazar ALBRECHT, Deceased.

(.....N. Y.)

1. **Tenancy by the entirety does not exist in a bond and mortgage** executed to husband and wife for moneys of which each individually contributed a part, but upon the death of either his or her share vests in his or her personal representatives.
2. **Costs of a contest on the accounting of a husband's executors** to determine whether or not a husband and wife were tenants by the entirety in a bond and mortgage for moneys of which each contributed part should be paid out of the estate where the question is new and the executors have acted in good faith.

(November 29, 1892.)

APPPEAL by objectors from a decree of the General Term of the Supreme Court, First Department, affirming a decree of the Surrogate's Court for New York County refusing to surcharge the executors' account with the alleged interest of decedent in a certain bond and mortgage which had been given to decedent and his wife. *Reversed.*

NOTE.—The above decision does not seem to have any direct precedent other than that cited in the opinion.

For the general doctrine as to tenancies and entirety, see *Baker v. Stewart*, 3 L. R. A. 434, and *note*, 40 Kan. 442; *Mittel v. Karl*, 3 L. R. A. 655, 133 Ill. 65; *Steiz v. Schreck*, 13 L. R. A. 825, and *note*, 123 N. Y. 253, 26 Am. St. Rep. 475.
18 L. R. A.

The facts sufficiently appear in the opinion.

Mr. Henry F. Lippold for Annie Linder-mann *et al.*, appellants.

Mr. James P. Niemann, for Katharine Albrecht, appellant.

The case at bar is to be determined upon the intent of the parties, as gathered from the bond and mortgage—made payable to them, "their executors, administrators, and assigns," as well as from the evidence and the surrounding circumstances,—and an inference of such intent may reasonably be drawn from a variety of circumstances, however slight.

Roman Catholic Orphan Asylum v. Strain, 2 Bradf. 34, and cases cited; *Orr v. McGregor*, 43 Hun, 523.

The execution of the bond and mortgage to them in their names jointly was not any evidence of a gift by either to the other of his or her contributive share therein.

The same were executed to them as separate individuals in their own right, and not *eo nomine* to them as husband and wife.

1 Preston, Estates, 132; 1 Preston, Abstracts, 41.

And were made payable to them, "their executors, administrators, or assigns," which was inconsistent with a right of survivorship.

For agreements concerning or transfers of such estates, see *Speier v. Opfer*, 2 L. R. A. 345, 73 Mich. 25; *Donahue v. Hubbard*, 14 L. R. A. 123, 154 Mass. 537, 26 Am. St. Rep. 271.

For effect of divorce on such estate, see *Steis v. Schreck*, *supra*.

Neither the rule, nor the reason of the rule, applicable to real estate—i. e., the common-law fiction of unity of husband and wife—applies to a case of personal property, held by husband and wife. In such cases the survivor takes the whole not by right of survivorship but by virtue of the original grant or estate under or by which they held.

Bertles v. Nunan, 92 N. Y. 156, and cases cited.

From all the cases cited by the learned referee it is apparent that the question of intention to be derived from the acts of the parties, or other *indicia* of intention, entered materially, if not wholly, into the reasoning of the various courts in reaching the conclusion they did, viz.: that it is presumed to have been a gift and advancement to her by the acts of her husband, and that the direct question of the right of survivorship, as between husband and wife, holding personal property in their joint names, and to which each had contributed, was not squarely determined.

See *Bryant v. Bryant*, 43 N. Y. 17; *Geary v. Page*, 9 Bosw. 290; *Jacques v. Short*, 20 Barb. 269; *Dillenbeck v. Dygert*, 97 N. Y. 303, 812, 49 Am. Rep. 525; *Yerkes v. Salomon*, 11 Hun, 471; *Syracuse Sav. Bank v. Hess*, 23 N. Y. Week. Dig. 280; *Mulcahey v. Emigrant Industrial Sav. Bank*, 89 N. Y. 438.

The tendency of the courts should be towards that inference—if reasonably to be drawn—which favors, as between man and wife, a separate and individual ownership of their property.

See *Power v. Lester*, 23 N. Y. 527; *Jooss v. Fey*, 129 N. Y. 17.

It cannot be fairly presumed that the old common-law fiction of unity of husband and wife, applied to real estate, applies with equal force to personal property—like a bond and mortgage—which latter is but a mere security for the former, and an incumbrance on land, for the reason that since the Married Woman's Acts, a husband may make a gift, or a transfer of such property, directly to the wife.

N. Y. Acts 1848, 1849; *Phillips v. Wooster*, 86 N. Y. 412; *Rauson v. Pennsylvania R. Co.* 48 N. Y. 216; *Seymour v. Fellows*, 77 N. Y. 178; *Kelly v. Campbell*, 2 Abb. App. Dec. 494; *Brown v. Thurber*, 10 Daly, 188; *Whiton v. Snyder*, 68 N. Y. 299; *Fruhauf v. Bendheim*, 127 N. Y. 587. See also *Cashman v. Henry*, 75 N. Y. 103, 81 Am. Rep. 487.

It has been the policy of the law to create a tenancy in common and not a joint tenancy, where it can be done without doing violence to any known rule of law.

3 N. Y. Rev. Stat. 7th ed. 2, 179, § 44; *Gage v. Gage*, 43 Hun, 502; *Purdy v. Hayt*, 92 N. Y. 453; 1 Preston, Estates, 192; 2 Preston, Abstracts, 41; 11 Am. & Eng. Encyclop. of Law, p. 1063; *Jooss v. Fey*, 129 N. Y. 17.

Mr. Henry Kropf for the executors.

Mr. Moses Weinman, for Louisa Uhl, respondent:

Upon the death of her husband the title of the bond and mortgage became vested in *Margaretha Albrecht*.

Sanford v. Sanford, 45 N. Y. 723; *Borst v. Spelman*, 4 N. Y. 284; *Bertles v. Nunan*, 92 N. Y. 152; *Roman Catholic Orphan Asylum v. Strain*, 2 Bradf. 84; *Re Brooks*, 5 Dem. 326; 19 T. R. A.

Christ's Hospital v. Budgin, 2 Vern. 683; *Dummer v. Pitcher*, 5 Sim. 35; *Coates v. Stevens*, 1 Younge & C. 66; *Craig v. Craig*, 3 Barb. Ch. 76, 5 L. ed. 824; *Abshire v. State*, 53 Ind. 64.

Maynard, J., delivered the opinion of the court:

Upon the final accounting of the executors in this case the legatees in the will objected to the account upon the ground that it did not include the interest of the decedent in a bond and mortgage executed to him and his wife in 1878 for the payment of the sum of \$6,000, money loaned, which was outstanding at the time of his death in 1886, and also at the time of the death of the wife, which occurred some two months later.

It was claimed by the executors that upon the death of the husband the title to the bond and mortgage and to the moneys secured by it vested wholly in the wife by virtue of her survivorship, and upon her death belonged to her estate to be distributed to her next of kin, and that no part thereof passed under the will of the husband to the legatees named therein. The surrogate sustained this claim and overruled the objections of the legatees, and his decision has been affirmed by the supreme court. It appeared from the evidence, and was found by the referee, that the husband and wife each invested the sum of \$3,000 in the bond and mortgage, and the money which was loaned to the mortgagor was drawn from the savings banks, where each had deposits to his or her individual credit. Under these circumstances we think it was a joint investment by the husband and wife, and that each had an interest in the security taken therefor to the extent of the amount contributed by him or her, and that upon the death of either such interest vested in the personal representatives of the deceased party.

There is no room here for the application of the doctrine which prevails where husband and wife take an estate in property as tenants by the entirety. That relation can only exist where there is a conveyance of a vested interest in or title to real property. Since the adoption of the Revised Statutes it has been the law of this state that a mortgagee acquires no title to the mortgaged property; that the mortgage is simply a chose in action, held as collateral security for the payment of a debt, and until foreclosure the mortgagor has the entire fee subject to the lien of the mortgage. Here the bond is the principal obligation, and the rights of the joint creditors as between themselves upon the collection of the debt are not affected by the existence of the mortgage as collateral security for its payment. It might be observed that if this was a case governed by the same principles which determine the rights of husband and wife where real property is conveyed to them during coverture, it would not necessarily follow that they would become tenants by the entirety. If nothing was shown to evince a contrary intent such would undoubtedly be held to be the relationship of the parties, as was decided in *Bertles v. Nunan*, 92 N. Y. 152. But this court has held in the recent case of *Miner v. Brown*,

133 N. Y. 308, that such tenancy is not created where it appears from the character of the transaction that it was the intention of the parties that the grantees should take as joint tenants or as tenants in common. To the same effect is *Jooss v. Fey*, 129 N. Y. 17. What would be the legal rights of the parties where upon a purchase of real property the husband and wife each has contributed from their separate estates equally or in any other ascertained proportion, to the payment of the consideration, does not as yet seem to have been the subject of judicial decision. It is not necessary, however, to further pursue this mode of reasoning, for it has no value, except as it may be instructive by way of analogy. The rights of husband and wife in the personal property of each other, or in that which may be transferred to them jointly, rests upon different grounds than those which support a tenancy by the entirety. We cannot affirm the decree of the surrogate without, in effect, ruling that if the wife had pre-deceased the husband he would have taken her share of the investment by virtue of his survivorship. But under the Married Woman's Acts, she is to be regarded as if she were sole with respect to her property rights, and she may unite with her husband in the purchase of personal property with her separate funds, and the interest which each will acquire in the subject of the purchase will not be affected by the marital relation. The law now regards them as standing upon the same plane of equality as if they were strangers to each other.

We are aware that there are many authorities holding that where the husband purchases a security or makes a deposit, or subscribes for stock in the joint name of himself and wife, and pays therefor with his own funds, upon his death the entire security belongs to the wife if she survives him. But the decision in all these cases is put upon the ground that it is apparent from the character of the transaction that the husband intended to give the property to his wife in the event of her survivorship, and hence the transfer possesses all the essential qualities of a gift *causa mortis* which he may revoke in his lifetime, and which does not take effect until his death if not previously recalled.

While he lives, his control over it is unlimited, and at his death it becomes her absolute property, if she survives him, but if she does not, the gift is not consummated and the husband retains the entire title. This was the rule laid down by Lord Eldon, in *Wilde v. Wilde*, (cited in 1 Roper, Husb. & W. Jacob's ed. p. 54), where it was held that if the husband purchased stock in the joint names of himself and wife it was *prima facie* a gift to her, in case of her surviving, unless evidence was produced of contemporaneous acts showing a contrary intention. But if the husband and wife each contribute to a joint investment or to the purchase of a security, and the title is taken in their joint names to be held by them, their executors, grantors, administrators or assignees, as was the bond and mortgage in the present case, no presumption can properly arise from the nature of the act that either intended to make a gift of his or

her share to the survivor. The just inference is that each regarded it as a loan of individual property upon the strength of the security taken, and they became tenants in common of the bond and mortgage, with all the rights and incidents of such relationship.

We are unable to find any reported case in this state where the question has been presented in this form, but the Supreme Court of Michigan held in 1877, in the case of *Watt v. Bovee*, 35 Mich. 425, that where husband and wife, being each possessed of means, had made investments, jointly, each supplying half, and had taken the securities in their joint names, the wife, on the decease of the husband during her lifetime, did not take the whole by the right of survivorship; and that the rule which prevails as to the right of survivorship in the case of united holdings of real estate by husband and wife is not applicable to personality. This view is supported by the principles of justice which should prevail in the determination of the rights of parties, and is in accord with the spirit of modern legislation which has striven to place the parties to the marriage contract upon the same footing with respect to the acquisition and control of their individual properties as if the conjugal relation did not exist.

The decree should be reversed and the executors required to account for the interest of the testator in the bond and mortgage; but as the question is new, and it is apparent that the executors have acted in good faith, the costs of both parties should be paid out of the estate.

All concur.

James KENT *et al.*, Exrs., etc., of James Kent, Deceased, *Repts.*,

v.

CHURCH OF ST. MICHAEL, *Appd.*

(.....N. Y.)

1. The power of a court in equity to compel a vendor to execute another deed where one has been lost so as to clothe the purchaser with the record title has its sanction in the general jurisdiction of a court of equity.
2. The living owners of an estate in whom is vested the whole estate subject only to the contingency that other persons may be born who will have an interest therein represent the whole estate for all purposes of any litigation in reference thereto and affecting the jurisdiction of the courts to deal with the same, and stand not only for themselves but also for the persons unborn.
3. A judgment requiring the execution of a deed to the real owner of land by persons having the record title to the whole estate subject only to the contingency that other persons may be born who will have an interest in

NOTE.—So little can be found in the decisions of the courts as to the power of a court to cut off the interest of persons not *in esse* that the above decision with its clear statement of law on the subject is one of interest and value to which little if anything could be added.

such record title is effectual to cut off the rights of such persons subsequently born.

4. A vendee who after discovering a defect in the title makes an oral agreement by which he remains in possession until the record title can be perfected in his vendor and never offers to surrender the premises thereby waives a provision requiring the execution of a deed within a specified time.

(November 29, 1892.)

APPPEAL by defendant from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of a Special Term for Dutchess County in favor of plaintiffs in a suit brought to enforce specific performance of a contract to purchase real estate. *Affirmed.*

The facts are stated in the opinion.

Mr. John J. Delany, for appellant:

The court will not decree specific performance of a contract for the purchase of realty where the title of the vendor is doubtful.

Adams v. Valentine, 88 Fed. Rep. 1; *Cooper v. Denne*, 4 Bro. Ch. 80; *Fleming v. Burnham*, 100 N. Y. 1; *Moore v. Williams*, 115 N. Y. 586; *Aldrich v. Bailey*, 28 N. Y. S. R. 571; *Irvine v. Campbell*, 8 L. R. A. 620, 121 N. Y. 358; *Vought v. Williams*, 8 L. R. A. 591, 120 N. Y. 253; *Abbott v. James*, 111 N. Y. 673; *Sloper v. Fish*, 2 Ves. & B. 145; *Rogers v. Waterhouse*, 4 Drew. 329, 6 Week. Rep. 828.

The title offered by the plaintiffs is doubtful.

The unborn remaindermen named in the will of Helen L. R. Stewart are not concluded by the judgment establishing the alleged lost deed made by said Helen L. R. Stewart to the plaintiffs' intestate.

A purchaser cannot be compelled to take title founded on matter of fact not admitting of satisfactory proof or which cannot be well proved.

Shriver v. Shriver, 86 N. Y. 585; *Smith v. Death*, 5 Madd. 871; *Lowes v. Lush*, 14 Ves. Jr. 548; *Argall v. Raynor*, 20 Hun, 267; *Fleming v. Burnham*, *supra*.

It cannot be contended that any afterborn grandchildren could be concluded on the ground of privity by an action in which their parents were made parties.

The judgment cannot bind the contingent interests of unborn children.

Monarque v. Monarque, 80 N. Y. 826, and cases cited; *Kilpatrick v. Barron*, 125 N. Y. 753; *Hotaling v. Marsh*, 132 N. Y. 29; *Harris v. Strod*, 182 N. Y. 392; *Lockman v. Reilly*, 95 N. Y. 64; *Moore v. Appleby*, 86 Hun, 368, affirmed 108 N. Y. 287.

The living infant remaindermen who were made parties are not forever barred from questioning the title rendered.

Under the principle in the case of *Fleming v. Burnham*, 100 N. Y. 1, the title here tendered does not meet the obligation assumed by a vendor under an ordinary contract of sale to tender a marketable title and one free from reasonable doubt.

Kilpatrick v. Barron, *supra*.

The failure of the plaintiffs to tender a clear and marketable title within the six months specified constituted such a breach of the 18 L. R. A.

agreement of sale as justified its rescission by the defendant, and this court will not now decree specific performance.

Tilley v. Thomas, L. R. 8 Ch. App. 61; *Dominick v. Michael*, 4 Sandf. 374; *Smith v. Wells*, 7 Paige, 22, 4 L. ed. 48; *Baumann v. Pinckney*, 118 N. Y. 604, and cases cited; *Nokes v. Kilmorey*, 1 De G. & S. 444; *Barnard v. Lee*, 97 Mass. 94; *Jones v. Robbins*, 29 Me. 351, 50 Am. Dec. 598; *Ohio Steel Barb Fence Co. v. Washburn & M. Mfg. Co.* 26 Fed. Rep. 702.

The plaintiffs elected to consider the contract of June 2, 1890, as broken by defendant's refusal to take the title tendered on November 25, 1890, and they cannot now assert a right to reconsider that election for their own benefit.

Selleck v. Tallman, 87 N. Y. 106.

The fact that defendant remained in possession of the premises after the six months does not affect the contract nor the rights of the parties thereto.

Messrs. Tillotson & Kent, for respondents:

The undisputed fact that defendant remained and still is in possession of the premises in question under the contracts alleged in the complaint would of itself constitute a waiver of any default of the plaintiffs in nonperformance of the contract within the time specified therein.

Tompkins v. Hyatt, 28 N. Y. 347; *Stenson v. Maxwell*, 2 N. Y. 415; *Gale v. Nixon*, 6 Cow. 445; *Schiffer v. Diets*, 88 N. Y. 808. See also *Arnold v. Green*, 116 N. Y. 572.

In an action brought to obtain a conveyance of any part of the trust property sold by Mrs. Stewart prior to her decease, the trustee and life tenants under that clause of her will represent the entire estate in such property, and are the only necessary parties defendant to such an action.

The grandchildren of Mrs. Stewart have simply a remainder contingent upon their surviving their respective parents, and also contingent on the birth of other children subsequent to the death of testatrix, who would share with them, and coupled with a power to enforce the trust in equity.

Taggart v. Murray, 53 N. Y. 233; *Dodge v. Stevens*, 105 N. Y. 590.

That contingent remaindermen were ever necessary parties was questioned in *Mead v. Mitchell*, 17 N. Y. 310, 72 Am. Dec. 455.

But the question has been definitely settled in this court in two recent decisions.

United States Trust Co. v. Roche, 116 N. Y. 120; *Townsend v. Frommer*, 125 N. Y. 446.

N. Y. Code Civ. Proc., § 2845, subd. 2, provides that an action may be maintained against an infant directing a conveyance of real property.

In *Brerort v. Grace*, 58 N. Y. 252, the court says: "Doubts were expressed in some of the cases whether this power extended to those not in being, who might thereafter be entitled to some estate in the premises. The reasons upon which the rule is based, as to the former [children in being], apply with equal force as to the latter. In both there is a want of capacity to manage and preserve the property, so as to protect the interest of those who are or may become entitled thereto, and hence the

necessity of devolving this duty upon the sovereign."

Mead v. Mitchell, 17 N. Y. 210, 73 Am. Dec. 455; *Brown v. Snell*, 57 N. Y. 299.

In *Bowman v. Tallman*, 27 How. Pr. 272, the court says: "Infants unborn are not seised, hence courts cannot sell their interests, because such interests do not exist. They can sell only interests existing."

If a life estate be devised to one with remainder to his children if there be a child in being at the death of the testator the whole remainder in fee simple vests in such child liable to be partially divested by the coming in *esse* of other children.

Baker v. Lorillard, 4 N. Y. 266; *Hayes*, p. 29. See also *Hannan v. Osborn*, 4 Paige, 336, 3 L. ed. 460.

In such a case the child in being or coming into being and taking a vested remainder in fee subject to open and let in the afterborn children might be regarded in some sense as holding the legal estate not only for its own benefit, but as trustee of afterborn children.

Moore v. Little, 41 N. Y. 66; *Jenkins v. Falcy*, 73 N. Y. 355; *Dodge v. Stevens*, 105 N. Y. 385. See also *Livingston v. Greene*, 52 N. Y. 116; *Smith v. Scholts*, 68 N. Y. 42; *Sheridan v. House*, 4 Abb. App. Dec. 218; *Brevcoort v. Brevcoort*, 70 N. Y. 140.

Earl, Ch. J., delivered the opinion of the court:

The plaintiffs are executors under the will of James Kent, deceased. The testator devised all his property to his executors, as trustees, in trust to pay the net income thereof to his wife during her life, and he authorized and empowered them to sell any of his real estate. It is not questioned that a valid trust was thus created; that the legal title to the real estate devised was vested in the trustees; and that they had a valid power of sale. In April, 1890, in the exercise of the power of sale, they entered into a written contract with the defendant by which they agreed to convey to it certain real estate, of which they claimed their testator was seised at the time of his death, and they agreed to execute to it an executor's deed on the 2d day of June thereafter, "containing the usual covenants, and assuring to them the fee simple of the said premises free from all incumbrances." At the time and place named in the contract it was ascertained that the testator had no record title to one half of the land contracted to be sold, and no deed to him for that half could be found. The defendant, therefore, refused to take a deed of that half of the land, but took a deed of the other half and paid therefor; and then another written contract was made between the parties by which the plaintiffs, for the consideration named, should, within six months thereafter, convey to the defendant an indefeasible title to the one half of the land mentioned. The plaintiffs' testator had in fact purchased that half of Helen L. R. Stewart, and paid for it, and taken a deed thereof, which had not been recorded, and was lost. She had died leaving a will in which she devised to trustees all her real estate, to be by them divided into three equal parts, directing them to pay the income of one part to each of her three children dur-

ing the lives of her children respectively, and after the death of any child to pay over and "divide the said share to and among his or her children then surviving, and the lawful issue of any such child or children who may have died leaving issue, in equal proportions, *per stirpes*." After the making of the second contract, the plaintiffs commenced an action in which they made defendants the trustees under the will of Mrs. Stewart, her three children and only heirs, and also her grandchildren who were infants, alleging in their complaint that in October, 1877, Mrs. Stewart conveyed the land in question to James Kent by deed properly acknowledged; that at that time Kent paid to her substantially all the purchase price, and went into the possession of the land, and remained in possession until November, 1896, when he died seised and possessed of the land in fee simple absolute. They then alleged the will of James Kent; the death of Mrs. Stewart, and her will; the contract of sale with the defendant, and the loss of the deed from Mrs. Stewart unrecorded, and the fact that it could not be found after diligent search; their belief that it had been lost; that they and their testator had been in possession of the land for twelve years, claiming the same absolutely in fee, and that owing to the loss of the deed there is a cloud on the title to the land, and that thus the defendants have on the record an unjust claim to the same; and they prayed judgment that the defendants in that action execute and deliver to them a good and sufficient deed, so as to vest and confirm the title to the land absolutely in them as the representatives of the estate of Kent, and for such other and further relief as the court should deem proper. The defendants were all adults but the grandchildren, and for them a special guardian was appointed. The adults answered the complaint, admitting the allegations thereof, and the infants, by their guardian, answered the complaint by putting in issue the allegations thereof. The action was brought to trial, and the facts alleged in the complaint were established and found, and judgment was given to the plaintiffs, pursuant to the prayer of the complaint. In compliance with the judgment, the adult defendants in their own names, and the infant defendants by their special guardian, executed a deed of the land to these plaintiffs, and all the devisees and heirs-at-law of James Kent, deceased. The parties of the second part in that deed then united in executing a deed of the land to the defendant, and it refused to accept the same when tendered to it by the plaintiffs, on the ground that the title tendered was still defective.

Under the will of Mrs. Stewart, her grandchildren took vested remainders in the shares of their parents, liable, however, to open and let in after-born grandchildren. Thus the trustees, children, and living grandchildren represented the entire estate of Mrs. Stewart, subject, however, to the contingency that there might be after-born grandchildren; and it was upon this contingency that the defendant based its objection to the title tendered to it, the claim being that after-born grandchildren would not be concluded by the judgment which had been rendered, and that their rights would not be affected by the deed given in

pursuance of that judgment. The sole question for our determination is whether that claim is well founded. There is no doubt that if the defendants, in the action brought by these plaintiffs against Mrs. Stewart's executors, children, and grandchildren, represented the whole title to her real estate, then the action was proper, and the conveyance given in pursuance of the judgment would carry a good title to the defendant. The deed from Mrs. Stewart by some accident had been lost after James Kent had paid for the land, and had been in possession of the same for many years claiming title thereto, and, on account of the loss, his executors could not make a good record title to the land in pursuance of their contract with the defendant. Under such circumstances, there can be no question that a court of equity had power and jurisdiction to relieve the persons who represented the grantee, and who in fact had title to this land, from the dilemma in which they were placed by the loss of the deed, by compelling Mrs. Stewart, if living, and after her death those who represent her title, to execute another deed. A purchaser under a valid contract of purchase, who has performed the contract on his part, and is entitled to a deed from his vendor, can compel specific performance of his contract by the delivery of the deed to him in pursuance thereof; and that can be done in the exercise of the jurisdiction of a court of equity to compel the specific performance of contracts, but where the contract has been performed, and the deed given, which the purchaser by some accident or misfortune has lost, so that he has no record title to the land which was conveyed to him, it is well-settled that a court of equity will compel the vendor to execute another deed so as to clothe the purchaser with the record title; and an action for that purpose is not dependent upon any provisions of the Code contained in sections 1638, 1650, and 2845, to which our attention has been called. It has its sanction in the general jurisdiction of a court of equity. Under such circumstances, it would be inequitable for the vendor to retain the record title, and to refuse to execute a new deed, and the purchaser can be relieved only by the execution of a new deed. Sugd. Vend. chap. 2, § 4, subd. 15; Adams, Eq. 166, 337; Willard, Equity Jurisp. 52, 301; *Cummings v. Coe*, 10 Cal. 529. Therefore the judgment against the trustees and heirs of Mrs. Stewart was in a proper action, and proper in form, and the question is whether it will bind the after-born grandchildren, if any, of Mrs. Stewart. We think it will.

The trustees, children, and grandchildren of Mrs. Stewart could not cut off or affect the title in the land of unborn grandchildren by any conveyance *in pais*. Rev. Stat. pt. 2, chap. 1, title 2, art. 1. By such a conveyance they could convey no greater title than they had. The effect of such a conveyance was under consideration in *Kilpatrick v. Barron*, 125 N. Y. 751, and *Harris v. Strodt*, 132 N. Y. 392. If the title to this land had actually been devolved under the will of Mrs. Stewart, and an action was brought to partition it, or to foreclose a mortgage upon it, or in some other way to change or extinguish the title, it would be the duty of the court to protect the rights

of unborn grandchildren by setting apart land or the proceeds of the land to represent in some form their interests. *Cheesman v. Thorne*, 1 Edw. Ch. 629, 6 L. ed. 271; *Mead v. Mitchell*, 17 N. Y. 210, 73 Am. Dec. 455; *Brevort v. Grace*, 53 N. Y. 245; *Monarque v. Monarque*, 80 N. Y. 820. Where an estate is vested in persons living subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate for all purposes of any litigation in reference thereto, and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, and stand, not only for themselves, but also for the persons unborn. This is a rule of convenience, and almost of necessity. The rights of persons unborn are sufficiently cared for if, when the estate shall be sold under a regular and valid judgment, its proceeds take its place and are secured in some way for such persons. *Calvert, Parties to Suits in Eq.* 48; *Mitt. Pl.* 178; 2 *Spence, Eq. Jur.* 707; 1 *Smith, Ch. Pr.* 92; *Story, Eq. Pl.* §§ 144, 148; *Wills v. Slade*, 6 Ves. Jr. 498; *Gaskell v. Gaskell*, 6 Sim. 648; *Nodine v. Greenfield*, 7 Paige, 544, 4 L. ed. 267.

But here this land did not pass under the will of Mrs. Stewart. All that these plaintiffs asked in their suit against the trustees, children, and grandchildren of Mrs. Stewart was a judgment confirming the title to the land which she had conveyed to Mr. Kent. The living parties defendant in that action were all opposed in interest to the plaintiffs, and the grandchildren belonged to and represented the class to which the unborn persons would belong. In such a case it is safe to permit the living to represent the unborn, and the unborn must be bound by the judgment confirming the title. There is no occasion for the court to make provision in the judgment for the persons not *in esse*, as [they, by the adjudication of the court, never could have any interest in the land. The general rule that no person shall be bound by an adjudication in an action to which he is in no way a party has some exceptions, and does not inexorably apply to a case where at the time of the adjudication persons are not *in esse* who may be affected thereby. In *Monarque v. Monarque*, *supra*, the parties had a vested title to the land sought to be partitioned, subject, however, to open and let in after-born children. But no notice was taken of such after-born children in the judgment, and no provision whatever was made for them, and hence it was decided that a good title could not be given to a purchaser under the sale made in pursuance of the judgment. It was held, in harmony with what I have herein stated, that a judgment and sale in partition only concludes contingent interests of persons not in being when the judgment provides for and protects such interests by substituting the fund derived from the sale of the land in place of it, and preserving the fund to the extent necessary to satisfy such interests. In that case there had been an action for the construction of the will by which the land was devolved, and to that action all the persons living who were interested were made parties, and it was there decided that the provisions of the will giving interests to persons unborn were involved, and it was held in this court

that that adjudication could not conclude or affect the persons not *in esse*, for the reason that the action was not a proper one for the construction of the will; that the court took jurisdiction of the action only by consent; and that, therefore, its adjudication bound only those who consented, and could not bind persons not in being. That case did not determine that, in a proper action for the construction of a will, persons not *in esse* could in no case be concluded by the judgment rendered therein. That they could be concluded I have no doubt, if the parties to the action properly brought were vested with the whole title, subject merely to the contingency that it might open and let in persons thereafter to be born. The adjudication in such a case, as well as that in the case brought by these plaintiffs against the trustees, children, and grandchildren of Mrs. Stewart, is in the nature of an adjudication *in rem*, and binds everybody. Therefore the title tendered to the defendant was good, and so free from any reasonable doubt that it should be compelled to perform its contract and take the title.

It is also objected, on behalf of the defendant, that the plaintiffs were not ready and

able to give a proper deed to it at the time stipulated in the second contract, to wit, within six months from the date of that contract. After the making of that contract, as the learned court found, the parties made a verbal agreement by which the defendant was to take possession of the land, and use, occupy, and enjoy the same until such time as the record title of the plaintiffs could be perfected, paying as rent therefor interest at the rate of 5 per cent on the purchase price. Under that agreement the defendant took possession of the land, and has continued in possession thereof, never having offered to surrender the same. These facts, found by the trial court, have support in the evidence, and we must take them as established and true, and they constitute in law a waiver of performance of the contract on plaintiffs' part at the time stipulated. The defendant could not retain possession of the land under the agreement, and at the same time repudiate the agreement, and refuse to take a deed tendered in pursuance thereof.

Our conclusion is that *the judgment should be affirmed*, with costs.

All concur, except **Andrews, J.**, absent.

MICHIGAN SUPREME COURT.

Timothy MAHONEY, Plff. in Err.,
v.

DETROIT STREET R. CO.

(.....Mich.....)

A passenger who fails to ask or obtain any written transfer or other evidence of his right to ride in a street-car which he enters after leaving one in which he has paid fare may be lawfully ejected if he refuses to pay fare therein and the conductor is not obliged to take the passenger's statement as evidence of his right to ride.

(December 2, 1892.)

ERROR to the Circuit Court for Wayne County to review a judgment allowing plaintiff only nominal damages in an action brought to recover damages for an alleged wrongful ejection of plaintiff from defendant's cars. *Affirmed.*

The facts are stated in the opinion.

Mr. James H. Pound, for plaintiff in error:

Upon plaintiff resting his case, the defendant by its counsel moved for a directed verdict in his favor, on the ground that the conductor of the first car of the defendant had no power to allow plaintiff to get off his car and pledge the defendant to carry plaintiff further.

Hufford v. Grand Rapids & I. R. Co., 6 Mich. 681, is an authority on the contrary holding that the record in this case presents a question for a jury to be determined inquest of damages.

See also *Hamilton v. Third Ave. R. Co.*, N. Y. 25.

Mr. John C. Donnelly, with **Mr. Sidney T. Miller**, for defendant in error:

Conceding for the purposes of the argument that a technical trespass and right of action existed, the circuit judge in his charge to the jury was clearly right.

Chandler v. Allison, 10 Mich. 480; *Allison v. Chandler*, 11 Mich. 542.

A passenger who has no ticket or other token showing him to be entitled to a ride may be ejected by a carrier, and cannot recover damages for the ejection.

Peabody v. Oregon R. & Nav. Co. 21 Or. 121; *MacKay v. Ohio River R. Co.* 9 L. R. A. 182, 84 W. Va. 65; *Hall v. Memphis & O. R. Co.* 15 Fed. Rep. 57; *Bradshaw v. South Boston R. Co.* 185 Mass. 408, 46 Am. Rep. 481; *Pine v. St. Paul City R. Co.* (Minn.) 16 L. R. A. 347.

This is so, although the passenger claims that he has given his ticket up or paid fare to another conductor, as "conductors of street-cars cannot be required to take the mere word of a passenger that he is entitled to be carried by reason of having paid his fare to the conductor or of another car."

NOTE.—For cases as to street railway transfers, see *Heffron v. Detroit City R. Co.* (Mich.) 16 L. R. A. 345; *Pine v. St. Paul City R. Co.* (Minn.) 16 L. R. A. 347.

For the rule of passenger travel, here applied to street railways, that a passenger's right to ride as between him and the conductor must be determined by the face of his ticket, see *Poulin v. Canadian Pac. R. Co.* 17 L. R. A. 800; *MacKay v. Ohio River R. Co.* 9 L. R. A. 182, and note, 84 W. Va. 65; *Peabody v. Oregon R. & Nav. Co.* 12 L. R. A. 823, and note, 21 Or. 121; *Kansas City, M. & B. R. Co. v. Riley*, 13 L. R. A. 83, 68 Miss. 765.

Bradshaw v. South Boston R. Co. supra; *Frederick v. Marquette, H. & O. R. Co.* 37 Mich. 343, 26 Am. Rep. 581.

The plaintiff frequently rode in street-cars in Detroit and knew their customs; knowing their customs and being asked by the conductor for an additional fare, it was his duty as a citizen of Detroit, and therefore interested in its good government, not to make trouble, but to pay the additional fare and ask the company for it afterward.

Hall v. Memphis & O. R. Co. and Peabody v. Oregon R. & Nav. Co. supra. See also *Shelton v. Lake Shore & M. S. R. Co.* 29 Ohio St. 214.

Grant, J., delivered the opinion of the court:

Plaintiff entered one of defendant's cars on Michigan avenue, going west, intending to go to Thirty-Third street. He paid his fare, five cents, to the conductor. The car he took did not go to Thirty-Third street, but stopped at defendant's barns, near the railroad crossing. This was near the city limits, and it appears that only certain cars went the entire distance. Upon the stoppage of the car the driver unhitched his horses, and was driving them to the opposite end, when plaintiff, perceiving this, said to the conductor that he desired to go further. To this the conductor replied, "You can go back in this car, and take the next car up, or get off here, and take the next car up." Plaintiff decided to get off there. A car soon came from the barns, and started westward. Some employé of the road asked him if he was going on that car, meaning evidently to ask whether he intended to return to the city on the same car. The terminus of the road was but a short distance from the barns, and plaintiff's destination was only five blocks from where he alighted from the first car. Plaintiff replied, "No;" that he had come up on another car. He was then informed that he would have to pay. This he declined to do. Meanwhile the car had gone about two blocks. He was then told that he must pay or get off. One of plaintiff's employés then approached him, took him by the lapel of his coat, and thereupon he alighted from the car. No force was in fact used other than this, and plaintiff claims no injury except to his feelings. Plaintiff did not ask for a "change off" from the first conductor, nor did the conductor offer him one. Plaintiff brought an action of tort to recover for his alleged unlawful and forcible ejection from the car. The learned court sustained his right of recovery, and directed a verdict for nominal damages, holding that it was the plaintiff's duty to pay his fare, and save any injury to his feelings.

It is insisted by the plaintiff that he had a valid contract for carriage from the point where he took the car to Thirty-Third street, and that his ejection from the car was therefore unlawful and tortious. If it be granted that he had such a contract, still he had no evidence of it except his own statement, and the question is, What was his duty under the circumstances? If the conductor were under legal obligation to accept his statement that he had such a contract, then his removal was un-

lawful; otherwise it was not. Counsel has cited no authority, nor have I found one, which holds that a stranger may enter the car of either a railway or street-car company without any evidence that he has paid his fare, and secure passage, by his own statement to the conductor that he has previously paid it to some other authorized agent. It is the duty of the passenger to secure evidence of such payment, or to pay when his fare is demanded. The business of such companies cannot be carried on upon any other basis. This certainly is common sense and experience. Plaintiff's counsel cites the following authorities in support of his position: *Hufford v. Grand Rapids & I. R. Co.* 64 Mich. 631; *Hamilton v. Third Ave. R. Co.* 58 N. Y. 25; *Carsten v. Northern Pac. R. Co.* 44 Minn. 454, 9 L. R. A. 688; *Pennsylvania Co. v. Bray*, 125 Ind. 280; *Lake Erie & W. R. Co. v. Fize*, 88 Ind. 384, 45 Am. Rep. 464; *Toledo, W. & W. R. Co. v. McDonough*, 53 Ind. 259; *Palmer v. Charlotte, O. & A. R. Co.* 8 S. C. 580; *Burnham v. Grand Trunk R. Co.* 68 Me. 298, 18 Am. Rep. 230; *Eddy v. Rider*, 79 Tex. 57; *Erie R. Co. v. Winter*, 143 U. S. 60, 36 L. ed. 71. An examination of these cases shows that in all except *Hamilton v. Third Ave. R. Co.* the plaintiff had procured and showed to the conductors either tickets or stop-over checks, showing that they had paid their fare, and the disputes arose over the right to ride upon such checks or tickets. It is unnecessary to review these authorities. In *Hamilton v. Third Ave. R. Co.* the plaintiff was transferred from one car to another by the conductor, the first car, for some reason, not going through to the passenger's destination. It does not appear just how the transfer was made, but it is quite apparent that when the cars were near together the transfer of passengers was made, and the dispute was whether plaintiff was one of the passengers so transferred. In that case no evidence of transfer was required except the knowledge of the second conductor, whose duty it was to see and know who were so transferred. Under those circumstances, the passenger had the undoubted right to insist upon his passage without further payment. If plaintiff had purchased a "change off" or transfer, and lost it, or if he had purchased a ticket and lost it, or if either had been accidentally destroyed, it would be absurd to hold that he was entitled to a ride upon stating to the conductor that he had such transfer or ticket, but had lost it, or that it was accidentally destroyed. It is apparent that in the present case plaintiff possessed no other or different right from that which he would have possessed had he procured evidence of payment which had been lost or destroyed. In the one case his contract to ride would be complete, but the only written evidence he had would be lost; while in the other his contract might be equally good, but he had neither asked nor obtained any evidence thereof, to show to the conductor in charge of the other car or train, which must serve as a voucher in his settlement with the company. It is a novel doctrine that one may compel the agent of another to accept without question, and without opportunity to investigate, his verbal statement that he has a contract with his prin-

cipal, and especially where frequent frauds upon the principal must inevitably result as the consequence of such a doctrine. It was the plaintiff's reasonable and clear duty to pay his fare, and seek redress from the defendant for a violation of his contract.

In the case of *Frederick v. Marquette, H. & O. R. Co.*, 37 Mich. 342, 26 Am. Rep. 531, Justice Marston said: "There is but one rule which can safely be tolerated with any decent regard to the rights of railroad companies and passengers generally. As between the conductor and passenger, and the right of the latter to travel, the ticket produced must be conclusive evidence, and he must produce it when called upon, as the evidence of his right to the seat he claims."

In *Hufford v. Grand Rapids & I. R. Co.*, *supra*, plaintiff paid his fare. The language of the court in that case, that "it was the duty of the conductor to accept the statement of the plaintiff until he found out that it was not true," must be held to apply to the circumstances of that case, where the plaintiff had a ticket. That statement would be most unreasonable in the case of one having no ticket. Several authorities in support of the rule above stated will be found cited in *Frederick v. Marquette, H. & O. R. Co.* The rule, and the reason therefor, are very ably stated in *Bradshaw v. South Boston R. Co.*, 135 Mass. 407, 46 Am. Rep. 481, and are also supported by the following cases: *Yorton v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 234, 41 Am. Rep. 28, and authorities there cited; *Peabody v. Oregon R. & Nav. Co.* 21 Or. 121; *MacKay v. Ohio River R. Co.* 34 W. Va. 65, 9 L. R. A. 132.

Inasmuch as the court should have directed a verdict for the defendant, it is unnecessary to discuss the question of damages.

Judgment affirmed.

The other Justices concurred.

PEOPLE of the State of Michigan, to Use of
Joseph W. CHADDOCK *et al.*, *Piffs.*

in Err.,
v.

Robert D. BARRY *et al.*

(.....Mich.....)

1. The day of service may be excluded and the return day included in computing the six days before the time of appearance required by How. Stat., § 6827, for the service of a summons.

2. A justice's judgment is not open to collateral attack because his docket does not affirmatively show that he waited one hour on an adjourned day for defendant to appear.

(December 2, 1892.)

ERROR to the Circuit Court for Missaukee County to review a judgment in favor of

NOTE.—For the general rules as to computation of time, see *notes to Seward v. Hayden* (Mass.) 5 L. R. A. 84; *Pearce v. Denver* (Colo.) 6 L. R. A. 541; *Kuhn v. Brownfield* (W. Va.) 11 L. R. A. 700; *Merritt v. Mora* (Pa.) 11 L. R. A. 724; also the case of *State v. Mounts* (W. Va.) 15 L. R. A. 242.
18 L. R. A.

defendants in an action brought upon a sheriff's bond to recover the amount which plaintiffs were alleged to have been damaged by reason of the failure of the sheriff to properly execute certain process. *Reversed.*

Joseph W. Chaddock and Hiram A. DeLano commenced a suit against John H. Eppink and William Kohlman, before a justice of the peace. They recovered a judgment a transcript of which was duly filed in the office of the clerk of the circuit court. They thereupon issued an execution which was delivered to a deputy sheriff and returned unsatisfied. Plaintiffs then brought suit upon the sheriff's bond claiming that during the life of the execution defendant Eppink had property, both real and personal, in the county which could have been applied in satisfaction of the execution. The sheriff defended on the ground that the justice's judgment was void for the reasons stated in the opinion.

Mr. Philip Padgham, for plaintiffs in error:

Under S. Laws 1840, p. 53, where a writ of attachment was to be served "three days at least before the return day thereof," it was held that three full days were meant. But this was on the authority of Mich. Rev. Stat. 1838, part 1, title 1, chap. 1, § 8, subd. 2.

Douman v. O'Malley, 1 Dougl. 450.

Under Comp. Laws, § 4997, where a summons was required to be served "at least two days before the return day thereof" the return day was excluded.

Sallee v. Ireland, 9 Mich. 154.

Under the charter of the city of Grand Rapids (Laws 1871, vol. 2, p. 883, title 6, § 5,) which provided that notice to open a street was to be served and return to be made "at least six days before the day appointed in said resolutions for the hearing of said petition," it was held there must be six "clear days."

Re Powers, 29 Mich. 504.

Under Laws 1875, p. 92, § 1253, notice of meeting to determine on the necessity of a highway was to be served "at least ten days before the time of said meeting." Held, that required ten full days.

People v. Clay Twp. Highway Comrs. 88 Mich. 247; *Coquard v. Boehmer*, 81 Mich. 445; *Cox v. Hartford Highway Comrs.* 83 Mich. 193.

Under Mich. Act 140 of Laws of 1875, a drain commissioner was to serve notice of examination of application "at least five days before the day appointed as aforesaid." Held, five clear days were required.

Lane v. Burnap Drain Comrs. 89 Mich. 786; *Taylor v. Burnap Drain Comrs.* Id. 789.

Where notice of condemnation proceedings were required to be published, the first publication to be "at least thirty days before the time fixed for the application," it was held that last day was excluded, as the settled rule in condemnation proceedings.

Rifenburg v. Muskegon, 88 Mich. 279.

Under How. Stat., § 6840,—writ of attachment to be served "at least six days before the

For computation when last day falls on Sunday, see *Brown v. Vailes*, 14 L. R. A. 120, and *note*, 16 Colo. 462, also *Hirshfield v. Ft. Worth Nat. Bank*, 15 L. R. A. 639, 88 Tex. 452.

As to what constitutes a legislative day, see *White v. Hinton* (Wyo.) 17 L. R. A. 66.

return thereof,"—it was held in the following cases that the last day was included:

Withington v. Southworth, 26 Mich. 881; *Town v. Tabor*, 84 Mich. 262; *Brown v. Williams*, 89 Mich. 755; *Hubbell v. Rhinesmith*, 85 Mich. 80.

But in *White v. Prior*, 88 Mich. 647, it was held that the last day should be excluded.

Under How. Stat., § 6827, the section involved in this case, it has been held that the last day is excluded.

Isabelle v. Iron Cliffs Co. 57 Mich. 120. See also *Everts v. Fisk*, 44 Mich. 516.

Under Comp. Laws 1857, § 4245, which provided that notice of an application be served "at least ten days before the making of such application," it was held that last day was included.

Arnold v. Nye, 23 Mich. 286; *Eaton v. Peck*, 26 Mich. 57; and the reasoning in *Warren v. Slade*, 23 Mich. 1, 9 Am. Rep. 70.

The only possible way to reconcile these decisions is to follow the opinion of *Justice Cooly* in *Arnold v. Nye*, *supra*, and consider the wording of the statute. The rule to be observed is clearly laid down in the case of *Columbia Turnpike Road v. Haywood*, 10 Wend. 424, where a distinction was made between a statute requiring a notice to be served at least fourteen days before the first day of the court, and requiring a summons to be sent at least six days before the time of appearance. The court says that the former statute excludes the first day of the court, "which our rules and the general rules of construction include." The distinction made is practically this: Where an act is to be done a certain number of days before a day stated, then that day is excluded in the computation; but where an act is to be done a certain number of days before another act, then the day on which that act is to be done is included.

The day before which an act is to be done is to be excluded.

Bailey v. Lubke, 8 Mo. App. 60; *Small v. Edrick*, 5 Wend. 188; *Charles v. Stansbury*, 8 Johns. 261; *Ball v. Mander*, 19 How. Pr. 468; *Columbia Turnpike Road v. Haywood*, 10 Wend. 424; *Eaton v. Peck*, *Withington v. Southworth*, *Town v. Tabor*, *Brown v. Williams* and *Hubbell v. Rhinesmith*, *supra*.

Mr. C. P. Thomas, for appellees:

The summons was returnable on the 18th day of February, and was served on the 12th. This service was void for our court has held that the day of service and also of return must be excluded in computing the time of service.

Isabelle v. Iron Cliffs Co. 57 Mich. 120.

Long, J., delivered the opinion of the court:

This cause was tried in the circuit court before a jury. The suit was on a sheriff's bond; but the only question in controversy here is upon a justice's summons, which was introduced in evidence, and upon which the rights of the parties depend. The summons was issued February 9, 1889, returnable February 18. It was served upon one of the defendants in the summons named February 12. It is claimed upon the part of the defendants that both the day of service and the return day should be excluded, and that, so excluding 18 L. R. A.

both days, no sufficient service was had to give the justice jurisdiction. How. Stat., § 6827, provides: "The summons shall in all cases, except as hereinafter otherwise provided, be served at least six days before the time of appearance mentioned therein." If this statute provides for six days exclusive of the day of service and the day of return, it was not properly served, and the justice did not acquire jurisdiction. If, on the contrary, either of these days is to be included in the computation of time, then it was properly served, and the justice had jurisdiction. It is claimed that there is great confusion in the cases heretofore decided by this court upon this question, but we think, if the proper rule in the construction of the statutes is kept in mind, this confusion is not so apparent. The rule was laid down in *Columbia Turnpike Road v. Haywood*, 10 Wend. 423, which was followed by this court in *Arnold v. Nye*, 23 Mich. 286, and that rule has since been adhered to, or at least it is apparent that this court has attempted to keep within that rule. In *Columbia Turnpike Road v. Haywood*, *supra*, the rule is that, in determining the time within which process or notice must be served, the language of the statute must be observed; and, where an act is to be done a certain number of days before a day stated, then that day is excluded in the computation, but, where an act is to be done a certain number of days before another act, then the day on which that act is to be done is to be included. The summons was therefore served within the time required by the statute, and gave the justice jurisdiction. Under the Act of 1875, pertaining to public drains, the commissioner is required to serve notice of examination of the application at least five days before the day appointed as aforesaid. Act No. 140, Laws 1875. In *Lane v. Burnap Drain Comrs.* 39 Mich. 786, and *Taylor v. Burnap Drain Comrs.* 40 Mich. 789, it was held that five clear days were required. It has also been held by this court that in proceedings to lay out highways the statute requiring that notices of meeting, to determine the necessity of a highway, must be served at least ten days before the time of said meeting, requires ten full days. *People v. Clay Turp. Highway Comrs.* 88 Mich. 247; *Coquard v. Boehmer*, 81 Mich. 445; *Coz v. Hartford Highway Comrs.* 88 Mich. 193; *Risenburg v. Muskegon*, 83 Mich. 279. It is held under How. Stat., § 6840, requiring writs of attachment to be served at least six days before the return thereof, that the last day is to be included. *Hubbell v. Rhinesmith*, 85 Mich. 80, and cases there cited. It is also held, under section 4245, Comp. Laws 1857, authorizing a commissioner to take depositions, which provides that notice shall be given to the adverse party at least ten days before the making of such application, that the day of service is to be excluded, and the day on which the application is to be made is included. *Arnold v. Nye*, *supra*. See also *Eaton v. Peck*, 26 Mich. 57, and *Warren v. Slade*, 23 Mich. 1, 9 Am. Rep. 70. We think the rule as laid down in *Arnold v. Nye*, *supra*, which adopted the rule of the New York court in *Columbia Turnpike Road v. Haywood*, *supra*, has not been intentionally departed from in the subsequent cases of this court, and that

the true construction of this statute includes the return day, mentioned in the summons in the computation of time.

As the rule in *Columbia Turnpike Road v. Haywood*, *supra*, must hereafter be followed, we note the language of that court in which it is said: "Our rule is well settled that, when days are mentioned in the statutes of our own rules, they are to be reckoned one exclusive and one inclusive. Thus a notice of argument is a notice of eight days. If the term commences on the 9th of the month, the service must be on the 1st. If you include in the computation the day of notice, you will have eight days, excluding the first day of the term; if you exclude the day of service, you include the first day of term; so, when six days' service of a summons are required and it is returnable on the 8th, the service on the 2d is good. This rule of construction is said by defendant's counsel to be inconsistent with the decision in *Small v. Edrick*, 5 Wend. 187; but it will be seen the phrasology of the two statutes under which the questions arose is different. The one requires the summons to be served at least six days before the time of appearance; the other requires notice to be served at least fourteen days before the first day of the court. The latter excludes the first day of the court, and therefore requires fourteen days,—one exclusive and one inclusive, excluding the first day of the court, which our rules and the general rules of construction include. That case is therefore an exception to the general rule, and is so from the terms of the statute. There was no error in the justice's court in this part of the case." In that case the justice summons was served on the 2d day of April, in the afternoon, and was returnable on the 8th day of April, at 10 o'clock in the forenoon. *Isabelle v. Iron Cliffs Co.*, 57 Mich. 125, which defendants' counsel relies upon as sustaining his position as holding that the day of service and the return day must be excluded in computing the time, must be overruled if at variance with the above rules of construction of the statute; but the learned justice who wrote that case was giving construction to a statute relative to the service and return of a writ of attachment. The officer making service in that case was unable to find the defendant within his bailiwick, and it was held that the case fell within the rule laid down in *Town v. Tabor*, 34 Mich. 262. We are aware that in a

note to the fourth edition of *Tiffany's Justice Guide*, under title of *Summons*, p. 81, the learned judge who revised that edition carries the impression that the rule has been settled in this state that both the day of service and the return day of the justice summons are to be excluded in the computation of time. He says, as supporting that contention, that, when an act is to be done before a specified time or day, that day is to be excluded in computing the time for complying with the requirement, and cites the cases of *Sallee v. Ireland*, 9 Mich. 154, and *Re Powers*, 20 Mich. 504; *People v. Clay Twp. Highway Comrs.*, 38 Mich. 247; also one case from New York, and two late cases from Massachusetts. He also says, "It is ruled in this state that the day of service is to be excluded," citing the cases above referred to, together with *Lane v. Burnap Drain Comrs.*, and *Taylor v. Burnap Drain Comrs.*, *supra*, and the case of *Arnold v. Nye*, *supra*. It is evident from this that the rule laid down in *Columbia Turnpike Road v. Haywood*, cited with approval in *Arnold v. Nye*, was lost sight of, as many of the cases cited in support of the rule laid down in the note arose under quite different statutes from the one in controversy here. We have examined the cases with considerable care, in order to deduce the proper rule of construction of this statute, so that in the future it cannot be said that there is confusion in the cases; and the rule hereafter must be adhered to under this statute, excluding the day of service and including the return day, in the computation of time.

It is also claimed that the judgment of the court below should not be disturbed, for the reason that the docket entry of judgment put in evidence does not show affirmatively that the justice, on the adjourned day of the cause, waited one hour for the defendants to appear. This point is ruled by *Smith v. Brown*, 34 Mich. 455. Had an attack been made upon the judgment in a direct proceeding for that purpose, this defect would have been error. *Bossence v. Jones*, 46 Mich. 492; *Noyes v. Hillier*, 65 Mich. 636. But the judgment was not attacked except in this collateral way, and the defect is not jurisdictional, as held in the above case.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

MISSOURI SUPREME COURT (2d Div.).

HENRY GAUS & SONS MANUFACTURING CO., *Appt.*,

v.

ST. LOUIS, KEOKUK & NORTHWESTERN R. CO., *Resp't.*

(.....Mo.....)

The construction and operation of a steam railroad along a street on the

established grade under proper municipal authority does not constitute such an application of the street to a new public use as requires payment of compensation for damages to the owner of abutting lots.

(December 12, 1892.)

A PPEAL by plaintiff from a judgment of the St. Louis Circuit Court in favor of the defendant in a suit brought to enjoin defend-

NOTE.—As to what constitutes an additional servitude on a public street, on which question the Missouri decisions are against those in most of the 18 L. R. A.

states, see note to *Western Ry. of Ala. v. Alabama Grand Trunk R. Co.* (Ala.) 17 L. R. A. 474.

See also 26 L. R. A. 246.

ant from laying its tracks and operating its road along a street in front of plaintiff's property without making compensation to it. *Affirmed.*

The facts are stated in the opinion.

Messrs. Mills & Flitcraft, for appellant:

The Missouri Constitution of 1875, art. 2, § 21, requires compensation to be paid in advance to owners for such damages to property as were previously considered consequential, and included therein damages to property caused by construction of steam railroads in streets.

Rude v. St. Louis, 93 Mo. 416; *Chicago v. Taylor*, 125 U. S. 161, 31 L. ed. 638; *Chicago & W. I. R. Co. v. Ayres*, 106 Ill. 518; *Dupuis v. Chicago & N. W. R. Co.* 115 Ill. 97; *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 208; *Chicago, B. & N. R. Co. v. Bowman*, 122 Ill. 595; *Calumet River R. Co. v. Moore*, 124 Ill. 329; *Centralia & O. R. Co. v. Brakes*, 125 Ill. 393; *Atchison, T. & S. F. Co. v. Schneider*, 2 L. R. A. 422, 127 Ill. 144; *Lake Erie & W. R. Co. v. Scott*, 8 L. R. A. 330, 132 Ill. 429; *Johnson v. Parkersburg*, 16 W. Va. 402, 87 Am. Rep. 779; *Hutchinson v. Parkersburg*, 25 W. Va. 226; *Spencer v. Pt. Pleasant & O. R. Co.* 23 W. Va. 406; *Arbuz v. Wheeling & H. R. Co.* 5 L. R. A. 871, 83 W. Va. 1; *Reading v. Althouse*, 98 Pa. 400; *Pusey v. Allegheny*, 98 Pa. 526; *Philadelphia & R. R. Co. v. Gets*, 118 Pa. 214; *Pittsburgh, V. & C. R. Co. v. Vance*, 115 Pa. 335; *Auman v. Philadelphia & R. R. Co.* 183 Pa. 98; *Pennsylvania R. Co. v. Miller*, 182 U. S. 75, 33 L. ed. 267; *Hot Springs R. Co. v. Williamson*, 45 Ark. 429; *Montgomery v. Townsend*, 80 Ala. 489; *Columbus & W. R. Co. v. Witherow*, 82 Ala. 195; *Gottschalk v. Chicago, B. & Q. R. Co.* 14 Neb. 550; *Republican Valley R. Co. v. Fellers*, 16 Neb. 169; *Omaha & N. P. R. Co. v. Janeczek*, 30 Neb. 276; *Omaha Horse R. Co. v. Cable Tramway Co.* 80 Fed. Rep. 832, 33 Fed. Rep. 689; *Blanchard v. Kansas City*, 16 Fed. Rep. 444; *Werth v. Springfield*, 78 Mo. 107; *McElroy v. Kansas City*, 21 Fed. Rep. 257; *Householder v. Kansas City*, 88 Mo. 494; *Julia Bldg. Asso. v. Bell Teleph. Co.* 88 Mo. 256; *Sheehy v. Kansas City Cable R. Co.* 94 Mo. 579; *Kansas City, St. J. & C. B. R. Co. v. St. Joseph Terminal Co.* 97 Mo. 457; *Gulf, C. & S. F. R. Co. v. Eddins*, 60 Tex. 668; *Story v. New York Elec. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146; *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268; *Abendroth v. Manhattan R. Co.* 11 L. R. A. 634, 122 N. Y. 1; *Kane v. Metropolitan Elev. R. Co.* 11 L. R. A. 640, 125 N. Y. 164; *Denver v. Bayer*, 7 Colo. 118; *Mollandin v. Union Pac. R. Co.* 14 Fed. Rep. 894; *Frankle v. Jackson*, 30 Fed. Rep. 398; *Denver Circle R. Co. v. Nestor*, 10 Colo. 408; *Denver & R. G. R. Co. v. Bourne*, 11 Colo. 59; *Gulf, C. & S. F. R. Co. v. Fuller*, 63 Tex. 487; *Texas & N. O. R. Co. v. Goldberg*, 63 Tex. 688; *Gainesville, H. & W. R. Co. v. Hall*, 9 L. R. A. 298, 78 Tex. 169; *Atlanta v. Green*, 67 Ga. 886; *Guess v. Stone Mountain G. Co.* 72 Ga. 820; *Weyl v. Sonoma Valley R. Co.* 69 Cal. 202; *Adams v. Chicago, B. & N. R. Co.* 1 L. R. A. 493, 39 Minn. 236.

The owner of an abutting lot has a special interest in the street distinct in kind and in addition to that enjoyed by the public in general. Interference with the right of ingress and egress, light, air, access by customers, by

teams and vehicles, and the use of the enjoyment of the street is a damage peculiar to the owner, and protected by the Constitution.

Rude v. St. Louis, *supra*; *McQuaid v. Portland & V. R. Co.* 18 Or. 237; *Pittsburgh, V. & C. R. Co. v. Vance*, *supra*; *Dill. Mun. Corp.* §§ 730-734; *Lackland v. North Missouri R. Co.* 31 Mo. 186, 34 Mo. 274.

Where buildings have been erected, adapted to a particular purpose, and a public improvement is made, which injuriously affects the property and reduces its market value, such a damage is for public use, and requires compensation to be made.

Chicago v. Taylor, 125 U. S. 161, 31 L. ed. 638; *Calumet River R. Co. v. Moore*, 124 Ill. 329; *Chicago, B. & N. R. Co. v. Bowman*, 122 Ill. 595; *Dupuis v. Chicago & N. R. Co.* 115 Ill. 97; *Centralia & C. R. Co. v. Brakes*, 125 Ill. 393; *Atchison, T. & S. F. R. Co. v. Schneider*, 2 L. R. A. 422, 127 Ill. 144; *Philadelphia & R. R. Co. v. Gets*, 118 Pa. 214; *Pittsburgh, V. & O. R. Co. v. Vance*, *supra*; *Laftin v. Chicago, W. & N. R. Co.* 33 Fed. Rep. 415, 34 Fed. Rep. 859.

Damage to property caused by dust, smoke, noise and vibration produced by steam railroads in streets are elements of damage to be considered.

Adams v. Chicago, B. & N. R. Co. 1 L. R. A. 493, 39 Minn. 236; *Gainesville, H. & W. R. Co. v. Hall*, 9 L. R. A. 298, 78 Tex. 169; *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 208; *Lewis, Em. Dom.* § 230; *Mills, Em. Dom.* 2d ed. § 193.

The proper remedy is an injunction, until the damage to plaintiff's proprietary rights is ascertained and paid.

Carpenter v. Grisham, 59 Mo. 247; *McPike v. West*, 71 Mo. 199; *McElroy v. Kansas City*, 21 Fed. Rep. 257; *Columbus & W. R. Co. v. Witherow*, 82 Ala. 195; *Weyl v. Sonoma Valley R. Co.* 69 Cal. 202; *Macon v. Harris*, 75 Ga. 761; *Georgia, S. & F. R. Co. v. Ray*, 84 Ga. 376; *Cox v. Louisville, N. A. & O. R. Co.* 48 Ind. 194; *Terre Haute & S. R. Co. v. Rodol*, 89 Ind. 129; *Midland R. Co. v. Smith*, 118 Ind. 233; *Harrington v. St. Paul & S. C. R. Co.* 17 Minn. 215; *Wagner v. Railway Co.* 38 Ohio St. 32; *Jarden v. Philadelphia, W. & B. R. Co.* 3 Whart. 502; *Verona's App.* 108 Pa. 83; *Monmouth County Freeholders v. Red Bank & H. Turnp. Co.* 18 N. J. Eq. 91; *Mettler v. Easton & A. R. Co.* 25 N. J. Eq. 214; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316; *Forsyth v. Wheeling*, 19 W. Va. 818; *Mason City S. & M. Co. v. Mason*, 23 W. Va. 211; *Mills, Em. Dom.* 2d ed. § 180; *Republican Valley R. Co. v. Fink*, 18 Neb. 87; *Hull v. Chicago, B. & Q. R. Co.* 21 Neb. 371; *Kittell v. Missisquoi R. Co.* 56 Vt. 96; *Phillips v. South Park Comrs.* 119 Ill. 627; *Chicago, St. L. & W. R. Co. v. Gates*, 120 Ill. 86.

Mr. John G. Chandler for respondent.

Macfarlane, J., delivered the opinion of the court:

This suit is to enjoin defendant from laying a track and operating a railroad laterally along Main street, in the city of St. Louis, in front of the property of plaintiff, until compensation for damages thereto should be ascertained and paid. Upon a trial in the circuit court plaintiff's petition was dismissed, and it appealed. A preliminary in-

junction, which was granted at the beginning of the suit, was dissolved, and the road had been built and was in use when the case was tried. The petition charged, and the evidence showed, that Main street is, and for many years has been, an improved, graded, guttered, curbed, and paved public highway, running north and south through the city of St. Louis. That plaintiff owns the entire block fronting on Main street between Clinton and Madison streets, and has thereon a two-story and basement factory, having a front of 240 feet by a depth eastwardly of 130 feet, which was erected for the special purpose of, and was adapted by its construction to use as, a planing mill, sash, door, blind, and box factory, and was used as such; that the building fronts on Main street, and is so constructed that the only front which is adapted for receiving and shipping lumber from the street is the Main street front; that the building is constructed with doors and driveways opening on Main street, for the purpose of receiving lumber and shipping out the product of its said factory; that Main street has a width of 80 feet; that the Merchants' Terminal Railroad Company has also a double-track railway along said street, the easternmost rail being within 15½ feet of the curb in front of the factory; that plaintiff and its customers had theretofore had free access to said factory by driving wagons and other vehicles over Main street to its front, and, for the purpose of carrying thither or removing therefrom lumber or mill work, have been able to enter said premises from Main street front by means of doors and entrances provided, and have been able to have wagons and vehicles stand on the street, in front of the factory, for the purpose of receiving and discharging lumber and mill work; that there is in front of said premises a sidewalk, made of plank and cinders, 15 feet wide from the building line to the curb of the street; that the defendant threatened and was about to occupy and obstruct said street by laying thereon in front of said factory, and operating by steam locomotives thereon, double tracks, thereby permanently obstructing said street, and not leaving space between the track and the building sufficient to permit of standing wagons and other vehicles, without constant danger of collision with engines and cars passing to and fro over said tracks, all of which would wholly destroy the use of the street as a thoroughfare, and tend to the manifest wrong and injury of plaintiff, and damage of its said property. The damage to the property, as charged, consisted in the prevention of free ingress and egress to and from the streets, noise and smoke, damage from fires, shaking and vibration of building; all caused by the passage of engines and cars over the street in such proximity to the premises. Defendant answered, setting up authority by virtue of an ordinance of the city granting it the license and right to construct a double-track railroad along Main street. The ordinance required that the tracks should conform to established grades of the street crossed and occupied. The ordinance and its provisions were not denied. The evidence satisfies us that the

tracks were built in a careful and skillful manner, and in compliance with the requirements of the ordinance.

1. We are satisfied from an examination of the evidence that plaintiff's property has been somewhat depreciated in value by reason of the construction of the railroad along the street, and the movements of engines and trains thereon. The inquiry to be made is whether the damages thus inflicted are such as are contemplated by section 21, art. 2, of the state Constitution, which ordains "that private property shall not be taken or damaged for public use without just compensation." It is not claimed by plaintiff that there was any physical injury done to their property, or that their possession was disturbed. It was also shown to our satisfaction, or conceded under the pleadings, that Main street was dedicated without restrictions to general use as a highway; that defendant was authorized, by the charter and ordinance of the city, to lay its tracks along said street, and to move thereon cars, propelled by steam locomotives, for the transportation of persons and property; and that the track was laid on the established grade of the street, and was constructed in a careful and skillful manner, and in strict compliance with the requirements of the ordinance. On the other hand, it must be conceded by defendant, because it is too well settled to admit of question, that every owner of a lot abutting on a public street decides the ownership of the property itself, has rights appurtenant thereto, which form a part of the estate. Those rights are said to be "as much property as the lot itself." Of these may be named an easement for the free admission of light and pure air, and the right of ingress and egress to and from his property. *Rude v. St. Louis*, 98 Mo. 418; *Lackland v. North Missouri R. Co.* 81 Mo. 188; *Story v. New York Elev. R. Co.* 90 N. Y. 145; *Adams v. Chicago, B. & N. W. R. Co.* 89 Minn. 286, 1 L. R. A. 493; *Grand Rapids & I. R. Co. v. Heisel*, 88 Mich. 62, 31 Am. Rep. 306.

In the last case cited the right is well expressed as follows: "Every lotowner has a peculiar interest in the adjacent street, which neither the local nor general public can pretend to claim; a private right in the nature of an incorporeal hereditament, legally attached to his contiguous ground; an incidental title to certain facilities and franchises which is in the nature of property, and which can no more be appropriated against his will than any tangible property of which he may be the owner." Depriving the owner of these incorporeal hereditaments, or interfering with their full enjoyment, by appropriating the street to a new and different public use from that originally contemplated, would undoubtedly be a damage within the foregoing constitutional provision. In the *Van De Vere Case*, 107 Mo. 91, the question as to what would constitute a damage where there was no physical invasion of the property itself was very carefully considered by this court. After quoting approvingly the views of some of our most eminent text-writers, the court, speaking through Judge Black, of the right of one to recover dam-

ages, said: "What we do say is this: that he must show that the property itself, or some right or easement connected therewith, is directly affected, and that it is specially affected." We think a public use which would interfere with these incorporeal rights, whereby the property was depreciated in value, would be a damage to the property, within the meaning of the Constitution, and would entitle the owner to compensation.

2. The vital question in this case we do not think turns upon the character of the rights of plaintiff which were interfered with, but whether there was an interference at all. In other words, the question is whether laying the railroad track in the street on grade, under municipal authority, and operating the road in the usual manner, was applying the street to a new public use, which required the payment of compensation for damages to the property, or whether doing so was merely exercising by authority a right which had resided with the public since the dedication of the land to public uses. When land is dedicated generally, and without restrictions, or condemned, for a public street in a town or city, the owner of the abutting lots, who secures the benefit of the street, and persons also who purchase and improve property thereon, hold their property rights subject to all the uses to which the street can be lawfully subjected by the public. New uses in the improvement in the mode of travel and transportation are constantly arising. When there is no restriction on the public use, new modes of use may be adopted which are consistent with the proper use of the street, without the consent of abutting owners, though such new uses may interfere somewhat with their own convenient use of the street. *Judge Norton*, expressing the opinion of a majority of this court in a recent case, says: "I think it may be safely affirmed that all the authorities to which we have been cited by counsel on both sides of this case agree that when the public acquires a street, either by condemnation, grant, or dedication, it may be applied to all uses consistent with, and not subversive of, the proper uses of a street, and not inconsistent with the uses contemplated in the dedication, grant, or condemnation; and that it is only when the street is subjected to a new servitude, inconsistent with and subversive of its use as a street, that the abutting owner can complain." *Julia Bldg. Assn. v. Bell Teleph. Co.* 88 Mo. 273.

3. There has been great diversity of opinion among the courts of this country as to whether, though under proper legislative authority, laying a track on the established grade, and operating a steam railroad thereon, in the transaction of commercial business, along a street, is subjecting the street to a public use not contemplated in a general grant or dedication. Whatever the rule may be elsewhere, this court has been uniform in holding that such a use is not a perversion of the highway from its original purposes. *Lackland v. North Missouri R. Co.* 81 Mo. 180; *Porter v. North Missouri R. Co.* 88 Mo. 128; *Cross v. St. Louis, K. C. & N. R. Co.* 77 Mo. 321; *Julia Bldg. Assn. Case*, 18 L. R. A.

supra; *Smith v. Kansas City, St. J. & C. B. R. Co.* 98 Mo. 24; *Kansas City, St. J. & C. B. R. Co. v. St. Joseph T. R. Co.* 97 Mo. 469; *Rude v. St. Louis*, 93 Mo. 414. In the early case of *Porter v. North Missouri R. Co.*, *supra*, *Judge Bates* says: "Upon deliberation, we think that the use of a street for purposes of a railroad, in its ordinary use as a means of travel and transportation, is not a perversion of the highway from its original purposes, and was authorized by the general assembly in the charter of the defendant. The damage to the plaintiff's property, resulting from such obstruction, was *damnum absque injuria*." *Judge Henry*, in *Cross v. St. Louis, K. C. & N. R. Co.*, *supra*, says: "Conceding the right to lay the track in the street and its proper construction at the grade of the street, the company was not liable for any inconvenience to property holders resulting from a proper and prudent operation of the road." *Judge Norton* recognized the rule in the *Julia Bldg. Assn. Case*, *supra*; *Judge Black* in the *Rude Case*, *supra*; *Judge Barclay* in *Smith v. Kansas City, St. J. & C. B. R. Co.*, *supra*,—in opinions written by them respectively, and *Judge Brace*, in *Kansas City, St. J. & C. B. R. Co. v. St. Joseph Terminal R. Co.*, 97 Mo. 469, after stating that the only damage suggested by the lotowner from the use of the street by the railroad is that resulting from the movement of trains, and the occupation of space on the street in doing so, says: "But, that space being in a public street, the defendant's tracks having been authorized to be laid by the city, its use by the defendant for the purpose of passing to and fro over it with trains is a legitimate use belonging to the defendant company, as well as the plaintiff, in common with every other citizen desirous of passing it with vehicles." These decisions from our own court show that the doctrine is firmly established in the jurisprudence of this state, and there is no occasion for an examination or review of the decisions of other states which hold to the contrary. It appears from the evidence that the only substantial damage which was special to plaintiff and not common to the public, shown by it, consisted in the interference with its free access from the street to its factory; the obstruction of the light and air across the open street; smoke, cinders, and dust from engine and cars; noise and jarring of the ground,—all caused by the movement of trains. These may cause damage to and depreciation of the property, but the damage results from a legitimate use of the street, and which might have been anticipated by plaintiff as a probable use when they bought their property and erected their improvements. *Cross v. St. Louis, K. C. & N. R. Co.* and *Kansas City St. J. & C. B. R. Co. v. St. Joseph Terminal R. Co.* *supra*.

The public use was fixed when the street was granted or dedicated. The license granted by the city to the defendant to lay its tracks upon the streets, and run engines and cars thereon in the transportation of passengers and property, was not a re-dedication to a new and distinct public use, but was a mere license to use it in a way contemplated by the

owner of the land when he subjected it to such uses. The lots were purchased, held, and improved, not only in view of the advantages of the street but also subject to the burdens of all consistent public uses which the increasing wants of the public might thereafter demand.

4 For any damages that may be caused by an unlawful or negligent maintenance of the

track in the street, or by negligent use of engines or movement of trains, defendant will be liable in an action for damages. Plaintiff has shown no ground for injunction, and *the judgment is affirmed.*

All concur.

Rehearing denied.

GEORGIA SUPREME COURT.

John J. McDONOUGH *et al.*, *Piffs. in Err.*,
v.

John S. MARTIN.

(.....Ga.....)

"Where the terms of a deed of conveyance, taking the whole together, show that the instrument is in its essence a quitclaim title, and that the makers intended no warranty except as against themselves and their own acts, a failure of the title to two of the lots out of a great number covered by the conveyance, by reason of the existence of a previous outstanding better title, will be no breach of any implied covenant arising out of a recital of facts or out of the use of words of conveyance, no fraud or intentional misrepresentation being alleged. Nor will the failure of the vendees to get or to hold possession of such two lots, without any fraud or misconduct on the part of the vendors, constitute a defense to an action for the purchase money, or any part thereof.

(January 11, 1892.)

ERROR to the City Court of Savannah to review a judgment in favor of plaintiff in an action brought to recover the amount due on certain notes which had been given to secure the purchase money of land. *Affirmed.*

The facts are stated in the opinion.

Messrs. Garrard & Meldrim for plaintiffs in error.

Mr. George A. Mercer, for defendant in error:

*Headnote by BLACKLEY, Ch. J.

NOTE.—*Recitals in a deed as basis of implied covenants of title.*

The case of *Severn & Clerkes*, 1 Leon. 122, has been sometimes quoted as authority for the doctrine that a covenant of title might be implied from a recital. But in that case the deed was a deed poll of a mere interest for years and recited the grantor's possession. It was held that the recital in connection with other parts of the deed created an obligation to make a good title.

In *Horry v. Frost*, 10 Rich. Eq. 112, it is said that a covenant may be as obligatory when expressed by way of recital as if expressed in the formal part of the agreement. But this was not a case concerning a deed but concerning an instrument comprising a controversy as to a will, and the recital was of a stipulation to pay certain debts.

In *Ferguson v. Dent*, 8 Mo. 687, an attempt was made to establish a covenant that a tract of land lay in a certain situation from the use of words following the description saying that it lay west and adjacent to a certain other tract.

18 L. R. A.

Bouvier defines a covenant to be an agreement by deed, whereby one of the parties promises the performance or nonperformance of certain acts, or that a given state of things does or shall, or does not or shall not, exist.

1 Bouvier, Law Dict. p. 402.

Express covenants are those which are created by the express words of the parties to the deed declaratory of their intention.

Id. p. 403.

Covenants for title are those covenants in a deed conveying land, which are inserted for the purpose of securing to the grantee and covenantee the benefit of the title conveyed.

Ibid.

Covenant of seisin is defined to be an assurance to the grantee that the grantor has the very estate, both in quantity and quality, which he professes to convey.

Id. p. 407.

There are no words in this deed which can be construed into a covenant of a right to sell. See Rawle, Covenants, pp. 28, 29, *note 3* to § 21, p. 54, § 41.

There are no implied covenants for title in the sale of land.

Ga. Code 1882, § 2702; *Brooks v. Turner*, 68 Ga. 298; *Jordan v. Jordan*, Dudley (Ga.) 181.

A purchaser of land without warranty can bring no suit for defect of title.

See *Abbott v. Allen*, 2 Johns. Ch. 519, 523, 1 L. ed. 472; *Frost v. Raymond*, 2 Cal. 190; 4 Kent, Com. 471, and *notes*; Platt, Covenants, 8 Law Lib. 47, 48, *note k*, 806, 88; *Browning v. Wright*, 2 Bos. & P. 21, 26; *Beall v. Berkhalter*, 26 Ga. 564.

Loss or damage caused by failure of title

In *Whitehill v. Gotwalt*, 3 Penr. & W. 812, which overruled *Christine v. Whitehill*, 16 Serg. & R. 96, the exact question as to the effect of a recital as a warranty of title is presented, and it is held that there is no such warranty created by the use after the description of land in a deed of the words "being part of 58 acres and 100 perches of land, late the property of" the vendor's father with a statement following that the probate court has decreed the land to the vendor and the other heirs have given him deeds of release.

The claim that recitals may constitute the basis of a covenant of title is also said by Rawle on Covenants, p. 420, to be denied in *Kean v. Strong*, 14 Ir. L. Rep. (Q. B.) 377, which case is not at present within our reach.

After diligent search we have been unable to find a single actual decision to justify the statement that covenants of title can ever be implied from recitals, although such a doctrine has sometimes been loosely asserted.

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cannot be set up as a defense to an action for the purchase money.

See 4 Kent, Com. 471, note b, citing *Owings v. Thompson*, 4 Ill. 502; *Wright v. Shorter*, 50 Ga. 78.

Bleckley, Ch. J., delivered the opinion of the court:

When this case was decided the syllabus was formulated by the court, handed down, and filed. Since then an argument in elucidation and support of the decision has been prepared at my request by A. H. Davis, Esq., one of our official stenographers. In studying and revising his argument, I have examined every authority to which it refers. My associates, after hearing it read, concur with me in adopting it as the opinion of the court. We do not merely recite it, but make it our own. For this reason, quotation marks are omitted.

This is an action on a note given for the purchase money of a large number of lots of land. The plea sets up (1) damages by a breach of the plaintiff's covenant that the title to the land was in him, and of the covenant for possession and seisin, the defendants having been evicted from two of the lots by title paramount; (2) failure of consideration in the loss of two of the lots, which the plaintiff covenanted that he owned. The plea makes no issue of fraud, misrepresentation, concealment, or mistake. The parts of the deed material to show the undertaking of the plaintiff are as follows: "This indenture . . . between John S. Martin, . . . Andrew J. Miller, . . . Cornelia V. Miller, the wife of the said Andrew J. Miller, . . . Sarah E. Miller and R. M. Miller, by their guardian *ad litem*, Andrew J. Miller, as parties of the first part, and John J. McDonough and Tiny B. Thompson, . . . and Edward Burdett, . . . copartners, composing the firm of McDonough & Co., . . . as parties of the second part, witnesseth that, whereas, the title to certain lands, hereinafter mentioned as described, is in the said John S. Martin, . . . as evidenced by a certain deed of conveyance made by Henry Gallagher, assignee in bankruptcy of A. J. Miller, . . . to said Martin; . . . and, whereas, certain portions of the lands described were . . . set apart to said Andrew J. Miller, as the head of a family, as a homestead; . . . and whereas, under a proceeding had before the . . . judge of the superior court of Pierce county, certain orders were passed . . . authorizing a private sale of the homestead property, in which proceeding all the parties at interest were duly represented: . . . Said parties of the first part . . . have granted, bargained, sold, remised, conveyed, released, and quitclaimed, and by these presents do grant, bargain, sell, remise, convey, release, and forever quitclaim, unto said parties of the second part, in their full possession and seisin, and to their heirs and assigns, the following lots of land, and all the estate, right, title, interest, use, trust, property, claim, and demand whatsoever, both at law and in equity, of said parties of the first part of, in, to, or out of all those lots, tracts, or parcels of land," etc. "To have and to hold the said conveyed and released premises unto said parties of the second part, their heirs and assigns, to their only proper use, benefit, and behoof forever,

. . . so that neither the said John S. Martin, nor the said Andrew J. Miller individually or as guardian *ad litem*, as hereinbefore stated, or said Cornelia V. Miller, or said Sarah E. and R. M. Miller, or either of them, their heirs and assigns, nor any other person or persons in trust for them or in their name, or in the name, right, and stead of any of them, shall or will, can or may, by any ways or means whatsoever, hereafter have, claim, challenge, or demand any right, title, interest, or estate in or out of said premises above described, and hereby released and conveyed; but that said parties of the first part, and every of them, their heirs and assigns, from all estate, right, title, interest, property, claim, and demand whatsoever of, in, to, or out of said premises or any parcel thereof . . . is, are, and shall be by these presents forever excluded and debarred."

The subject here conveyed is described as "the following lots of land, and all the estate, right, title, interest," etc., "of the parties of the first part." The deed uses appropriate words of release and quitclaim, and lacks the usual covenant of general warranty, which, by Code, § 2708, includes covenants of a right to sell, of quiet enjoyment, and of freedom from incumbrances. There are no formal covenants at all, except the one against any title, claim, etc., under the parties making the deed.

Covenants are of two kinds,—express and implied. Express are those stated in words more or less distinctly exposing the intent to covenant, and implied are those inferred by legal construction from the use of certain words of conveyance. The plea makes it necessary to determine whether this deed contains a covenant of either sort. It is insisted that the recital that the title was in the plaintiff, as evidenced by a certain deed, amounts to a covenant of title, though informally expressed. A covenant requires no special form, but, if it is clearly the intention of the grantor to answer for the truth of a statement in the instrument, this will constitute a covenant on his part. There is authority holding that a recital may have the force of a covenant. 3 Devlin, Deeds, § 888; 4 Am. & Eng. Encyclop. Law, 469; *Severn's Case*, 1 Leon. 122; *Christine v. Whitehill*, 16 Serg. & R. 98 (Gibson, Ch. J., dissenting). Possibly this means that, where the deed is informally drawn, without any technical covenants, the court may find an undertaking of some sort in the recital; for when there is an express covenant the recital will not be construed as an additional covenant. *Whitehill v. Gotwalt*, 8 Penr. & W. 818 (overruling *Christine v. Whitehill*, *supra*); *Wright v. Shorter*, 50 Ga. 72. At any rate that a recital may ever attain the dignity of a covenant is controverted by high authority. "Owing to a misapprehension of one or two old cases, the dangerous doctrine has been more than once broached that covenants for title may be implied from a recital; but this has since been distinctly and decisively repudiated." Rawle, Covenants, § 280. And see *Ferguson v. Dent*, 8 Mo. 667, holding that a recital in the description of the premises is not a covenant; *Delmer v. McCabe*, 14 Ir. C. L. Rep. 877, holding that a recital of seisin, when modified and explained by other parts of the instrument, does

not amount to a covenant. The true rule is to view the recital in the light cast on it by the rest of the deed, and give effect to the intention as a consistent whole. *Platt, Covenants*, 83; *Severn's Case, supra*; 4 Am. & Eng. Encyclop. Law, 469; Code, § 2697. Now, if this recital, standing alone, were equivalent to a general warranty of title, it would be restrained and reduced by the express limited covenant; otherwise the latter, which is set out with much technicality and verbosity, would be nullified and destroyed by the recital, which is mere inducement, and not fairly interpretable as a substantive covenant. Such a construction would override the plain intention to covenant specially. Where a conveyance contains both a general and a special covenant touching the same subject, which are inconsistent, the general will not enlarge the special covenant, but will be thereby restricted. *Rawle, Covenants*, § 287 *et seq.*; 2 Sugd. Vend. 605 *et seq.*; *Bricker v. Bricker*, 11 Ohio St. 240. The order in which the conflicting covenants occur does not seem to be material at the present day, because the intent is gathered from the whole instrument. *Rawle, Covenants*, § 286, and *note*. It would seem to be more especially just to let the special covenant prevail where, as in this case, the general covenant not only stands upon implication, but is of questionable existence, while the special covenant is expressed with great fullness and regard to technicality. In *Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 75 U. S. 8 Wall. 276, 19 L. ed. 849, the action was brought upon a covenant claimed to exist in the recitals of the instrument which contained technical covenants, the claim being rested on the fairness and equity of that construction. (See argument for the canal company.) The decision set out in the headnote was as follows: "In the case of a contract drawn technically in form, and with obvious attention to details, a covenant cannot be implied, in the absence of language tending to a conclusion that the covenant sought to be set up was intended. The fact that the non-implication of it makes the contract, in consequence of events happening subsequently to its being made, quite unilateral in its advantages, is not a sufficient ground to imply a covenant which would tend to balance advantages thus preponderating." Furthermore, if the conveyance is only of the grantors' right, title, and interest in the land, the scope of it is not enlarged by a general covenant, but such covenant must be limited to fit the subject conveyed. 1 *Warvelle, Vend. & P.* 421, § 8; *Allen v. Holton*, 20 Pick. 458; *Sweet v. Brown*, 12 Met. 175; *McNear v. McComber*, 18 Iowa, 12; *Gee v. Moore*, 14 Cal. 472; *Kimball v. Semple*, 25 Cal. 440; *Bates v. Foster*, 59 Me. 167, 8 Am. Rep. 406; *Gibson v. Chouteau*, 89 Mo. 536; *Young v. Clippinger*, 14 Kan. 148; *Stockwell v. Couillard*, 129 Mass. 281.

Is any covenant implied in these words: "Said parties of the first part . . . do grant, bargain, sell, remise, convey, release, and forever quitclaim unto said parties of the second part, in their full possession and seisin. . . . the following lots of land, and all the estate, right, title, etc., of said parties of the first part," etc.? At common law, certain words of conveyance imported covenants of title; and,

so strong was the implication, it was in some cases held that an express limited covenant could not repel it. It seems now generally agreed that, in conveyances of freehold, only one word, "do," or "dedi,"—"I give," or "have given,"—had such potent effect. *Rawle, Covenants*, § 270; *Frost v. Raymond*, 2 Cal. 188. The word "grant" did not imply a covenant. *Platt, Covenants*, 47, 48. Nor did "grant, bargain, and sell." *Ricketts v. Dickens*, 5 N. C. 848, 4 Am. Dec. 555; *Frost v. Raymond, supra*. And it has been held that, in a conveyance merely of the grantor's rights in the land, even the terrible word "dedi" would not raise a warranty. *Deakins v. Hollis*, 7 Gill & J. 311. Also it is said that, in a deed of "grant, bargain, and sell," an express covenant takes away all implied covenants. *Vanderkarr v. Vanderkarr*, 11 Johns. 123. When conveyances came to be made under the Statute of Uses, the courts did not raise covenants by implication. The deed of bargain and sale came into use under this statute, and, it being the deed commonly employed in the United States, as a general rule, in the absence of statute, there are no implied covenants with us. *Tiedeman Real Prop.* § 859; 8 Washb. Real Prop. p. *671 *Walker, Am. Law*, 9th ed. p. 454; *Allen v. Sayward*, 5 Me. 227, 17 Am. Dec. 221. In some of the states, by express statute, the words "grant, bargain, and sell" import certain covenants. 4 *Kent, Com.* 478, 474; *Rawle, Covenants*, § 285 *et seq.*; *Martindale, Conv.* § 173. But where there is also an express covenant it is held that the statutory implied covenant is modified thereby. *Weems v. McCaughan*, 7 Smedes & M. 422; *Shelton v. Pease*, 10 Mo. 473. So the statutory covenant will be restrained where the conveyance is of the grantor's interest only. *Gibson v. Chouteau*, 89 Mo. 536. There is no statutory implication of covenants in Georgia, except as to deeds containing a general warranty. Code, § 2708. In *McDonald v. Beall*, 55 Ga. 288, it was held that there is no implied warranty in the sale of land. That being a parol sale, and no deed being given, the case does not apply here.

The present deed purports to convey the specific lots and the grantors' right, title, interest, etc., in the same. The first part of the descriptive clause, standing alone, might import an intention to pass title paramount, not merely such title as the grantors had. But it does not stand alone; it is followed by a nearly exhaustive catalogue of words signifying any kind of interest which the grantors might have in the land. All this would be useless surplusage, unless it was intended by the grantors to convey simply such title or interest as they had, without undertaking to pass necessary title paramount. This view is strengthened by observing the words of conveyance which are words of release and quitclaim, (*Gibson v. Chouteau, supra*; *Young v. Clippinger*, 14 Kan. 148;) and also by considering the special warranty, which extends solely to title or claim by or through the grantors, (*Wright v. Shorter*, 56 Ga. 72.) This special warranty would be rendered wholly nugatory by construing the clause in question as an unqualified undertaking to pass title paramount.

The latter part of section 2248 of the Code is not without application here, by analogy at least. It says: "If a less estate is expressly limited, the courts shall not by construction increase such estate into a fee, but, disregarding all technical rules, shall give effect to the intention of the maker of the instrument, as far as the same is lawful, if the same can be gathered from its contents; and, if not in such case the court may hear parol evidence to prove the intention." The court, in trying this case, heard parol evidence from both sides as to the sale of these lands, and it in no wise conflicts with the construction put upon the deed. On the contrary, the defendant who made the purchase admitted in his testimony that he was willing to purchase without a warranty if he could be placed in actual possession of the land. In rebuttal he testified that it was agreed that his firm should take the lands without warranty. All the testimony shows it was plainly understood on both sides that there was to be no warranty. The defendants relied upon certain testimony of McDonough as showing the clause containing the expression "in their full possession and seisin" to be a covenant of possession and seisin. But this expression must be taken as qualified by the immediately accompanying words of conveyance, which contemplate a mere release or quitclaim, and by the subsequent special covenant. Certainly this is not a formal, or even a plain, covenant for possession and seisin to any extent, much less as against all persons whatsoever. It can have effect as against any acts or title by the grantors or persons claiming under them. The testimony referred to is a very feeble support to the construction contended for. The witness said: "If he could be placed in actual possession of the land, he was willing to purchase the property, and waive a covenant of warranty. . . . Possession was to be given to defendants, because in their sawmill business this possession is necessary. It was particularly important that defendants should have exclusive possession, because they had their timber lands lying beyond these, which they wished to reach. . . . The grantors knew that defendants were in the sawmill business, and were fully aware of the use to which defendants expected to put these lots." The witness seems to be speaking of his own state of mind, and not of any agreement of minds. He does not say that the grantors promised or undertook to put defendants in possession. The delinquency here charged consisted in knowing of the use to which the lots were expected to be put, and (it may be inferred) in not making proper provision therefor. The only agreement to which he distinctly swears is this: "It was agreed that his firm would take the lands without warranty." It may be doubted, under authorities presently to be cited, whether this testimony was admissible, because the legal effect or extent of a covenant cannot be varied by parol. But, whether admissible or not, it was not strong enough to establish the construction contended for.

Upon the whole, then, it appears that the deed contains no covenant except the special one above alluded to. Does the loss of either of the two lots come within its terms? It is

not disputed that the title to lot 104 was once in A. J. Miller, one of the grantors, and was devested by sheriff's sale, under an execution against A. J. Miller & Son, five years and more before the deed to defendant was made. The sheriff's deed was duly recorded, and this record was constructive notice to the defendants. Their plea is based, not on fraud, misrepresentation, or breach of confidence, but solely on breach of covenant. The loss of this lot does not fall within the latter part of the special covenant, because the title or claim under the sheriff's sale was not set up by any of the grantors, but by a stranger. Nor does it come within the first part of that covenant, because that provides against claims thereafter made by the grantors, or by some person claiming under them. The grantee in the sheriff's deed holds adversely to the defendant in execution, and not under him. The defendants' deed is a quitclaim, purporting to pass only such interest as the grantors had at the time of conveying. It often happens that persons give such deeds who have no title at all; and the lack of title, where no fraud or deception is practiced, is no ground for subjecting such a grantor to damages. As to lot 194, which was lost in the ejectment, Miller testified without contradiction that he "told McDonough that a suit of ejectment was then pending for this lot, and McDonough replied that he (Miller) must defend McDonough & Co." This loss likewise is not within the special covenant, because it was an adversity which the grantors could not prevent, unless they were negligent in defending, which does not appear. Besides, McDonough was notified of the action then pending, and apparently chose to take the risk. His reply that Miller must defend McDonough & Co. hardly makes a promise by Miller to do it. Even if Miller had promised, it would not be allowable, where there is no issue of fraud or the like, to attach a parol promise like this to a deed containing no such undertaking. *Anonymous*, 2 Ch. Cas. 19; *Raymond v. Raymond*, 10 Cush. 184; *Howe v. Walker*, 4 Gray, 818; *Earle v. De Witt*, 6 Allen, 530; *Hunt v. Amidon*, 4 Hill, 345, 40 Am. Dec. 283; *Coleman v. Hart*, 25 Ind. 256; *Holley v. Young*, 27 Ala. 204. And see *Peabody v. Phelps*, 9 Cal. 213.

Now, are the defendants entitled to set up as a defense to the notes sued on that they lost the said two lots? This depends upon who took the risk of the title being good. The grantors, both in the negotiations and in their deed, expressly declined that risk; consequently the purchasers assumed it. The law is clear that, where the buyer takes a quitclaim deed,—that is, a deed without any warranty,—the maxim of *caveat emptor* applies. He is without remedy if the title fails. He cannot recover back the purchase money, either at law or in equity. *Dorsey v. Jackman*, 1 Serg. & R. 42; *Earle v. De Witt*, *supra*; *Soper v. Stevens*, 14 Me. 133; *Bates v. Delavan*, 5 Paige, 300, 8 L. ed. 726. And see *Com. v. McClanahan*, 4 Rand. (Va.) 482. Equity will not relieve against payment of the purchase money (1 Fonblanque, Eq. 373, *note*; Rawle, Covenants, § 821; *Barkhamsted v. Case*, 5 Conn. 523, 18 Am. Dec. 92, 2 Sugd. Vend. 552;) nor can the purchaser have rescission, (*Maney v.*

Porter, 3 Humph. 346, 363; *Middlekauff v. Barrick*, 4 Gill, 290; *Butman v. Hussey*, 80 Me. 263;) nor can he set up the failure of title in defense to an action for the purchase money, (*Buckner v. Street*, 15 Fed. Rep. 865; *Wright v. Shorter*, 56 Ga. 72.) In the case last cited this court held: "When bridge and ferry franchises, purporting on the face of the grant to be exclusive, are conveyed by deed in fee simple, with warranty of title against the vendor and his heirs only, the purchaser, in the absence of any fraud in the vendor, takes the risk of the grant's proving exclusive or not exclusive in its legal operation." In the absence of fraud, misrepresentation, or mistake, the purchaser's redress depends solely on the covenants expressed in the deed. If there are no covenants, or if the loss is not within the covenants, the loss falls upon him, and will not be thrown back on the innocent vendor. To do this would be to import a condition into the contract that the vendor should repay or lose the purchase money on failure of title, though the parties themselves made no such agreement. In such case the vendee buys the ven-

dor's title for better or for worse, and pays his money, not for the land necessarily, but for the vendor's title such as it is. When he gets what he bargains for, he ought to pay. A vendee can protect himself, by requiring the usual covenant of general warranty, or he can waive that protection by accepting a deed with a limited warranty, or one without any warranty at all. Whichever he selects, he ought to abide by his choice. It will frequently happen that a quitclaim deed is obtained for very much less than a warranty deed would cost. To allow a purchaser by quitclaim to set off against the purchase money a failure of title to some of the land would force the vendor to part with such proprietorship as he had in the whole tract for less than he agreed to take.

The foregoing discussion disposes of this litigation upon its substantial merits, and, though various grounds are stated in the motion for a new trial, they are all controlled, as to the result, by what has been said. The court did not err in overruling the motion.

Judgment affirmed.

SOUTH DAKOTA SUPREME COURT.

Lars F. ERICKSON, *Recept.*,

v.

BROOKINGS COUNTY, *Appt.*

(.....S. Dak.)

*1. The real estate of E., the owner, was duly assessed for taxes for the year 1885. On the 1st day of October, 1886, E. paid to the treasurer of the county the amount of the taxes thus assessed. Afterwards, on the 5th day of October, 1886, the treasurer wrongfully advertised and sold the real estate of E. for these taxes to B., and issued him a tax certificate. Two years afterwards, there having been no redemption of the land from the sale, the treasurer executed and delivered to B. a tax deed for the land. Afterwards B., for a valuable consideration, conveyed to E. the tax deed, and assigned all his (B's) right, title, and interest to the land and to the recovery of the money he had paid for the land at the tax sale. Held, that under our statute (§ 1629, Comp. Laws) the purchaser at a wrongful, unlawful, or erroneous tax sale is entitled to have his money refunded to him, with interest at 12 per cent per annum from the date of sale, by the county selling the land. Held, further, that this right to have the money refunded is assignable, and when it is duly assigned the assignee has the same right and title to the money as the assignor had himself before the assignment, and, in case the proper officer of the county refuse to refund the money, the assignee can maintain an action for its recovery.

*Headnotes by BENNETT, P. J.

NOTE.—For assignability of right to set aside judgment, see *Whitney v. Kelley*, 15 L. R. A. 518, and note, 94 Cal. 146.

For assignability of future accounts or earnings, see *Sandwich Mfg. Co. v. Robinson* (Iowa) 14 L. R. A. 126, and note.

For assignability of unearned salary of officer, see *Bowery Nat. Bank v. Wilson*, 9 L. R. A. 706, 122 N. Y. 473.

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*2. The date of a receipt given for the payment of money is prima facie evidence that the money was paid and the receipt executed on the day it bears date. Yet this presumption is not conclusive, but is easily overcome, so far as relates to the precise date, and the true date may be proved *alibis*.

(December 12, 1892.)

APPEAL by defendant from a judgment of the Circuit Court for Brookings County in favor of plaintiff in an action brought to recover money which plaintiff had been compelled to pay to redeem a certain tax certificate against his property which was alleged to have been illegal for the reason that at the time it was issued there were no taxes standing unpaid against the property. *Affirmed.*

The facts are stated in the opinion.

Messrs. P. C. Murphy, State's Atty., and George A. Mathews, for appellant:

The sale by the treasurer of respondent's land after the tax had been paid is a tort for which the treasurer and not the county is liable.

Morris v. Sioux County, 43 Iowa, 416; *Wallace v. Menasha*, 48 Wis. 79, 33 Am. Rep. 804; *Martin v. Brooklyn*, 1 Hill, 545; *Hamilton County Comrs. v. Mighels*, 7 Ohio St. 109; *Ang. & Am. Priv. Corp. § 811*; *Otoe County Comrs. v. Gray*, 10 Neb. 565.

If the tax was actually paid as alleged, on October 1, the jurisdiction of the treasurer over

For assignability of cause of action for personal tort, see *Hunt v. Conrad*, 14 L. R. A. 512, and note, 47 Minn. 567.

For assignability of contract for personal services requiring special skill and knowledge, see *Sloan v. Williams*, 12 L. R. A. 496, and note, 138 Ill. 43.

For assignment of future contingent interest, see *Read v. Mosby*, 5 L. R. A. 122, and note, 87 Tenn. 759.

the land ceased immediately upon such payment, and in the subsequent sale he was a mere wrongdoer; his acts were *ultra vires*, for which the county was in no manner responsible.

Iowa R. R. Land Co. v. Woodbury County, 64 Iowa, 212; *Butler v. Fayette County Supra*, 46 Iowa, 826; *D. M. & M. R. Co. v. Lowry*, 51 Iowa, 486; *Stone v. Woodbury County*, Id. 522; *Lorillard v. Monroe*, 11 N. Y. 392, 62 Am. Dec. 120; *Otoe County Comrs. v. Gray*, *supra*; *Price v. Lancaster County*, 18 Neb. 199.

The county is not liable for any portion of the tax erroneously collected except the amount which it collected for its own use, and cannot be held responsible for the moneys paid over to the public organizations within the county which were authorized to disburse them.

Price v. Lancaster County, *supra*.

Where the owner redeems from a void tax sale, void because the taxes for which the land was sold had been paid, he cannot recover back the amount paid in redemption from the county.

Morris v. Sioux County, 42 Iowa, 416; *Sears v. Marshall County*, 59 Iowa, 608; *Shane v. St. Paul*, 26 Minn. 543; *Smith v. Schroeder*, 15 Minn. 35, and cases there cited; *Powell v. St. Croix County Supra*, 46 Wis. 210; *Cooley*, *Taxn*, 556, and cases cited; *Otoe County Comrs. v. Gray*, *supra*.

Messrs. Hall & Jenkins, for respondent:

It is unnecessary to present any formal complaint to a board of county commissioners.

Howard County Comrs. v. Jennings, 104 Ind. 108; *Stout v. Grant County Comrs.* 107 Ind. 343; *Dubois County Comrs. v. Werts*, 112 Ind. 268.

It has always been considered that the payment under protest of an illegal tax or demand to any officer armed with a warrant authorizing him to enforce the payment is not voluntary and may be recovered back. Nor is it necessary in order to constitute a compulsory, as distinguished from a voluntary, payment, that the unlawful demand be made by an officer who is prepared to enforce it by process; there may be that kind and degree of necessity or coercion which justifies and virtually requires payment to be made of the illegal demands of a private person who had it in his power to seriously prejudice the property rights of another, and to impose upon the latter the risk of suffering great loss if the demand be not complied with.

State v. Nelson, 4 L. R. A. 308, 41 Minn. 25, and cases cited; *Ferguson v. Winslow*, 84 Minn. 884, and cases cited; *Wakefield v. Newbon*, 6 Q. B. 266; 2 Dill. Mun. Corp. 943, and cases cited; *Parcher v. Marathon County*, 52 Wis. 888, 88 Am. Rep. 745.

Under our statute (S. Dak. Rev. Laws, § 1629), upon a sale of lands where no taxes are due, as in this case, the purchaser can recover from the county, not only the total amount paid but also interest thereon at 12 per cent per annum.

Wilson v. Butler County, 4 L. R. A. 589, 26 Neb. 676; *Roberts v. Adams County*, 18 Neb. 471; *Daniels v. Watertown Twp.* 55 Mich. 376; *Babcock v. Beaver Creek Twp.* 65 Mich. 479; *State v. Nelson*, *supra*.

The purchaser can recover the full amount paid to the county.

Roberts v. Adams County, *supra*; *Merriam* 18 L. R. A.

v. Otoe County, 15 Neb. 408; *Wilson v. Butler County*, *Daniels v. Watertown*, *Babcock v. Beaver Creek Twp.* and *State v. Nelson*, *supra*; *Powell v. St. Croix County Supra*, 46 Wis. 210.

A county no more than an individual should be permitted to receive and retain money through a mistake of fact or wrongful act.

Roberts v. Adams County and *Merriam v. Otoe County*, *supra*.

This being a cause of action for moneys paid to the use and benefit of appellant, and as respondent has shown himself to be the proper party entitled thereto, there can be no question as to this being an assignable claim.

Fairbanks v. Sargent, 6 L. R. A. 475, 117 N. Y. 320; *People v. Tioga C. P.* 19 Wend. 73; *Bliss*, Code Pl. § 38; *Comegys v. Vasse*, 26 U. S. 1 Pet. 209, 7 L. ed. 115; *Vimont v. Chicago & N. W. R. Co.* 64 Iowa, 518. See also *Cleas v. Traer*, 57 Iowa, 459; *Howley v. Chicago, B. & Q. R. Co.* 71 Iowa, 717.

Bennett, P. J., delivered the opinion of the court:

The allegations of the complaint show that on the 1st day of October, 1886, the plaintiff paid to the treasurer of Brookings county all the taxes which were due and assessed against his real estate for the year 1886; that afterwards the treasurer unlawfully, erroneously, and wrongfully advertised and sold his real estate for such taxes for the sum of \$21.91, to one Bowdle, and issued to him a tax certificate. Two years afterwards, there having been no redemption of the land from this sale, the treasurer executed to said Bowdle his deed for the land, and afterwards Bowdle assigned to the plaintiff all his right, title, and interest in and to said premises and to the said money paid by him for the tax-sale certificate. If these allegations are true, (and, for the purpose of determining the questions arising on demurrer to the complaint, we must assume they are,) there were no taxes due from the respondent on the day of the tax sale; and, if none were due, it was wrong to offer for sale the land, to sell it, or to take the money bid at the sale, or to issue a certificate of sale to the alleged purchaser, by the treasurer. This being done, the purchaser, under our statute, is entitled to have his money refunded to him, with interest at 12 per cent per annum from date of sale. Section 1629, Comp. Laws, provides that when by mistake or wrongful act of the treasurer land has been sold on which no tax was due at the time, the county is to save the purchaser harmless by paying him the amount of the principal and interest at the rate of 12 per cent from date of sale. But the question now arises, Is this right of the purchaser at the tax sale to be thus reimbursed a personal right, or can it be transferred to another by assignment? Upon the determination of this question depends the liability of the county to the respondent in this action. Section 2876, Comp. Laws, says a thing in action is a right to recover money or other personal property by a judicial proceeding. Section 2877 says a thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. There can be no doubt but that Bowdle, the original purchaser at the wrongful tax sale, had the right to recover back the money he

paid at said sale by a judicial proceeding, if its payment had been refused by the proper officer of the county who should have refunded it to him. If this is true, Bowdle had, under the provisions of the section above quoted, a "thing in action." Mr. Pomeroy, in his valuable work on Remedies and Remedial Rights, after discussing at length the assignability of things in action, in sections 144-147, says: "It is fully established by a complete unanimity in the decisions that causes of action which survive and pass to the personal representatives of a decedent as assets, or continue as liabilities against such representatives, are, in general, assignable; while those causes of action which do not thus survive are not assignable." "By the common law," he says, "causes of action arising out of contract, unless the contract, being still executory, was purely personal to the decedent, or unless the injury resulting from its breach consisted entirely of personal suffering, bodily or mental, of the decedent, did thus survive; while causes of action arising out of torts did not, in general, survive. But the statutes in most, if not all, the states have changed this ancient rule, and have greatly enlarged the class of things in action which survive. It is now the general American doctrine that all causes of action arising from torts to property, real or personal, injuries to the estate by which its value is diminished, do survive, and go to the executor or administrator as assets in his hands. As a consequence, such things in action, although based upon a tort, are assignable." The following *résumé* of authorities will show the universality of the rule, and the reasons upon which it is based: *Hoyt v. Thompson*, 5 N. Y. 820; *Haight v. Hayt*, 19 N. Y. 464; *Byrnie v. Wood*, 24 N. Y. 607; *Weire v. Davenport*, 11 Iowa, 49, 77 Am. Dec. 132; *Tyson v. McGuineas*, 25 Wis. 656; *Blair v. Hamilton*, 48 Ind. 82; *Chapman v. Plummer*, 36 Wis. 263.

The criterion, therefore, by which to judge of the assignability of things in action is to ascertain whether the demand survives upon the decease of the party or dies with him. If all things in action are separated into two classes by this line of division, those embraced in the first class are assignable, and those which fall into the second are not. In the first class may be put claims arising from the breach of contracts; those arising from torts directly to real or personal property; and frauds, deceptions, and other wrongs by which an estate, real or personal, is injured, diminished, or damaged. In the second class are all torts to the person or character, when the injury and damage are confined to the body or the feelings of the person injured. As a result of these general principles, we think it safe to say that it is fully established that a right of action to recover for the wrongful taking and carrying away or the wrongful conversion of personal property is assignable. *Sherman v. Elder*, 24 N. Y. 381; *Richtmeyer v. Remsen*, 38 N. Y. 206; *Smith v. Kennett*, 18 Mo. 154; *Lazard v. Wheeler*, 22 Cal. 140; *Tyson v. McGuineas*, *supra*. A contract of guaranty may be assigned, (*Small v. Sloan*, 1 Bosw. 352;) the right to trade-mark, (*Lockwood v. Bostwick*, 2 Daly, 521;) a widow's right to dower, (*Strong v. Clem*, 12 Ind. 37, 74 Am. Dec. 200;) the claim of a rightful officer

against an intruder for the fees of the office received by the latter during the period of his occupancy, (*Platt v. Stout*, 14 Abb. Pr. 178;) a sheriff's demand against an attorney for his fees in executing process, (*Birkbeck v. Stafford*, Id. 285). An assignment of demand in expectancy is valid in equity as an agreement, and becomes an absolute transfer as soon as the demands arise and come into existence in favor of the assignor. *Field v. New York*, 6 N. Y. 179, 57 Am. Dec. 435; *Bliss v. Lawrence*, 53 N. Y. 442, 17 Am. Rep. 273. In California, under a statute *verbatim* like the above, the following rights of action arising out of contracts have been declared assignable: Breach of an agreement to pay money, (*Gray v. Garrison*, 9 Cal. 325;) of a contract not to run boats on a certain line of travel, (*California Steam Nav. Co. v. Wright*, 6 Cal. 258, 65 Am. Dec. 511;) of a contract to pay for street work, (*Cochran v. Collins*, 29 Cal. 129). In the case at bar, Bowdle having a thing in action,—that is, the right to a recovery of the money back from the county which he had paid for the wrongful sale of plaintiff's lands for taxes, it being a claim which would survive to his personal representatives had he died before it was enforced, and not relating to his person or character, or confined to his body or mental feeling,—under the rule as above stated it was assignable, and his assignee had the same right and title to it as he had himself. By his assignment he had precluded himself from ever asserting any right to the money from the county, but it was transferred to his assignee. The complaint averring the assignment to the plaintiff, if the county was liable to refund to the original purchaser, it is liable to plaintiff.

It is also contended that the complaint is defective, because it does not aver payment of the original tax by the respondent prior to the sale. This contention is based upon the ground that the receipt attached to the complaint as an exhibit was dated October 9, 1888,—five days after the alleged wrongful sale of the land,—and that, if there is a variance between the receipt and the complaint, the former must control. This contention is untenable. While the general rule is that a receipt should be *prima facie* taken to have been made on the day it bears date, and is presumed to have been executed on the day as specified, yet this presumption is not conclusive, but is easily overcome, so far as relates to the precise date; and the true date may be proved *aliunde*. *Fairbanks v. Metcalf*, 8 Mass. 230; *Harrison v. Phillips Academy*, 12 Mass. 456; *Treadwell v. Reynolds*, 47 Cal. 171; *Cook v. Knowles*, 38 Mich. 316.

In the last case cited it was held that parol evidence is admissible to show the true date of the delivery of a deed. The allegation of the complaint is "that on the 1st day of October, 1886, William Nichols, by virtue of his said office as treasurer of said county of Brookings, collected from plaintiff, and plaintiff paid to said William Nichols, as treasurer of said county of Brookings, the sum of fifteen dollars and thirty-eight cents, . . . being in full for the real-estate taxes as aforesaid duly assessed and levied against the said real property of plaintiff for the year 1885." It is thus shown that the complaint makes a positive allegation

of the payment, the time of payment, and to whom paid; therefore all contentions based upon the receipt as forming a substantial part of the complaint are not well founded, and cannot be considered on demurrer in determining the sufficiency of the pleading. Neither is the contention that this is an action founded upon the idea that the money paid to Bowdle was in the nature of a redemption; therefore the authorities cited in support of that point are not pertinent. The theory of the complaint is that the respondent is the legal assignee of all the right, title, and interest that Bowdle had in the money he paid for the land which had

been wrongfully and erroneously sold at the tax sale by the treasurer of Brookings county; and that Bowdle had an assignable interest, and that, as the plaintiff was his legal assignee, he could maintain an action the same as Bowdle could have done. The allegations of the complaint sustaining this theory, when stripped of much superfluous matter which does not affect the substantial averments, we must hold that the complaint is good, and the demurrer properly overruled.

Judgment affirmed.

All the Judges concur.

MISSOURI SUPREME COURT IN BANC.

Helena BLANK, *Appt.*,

v.

Francis NOHL, Admr., etc., of Oscar Blank,
Deceased, *Resp't.*

(.....Mo.....)

1. **An agreement made by a man on the day after obtaining a decree of divorce to pay his former wife a monthly sum during her life if she will not apply for a new trial is against public policy and void as tending to promote and facilitate a divorce.**
2. **A contract for a valuable consideration not to apply for a new trial, made by one against whom a decree of divorce has been entered after a trial at which she wholly abandoned the position assumed in her pleadings and made no defense, is on its face collusive and a fraud on the law.**

(November 14, 1932.)

APPPEAL by plaintiff from a judgment of the St. Louis Circuit Court in favor of defendant in a proceeding brought to establish a claim against the estate of Oscar Blank, deceased. *Affirmed.*

The facts are stated in the opinion.

Mr. Edmond A. B. Garesche, for appellant:

The consideration named in the agreement was both a sufficient and a valuable one. The promise of the appellant was valuable to the respondent's intestate in that it saved him the useless annoyance and expense of being represented upon the motion for a new trial. The one promise therefore was a good consideration for the other, unless hers was against public policy.

Moss v. Green, 41 Mo. 839; *Davis v. Collo-way*, 80 Ind. 112, 95 Am. Dec. 671; 1 Parsons, Cont. 6th ed. § 448; *Babcock v. Wilson*, 17 Me. 872, 85 Am. Dec. 268; *Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79; *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 870; *Goodspeed v. Fuller*, 48 Me. 141, 71 Am. Dec. 572; *Shepard v. Rhodes*, 7 R. I. 470, 84 Am. Dec. 878; *Reddick v. Jones*, 28 N. C. 107, 44 Am. Dec. 68; *Adams v. Wilson*, 12 Met. 188, 45 Am. Dec. 240; *Davis v. Steiner*, 14 Pa. 275, 58 Am. Dec. 547.

NOTE.—The above case makes a striking application or extension of the rule that a contract to facilitate a divorce is against public policy.
18 L. R. A.

The waiver of a legal right, as for instance here the right to move for a new trial, is a good consideration.

Given v. Corae, 20 Mo. App. 132.

It is not even necessary that the promise should be of benefit to the promisee.

Williams v. Jensen, 75 Mo. 681.

Where the contract has been performed by the party not originally bound to perform, the other party to the contract will not be heard to urge the impossibility of compelling specific performance as a defense to an action upon the contract, or for a breach thereof.

Hempler v. Schneider, 17 Mo. 258; *Lindell v. Rokes*, 60 Mo. 249, 21 Am. Rep. 395; *Jones v. Durgin*, 16 Mo. App. 370; *Neef v. Redmon*, 76 Mo. 195.

Where collusion is alleged as a defense it must be proved by him who charges it. It cannot be assumed on mere suspicion, for in the eyes of the law connivance and collusion are so disgraceful that the evidence to establish them must be very clear and strong. And when the question of either collusion or connivance is raised to defeat a contract the agreement of the parties will be presumed to be fair and not unlawful or fraudulent, and the burden is on the party attacking it as fraudulent or illegal to prove by evidence clear and convincing the fraud or illegality.

Hopkins v. Hopkins, 89 Wis. 167; *Pollard v. Wybourn*, 1 Hagg. Eccl. Rep. 725; *Duins v. Donovan*, 8 Eng. Eccl. Rep. 808-810; *Phillips v. Phillips*, 1 Rob. 144; *Giddings v. Steele*, 28 Tex. 733, 91 Am. Dec. 336.

It is not collusion for a husband to allow his wife alimony during the suit.

Barnes v. Barnes, L. R. 1 Prob. & Div. 505; *Stewart, Mar. & Div.* § 808.

Or for the wife to aid in proofs against herself.

Harris v. Harris, 4 Swab. & T. 232.

Nor is mere friendliness in carrying on a divorce suit, and in even mutual assistance in proving the actual facts, collusion.

Stewart, Mar. & Div. § 308; *Hunt v. Hunt*, 47 L. J. Mat. 22; *Barnes v. Barnes*, *supra*.

And the mere fact of defendant's confession is no proof of collusion.

Stewart, Mar. & Div. § 306.

This agreement does not fall within that class which has been held illegal between the parties to a divorce suit, on the ground of public policy. It was not collusive and having

been entered into only after the decree had been rendered, when the divorce therefore was *fait accompli*, cannot be truthfully said to have facilitated the divorce.

Schmieding v. Doellner, 10 Mo. App. 373, 13 Mo. App. 228; *Wilson v. Merrill*, 88 Mich. 707; *Hunt v. Hunt*, *supra*; *Blake v. Blake*, 7 Iowa, 50; *Jones v. Jones* (Colo.) June 30, 1891.

Messrs. Kehr & Tittmann, for respondent:

On its face the agreement is without consideration. As it recites that the divorce had been granted, it follows that the defendant had thereby been absolved from all obligation to the plaintiff, and his promise to pay her an annuity is without a consideration to support it.

Roykin v. Rain, 28 Ala. 332, 65 Am. Dec. 356; *Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79; Anson, Cont. 2d Am. ed. p. 79; *Greendbaum v. Elliott*, 60 Mo. 25; Bishop, Cont. § 102.

A motion for a new trial is an application for an order granting a re-trial or re-examination of the cause in the same court. It enables the party making it to point out any error of fact or law, or any accident or omission by which justice was defeated in the trial of the cause. Without it no review is possible of any error of law or fact committed by the trial court.

Thompson, Trials, §§ 2710, 2712; *Exchange Nat. Bank v. Allen*, 68 Mo. 474; *Wetherall v. Harris*, 51 Mo. 65; *Brady v. Connelly*, 52 Mo. 19; *Hulett v. Nugent*, 71 Mo. 181; *State v. Smith*, 104 Mo. 419.

It is competent and proper at all times to go back to the facts out of which an agreement arose, and to determine by them the law and the rights of the parties, no matter what disguise may have been resorted to to hide them.

Leake, Cont. pp. 771, 772; Anson, Cont. 2d Am. ed. (Knowlton) 260, and *note*; *Folsom v. Mussey*, 8 Me. 400, 23 Am. Dec. 523.

The true and real consideration for the agreement was the withdrawal of opposition to the divorce. It is quite immaterial at what stage of the case the agreement to facilitate the divorce was made. Any agreement pending the suit concerning the alimony made without the knowledge or sanction of the court, or any agreement between the parties to withhold facts or evidence from the court, or to influence its decision by concealment or misrepresentation is void.

Speck v. Dauman, 7 Mo. App. 165; *Schmieding v. Doellner*, 10 Mo. App. 373; 2 Bishop, Mar. & Div. 6th ed. §§ 287a, 289, 435; *Sayles v. Sayles*, 21 N. H. 312; *Weeks v. Hill*, 83 N. H. 199; *Cross v. Cross*, 58 N. H. 373; *Stoutenburg v. Lybrand*, 18 Ohio St. 228; *Viser v. Bertrand*, 14 Ark. 267; *Sampson v. Cresson*, 6 Phila. 229; *Kilborn v. Field*, 78 Pa. 194; *Stilson v. Stilson*, 46 Conn. 15; *Belden v. Munger*, 5 Minn. 211, 80 Am. Dec. 407; *Adams v. Adams*, 25 Minn. 72; *Muckenbury v. Holler*, 29 Ind. 139; *Everhart v. Puckett*, 78 Ind. 409; *Stokes v. Anderson*, 4 L. R. A. 313, 118 Ind. 533; *Beard v. Beard*, 65 Cal. 354; *Phillips v. Thorp*, 10 Or. 494; *Comstock v. Adams*, 23 Kan. 513, 33 Am. Rep. 191; *Hamilton v. Hamilton*, 89 Ill. 349; *Danforth v. Danforth*, 105 Ill. 608; *Barnes v. Barnes*, L. R. 1 Prob. & Div. 505; *Hops v. Hope*, 8 De G. M. & G. 731; 18 L. R. A.

Goodwin v. Goodwin, 4 Day, 243; *Sellon v. Reed*, 5 Bias. 125.

Black, J., delivered the opinion of the court:

This was a proceeding commenced in the St. Louis probate court by Helena Blank against Francis Nohl as administrator of the estate of Oscar Blank, to obtain the allowance of a demand amounting to over \$9,000. The demand is founded upon the following contract, signed by Helena Blank and by Oscar Blank, dated the 9th March, 1886: "Helena Blank, Plaintiff, vs. Oscar Blank, Defendant. In the circuit court of the city of St. Louis, No. 52,206. The above cause having been heard by the court upon the pleadings and proofs in the cause, and a decree of divorce granted to defendant and against plaintiff, defendant, Oscar Blank, mindful of the marital relations which have existed between themselves, in consideration that she doth forego making a motion for a new trial, which would be futile in any advantage to her, while productive to him of further annoyance and expense, doth covenant to and with said Helena Blank that on the first day of every month, beginning with the first day of the month of April now next ensuing, he will pay to her the sum of seventy-five dollars, and a like sum of seventy-five dollars on the first day of every month thereafter, so long as she, the said Helena, shall live, and whether she, the said Helena, remain married or unmarried. And it is agreed between the parties that, inasmuch as the same is intended to be for her maintenance and support, the amount so to be paid to her shall never be subject to the demands of any of her creditors, nor shall it ever be anticipated by her assignment, and payable to her only upon her individual receipt; nor can it at any time or under any circumstances be compounded or commuted for a fixed sum, as other annuities are, though by mutual concurrence of said Helena and of said Oscar Blank, his heirs, executors, or administrators, for a valuable consideration, it may be released." The agreement goes on to provide that Oscar Blank shall pay the costs of the suit, but no attorneys' fees beyond what he had paid; that he will turn over to Helena Blank one bond of the value of \$1,000; and it is then further provided "that the said Oscar will deliver to her, her letters during 1879, by her written to F. L. Schmidt, and the translations thereof, read at the trial in the above-entitled cause, which letters he about a month ago obtained of said Schmidt; that while he may retain them until, by the expiration of the term, said Helena cannot, by a motion for new trial, avoid the advantage he thus gained over her, yet that upon the execution of these presents these letters, sixteen in number, and their translations as so read in court, and her photograph, as shown in court at the trial in explanation of one of these letters, shall be inclosed in suitable envelopes or coverings, sealed with a seal, to be left in the possession of ———, her attorney, while the papers themselves shall remain in possession of ———, attorney of said Oscar, but as escrows, to insure their delivery on the first day of the next ensu-

ing April term of said circuit court to said Helena, provided she have complied with her part of this contract; the letters and papers so mentioned to be so inclosed and sealed to insure that no publicity of their contents be had. In consideration whereof the said Helena covenants to and with said Oscar that she will forego her right to move for a new trial in the above-entitled cause." Dr. Oscar Blank made the payments specified in the contract from the date thereof down to his death in June, 1887; and the defendant, as administrator of his estate, continued to pay the plaintiff the \$75 per month for about one year thereafter. The probate court rejected the demand, and so did the circuit court, and she sued out this appeal.

The divorce suit of Helena Blank against Oscar Blank, mentioned in the foregoing agreement, was commenced in 1879. She alleged in her petition that the defendant had assaulted her, that he had threatened to kill her; that he had charged her with infidelity; and that he had been guilty of various other indignities. The defendant filed answer and cross-bill. In the cross-bill he charged her with repeated acts of adultery with F. L. Schmidt. The parties prepared for trial on these pleadings, by each causing some ten or eleven witnesses to be subpoenaed for the 4th March, 1880, the day on which the cause was set down for trial. Instead of going to trial on that day, leave was granted to defendant to withdraw his answer and cross-bill from the files, and amend the same, and the like leave was granted to the plaintiff to withdraw her reply. On the next day the defendant filed an amended answer and cross-bill, and the plaintiff at the same time filed a reply thereto. This amended cross-bill, instead of charging the plaintiff with adultery, alleged that she had neglected the society of the defendant for that of Schmidt, and had permitted the latter undue familiarities. On the 8th of the same month the court heard the case, and awarded the defendant a decree of divorce. The above contract was executed on the following day, the 9th March, 1880. There had been a previous divorce suit between these parties, on hearing of which the court dismissed the bill and cross-bill.

On the trial of the present case in the circuit court, the defendant administrator called to the witness stand the attorney who represented Oscar Blank in the divorce suit mentioned in the contract. This witness says: "I conferred with the attorney for the plaintiff in the divorce suit, upon the subject incorporated in the agreement, before the hearing of that suit. The defendant had obtained certain letters which were very damaging, and I was satisfied that I could prove they were written by Mrs. Blank. I said to the attorney for the plaintiff: 'There is no show for you in this case. You might as well let judgment go. Dr. Blank has no unkind feeling towards his wife, and he is willing to settle on her \$75 per month.' The attorney for plaintiff rejected the proposition, and the letters were returned to me, and we went to trial. The proposition was, if no fight was made, he would settle on her \$75 per month after the divorce, but the proposition was rejected. The arrangement about \$75 per month had been mooted and bruited

for quite a while. When this agreement was entered into the divorce was an accomplished fact. The agreement is a very sincere and truthful expression of the facts, as I understood them." As to the trial of the divorce case this witness says: "There were two witnesses called,—one to prove the signatures to the letters; and the other, an expert, to prove the translations. The letters were in German, and are the letters alluded to in the agreement. I have no recollection as to whether we had any other oral testimony. I don't remember of any other testimony but those letters and the formal proof. My impression is very clear that Mrs. Blank was present at the trial. She may have been away. *Question.* She called no witnesses on the 8th? *Answer.* I have no recollection of her calling any; there may have been, but I have no recollection. This witness says there was no agreement to suppress any evidence. The letters were passed to the judge to read and act upon."

Back of the question whether the contract can be valued so as to allow the plaintiff a sum in gross in full discharge of it, is the more important one, whether the agreement can be enforced at all, so far as it remains unexecuted. In other words, the question is whether the agreement violates a sound public policy. Marriage is more than a mere civil contract. It is a matter of state concern; and, when the marital relation is once created, it cannot be dissolved by any agreement of the parties. It can be dissolved, and dissolved only, in the manner and for the causes allowed by law. Courts sitting in divorce cases are bound to protect the public interests as well as the rights of the parties themselves; and hence it is that, before a party is entitled to a divorce, it must be made to appear by proof that he or she is the innocent and injured party; and this, too, though there is a default on the part of the other party. For like reasons, the law is well settled that an agreement having for its object and consideration the granting of a divorce is illegal and void. Says Bishop: "But the law does not favor divorce, and permits it only in approved cases, and on sentence from duly established authority. Therefore any agreement for divorce, or any collateral bargain promotive of it, is unlawful and void." 2 Bishop, Mar. & Div. § 696, ed. 1881. The defendant in a divorce suit is not bound to make a defense, and mutual assistance in proving the actual facts does not amount to collusion. Stewart, Mar. & Div. §§ 802, 308. But a bargain that there shall be no defense is collusion, and any promise founded on such an undertaking cannot be enforced. 2 Bishop, Mar. & Div. 6th ed. § 259. The case of *Barnes v. Barnes*, 1 L. R. Prob. & Div. 505, furnishes an illustration of what are and what are not collusive contracts. It is there said, in substance, that the mere fact that the husband gave the wife money for her support, both before and after he instituted the divorce suit, did not prove collusion; but furnishing the support in consideration that the wife would keep quiet, so that he could get a decree cheaper than he otherwise would get it, was collusion. Says Bishop: "It makes no difference how just the cause may be, if the parties collude in the management of the case before the court, this is collu-

sion. It is also collusion where material facts are suppressed, though they would not have changed the result." 2 Bishop, Mar. & Div. 6th ed. § 28. The authorities are numerous to the effect that any agreement that the defendant in a divorce suit will not make a defense, or having for its object the dissolution of a marriage contract, or designed to promote and facilitate a divorce, is void, because opposed to the policy of the law; and any promise founded on such an agreement is also void, and should not be enforced. *Sayles v. Sayles*, 21 N. H. 819; *Cross v. Cross*, 53 N. H. 373; *Vier v. Bertrand*, 14 Ark. 267; *Stoutenburg v. Lybrand*, 13 Ohio St. 228; *Kilborn v. Field*, 78 Pa. 194; *Adams v. Adams*, 25 Minn. 72; *Muckenburg v. Holler*, 29 Ind. 189; *Phillips v. Thorn*, 10 Or. 494.

The defendant in the divorce suit made a proposition to the plaintiff to the effect that if she would let judgment go in his favor he would settle upon her \$75 per month. Thereupon the pleadings were amended, and the witnesses discharged, and in four days thereafter the case was submitted on the letters, and the defendant obtained a divorce decree. On the next day the contract now in question was executed. On this evidence the conclusion would be irresistible that this written contract simply voiced a previous arrangement. On such a state of facts, there can be no doubt but the contract should be held to be illegal and void. But the administrator produced evidence to the effect that the proposition made by the defendant was rejected, and that there was no agreement or understanding between the parties at or prior to the date of the decree. On this state of facts it is earnestly insisted that the agreement sued upon was not one made to promote or facilitate a divorce, and this for the reason that it was entered into after the divorce had been granted,—after the divorce was an accomplished fact.

The error in this argument lies in the fact that the divorce was not then an accomplished fact. The law gave the plaintiff the right to file a motion to set aside the decree and for a new trial at any time within four days. Such a motion is a regular step in the proceeding. By it she could have pointed out any suppression of evidence or impositions upon the court, as well as errors of law and fact. By this

agreement she undertakes to make no motion for new trial. It is in its entire scope and effect an undertaking to abandon all opposition to the decree, which was then still open to review by the trial court. The agreement is also careful to carry the case over the term, when the court would have no power to set the judgment aside of its own motion. Such an agreement is just as vicious as one to make no defense at all. There is in principle no difference between an agreement to make no defense and one to abandon all opposition, while a motion to set aside the decree and for new trial can yet be made, heard, and sustained. We have found no case which will uphold such a contract as the one under consideration. It is, on its face, a collusive contract and a fraud on the law. The plaintiff in her verified petition charged the defendant with acts which, if true, entitled her to a decree, with alimony, unless she was also in fault. The defendant in his verified cross-bill charged her with acts which, if true, entitled him to a decree, unless he was in fault. The plaintiff produced no evidence in support of the charges made by her. This is sufficiently shown by the evidence in the present case and the undisputed circumstances. The cause was submitted on the letters written by plaintiff, and a decree entered for defendant. The case presented by the pleadings was one calling for close consideration by the court at the hearing and on a motion to set aside the decree and for a new trial; yet this agreement seeks to and does cut off all further inquiry and investigation. It was and is an imposition on the court,—a direct effort to defeat the policy of the law. Such agreements cannot be sustained, unless we disregard and set at defiance well-settled rules of law. A defense like this comes with seeming bad grace from the estate of one who has reaped the benefit of the illegal contract, but the objection interposed to the enforcement of the contract is sustained, not out of any consideration for Dr. Blank or his estate, but because the law will not lend its aid to the enforcement of an illegal contract. The law leaves the parties where they have placed themselves.

The judgment is affirmed.

Sherwood, Ch. J., not sitting. The other Judges concur, except *Barclay, J.*, who dissents.

WISCONSIN SUPREME COURT.

MILWAUKEE STEAMSHIP CO., *Resp't.*,

City of MILWAUKEE, *Appt.*

(.....Wis.....)

1. The requirement that articles of incorporation shall state "the name and location of such corporation" does not authorize the articles to fix the place of the "principal office."

2. "The principal office or place of business" for the purpose of taxation under the Wisconsin statutes of a corporation owning and employing a large number of vessels is at the office of a firm of agents, one of whom is the president and the other the secretary of the company where all the business of the company, except the annual and special meetings of stockholders for the election of directors and the annual meeting of the directors to elect officers, is there conducted by such

NOTE.—The rapidly increasing importance of the question where the place of business of a corporation shall be for the purpose of taxation makes the 48 L. R. A.

above case valuable especially in view of the distinctions made between the cases from other states.

agents, although such elections were held in another place which is designated as its principal office in its articles of association by an unauthorized provision as the statute only required them to state "the name and location" of such corporation.

(December 6, 1892.)

APPEAL by defendant from a judgment of the Circuit Court for Milwaukee County in favor of plaintiff in an action brought to recover back certain taxes assessed against plaintiff and paid by it to defendant under protest. *Reversed.*

The facts are stated in the opinion.

Messrs. Conrad Kren, City Atty., and V. W. Seely, Asst. City Atty., for appellant:

The allegations in the answer that "said plaintiff kept said office in the town of Lake for the sole purpose of evading taxation in the city of Milwaukee, and with intent to defraud the defendant of taxes, etc.," is well and appropriately stated as a good defense, and should be construed as stating that the principal place of defendant's business was in the city of Milwaukee.

Detroit Transp. Co. v. Detroit Assessors, 91 Mich. 882.

Messrs. Van Dyke & Van Dyke, for respondent:

In 1 N. Y. Rev. Stat., 889, § 6, we find identically the same language as is found in the Revised Statutes of Wisconsin of 1849 and 1858, and, as it existed in New York prior to 1849, it is fair to assume that the provisions of the Wisconsin Revised Statutes of 1849 were borrowed from New York.

In that state a corporation owning vessels is taxable in respect thereof only at the place where its principal office is located by its articles of organization.

Western Transp. Co. v. Scheu, 19 N. Y. 408; *Oswego Starch Factory v. Dalloway*, 21 N. Y. 449; *Union S. B. Co. v. Buffalo*, 82 N. Y. 351. See also *Pelton v. Northern Transp. Co.* 37 Ohio St. 450; *Middletown Ferry Co. v. Middletown*, 40 Conn. 65.

Orton, J., delivered the opinion of the court:

The following facts are substantially stated in the complaint: The plaintiff is a corporation of this state, and is conducting the business of owning and employing steam and sail vessels in the general freighting business on the lakes and navigable waters connecting them, and at the times herein mentioned owned a large number of such vessels, and employed them in carrying cargoes of iron ore and other cargoes between points and places on said lakes. In its articles of organization, duly made and filed, it is certified and declared, in accordance with section 1772, Rev. Stat., that the name of said corporation shall be the "Milwaukee Steamship Company." It shall be located in and have its principal office in the town of Lake, in Milwaukee county, but may transact business in and locate such branch office or offices as may be necessary or convenient, and shall be designated by the board of directors at such place or places in any part of the state, or any of the states. At all

times herein mentioned the plaintiff had and maintained an office in a building in the town of Lake, in said county, outside the city of Milwaukee, upon which said building was a sign bearing the inscription, "Office of the Milwaukee Steamship Company," at which office in said building the stockholders of the plaintiff held their annual meetings for the election of directors, and also such occasional special meetings as were necessary; and there the directors of said plaintiff held their annual meeting for the election of officers, but no other business of said company was ever transacted at said place. And at all other times said office remained in charge of John Saveland, the plaintiff's assistant secretary, who at all times resided in said building in which said office was located. The manner in which the plaintiff's vessels were employed was as follows: David Vance and Frank L. Vance, copartners under the firm name of David Vance & Co., and engaged in business as fire and marine insurance agents and vessel agents, had an office in the third ward of said city of Milwaukee, in which was conducted the business of said firm of David Vance & Co. The said firm acted as the agents for plaintiff's vessels among others, and as such agents usually chartered them before the opening of navigation in each year for such season, or for a number of consecutive trips. The vessels so chartered have been principally employed in carrying iron ore from Escanaba and Ashland to Lake Erie ports, with occasional return cargoes of coal. The masters of said vessels attended to the details of the business of the same under their command, collecting freight, paying the usual running expenses, and remitting the balance to the said firm as agents for such vessels. The said firm of David Vance & Co., as agents, kept an account of the moneys so received and such disbursements as they made on account of said vessels, and accounted therefor to the plaintiff annually, or as required. At all said times said David Vance was president, and said Frank L. Vance was secretary, of the plaintiff company, and David Vance & Co. were the plaintiff's agents; and the secretary kept an account of the net earnings of the vessels and of the dividends made and paid from time to time. At all said times the plaintiff employed no clerks, bookkeepers, or office help, and did not have or occupy any office in the city of Milwaukee, and did not in any manner contribute to the payment of the rent of said office. In the year 1890 all the vessels owned by the plaintiff, and employed as aforesaid, were assessed for the purpose of taxation in said town of Lake, on the 17th day of December, 1890; and the plaintiff duly paid to the town treasurer of said town all the state, county, school, and town taxes levied pursuant to the assessment aforesaid in that year. In said year 1890 the assessor of the third ward of the city of Milwaukee also listed said vessels for assessment for the purpose of taxation in said third ward, and the said vessels were assessed in said ward, and the city tax hereinafter mentioned levied against the plaintiff thereon, notwithstanding

ing the plaintiff duly protested against the same before the assessor and board of review. On the 31st day of March, 1891, the chief of police of the city of Milwaukee, having the warrant authorizing him to collect the delinquent city taxes, demanded the payment of said tax so levied against the plaintiff in respect to said vessels, and, the plaintiff refusing to pay the same, said officer levied upon property of the plaintiff to satisfy the same, whereupon the plaintiff, under coercion of said levy, to save its property, and under protest, paid the city taxes and charges in the sum of \$798.37; and said sum has been covered into the treasury of said city. Judgment against the defendant is prayed for the sum of 798.24 and interest, besides costs. The defendant, by answer, either admits or alleges ignorance of the main facts set forth in the complaint, and avers on information and belief that at all the times mentioned in the complaint the plaintiff had kept and maintained an office in the third ward of the city of Milwaukee, at which said office the plaintiff kept its officers and clerks, all of its general and principal books of account, and its stock book; and there its officers transacted all of its business, except as hereinbefore admitted, and, save the annual election of directors and officers and special meetings of stockholders, no other business was done or transacted by the plaintiff at its said office in the town of Lake; and at all times, save at the times of said elections and meetings, said office in the town of Lake remained closed, and that no books of account, or any stock book was ever kept in or taken to said office. It will be seen that in respect to these two offices of the company the answer does not much enlarge the averments of the complaint. The complaint states that no business was done in the office in the town of Lake except the annual and special meetings of the stockholders for the election of directors, and the annual meeting of the directors to elect officers; "and no other business of said company was ever transacted at that place."

The office in the third ward of the city of Milwaukee was kept by David Vance, the president, and Frank L. Vance, the secretary, of the company; and they were also vessel agents, and acted for plaintiff's vessels, and chartered them each year, or for consecutive trips. The captains of the vessels remitted to them there the balances after paying the running expenses. The secretary of the company kept there an account of the net earnings of the vessels and the dividends made and paid from time to time. David Vance & Co. were the plaintiff's agents at all times at that office, and kept an account there of the moneys received and the disbursements made on account of said vessels, and accounted to the plaintiff annually therefor. It is a fair inference from the complaint that all the business and financial affairs of the company were transacted, and accounts thereof kept, and everything done by the company that required an office, except the said election meetings, was done at said office in the third ward of the city. The answer states

that the plaintiff kept its offices and clerks, all of its general and principal books of account, and its stock book, and transacted all the business of the company at the third ward office, except only such election meetings; and that at all other times the office in the town of Lake remained closed. There is but little, if any, difference between the complaint and answer as to what was done at these two offices. The plaintiff moved to strike the answer from the files, on the ground of its frivolousness, and the court granted the motion. In present practice this is the same in effect as sustaining the demurrer on the ground that the answer does not state a defense to the action. The court entered an order not only granting the motion, but for judgment in favor of the plaintiff on the pleadings, without leave to answer over, and rendered judgment for the plaintiff.

We shall treat the order as in effect sustaining the demurrer to the answer. The only question presented is, Was "the principal office or place of business" of this corporation in the third ward of the city of Milwaukee, where its property was assessed for the purpose of taxation? If so, that shall be held to be its residence for such purpose. Rev. Stat. §§ 1040, 1041. In view of the contention of the learned counsel of the respondent that its "principal office" is fixed by law in the town of Lake, it must be observed that the Statute (Rev. Stat. § 1772) provides that the corporation, in its articles of incorporation, shall state "the name and location of such corporation." The articles of this company go further, and state also "that its principal office shall be in the town of Lake, or it shall have its principal office" at that place. This is unauthorized by the statute, and of course of no effect. Its "location," whatever that may mean, may or may not have been properly stated, but as to the place of its principal office the articles are simply void. As a legal conclusion from the facts stated in the complaint and answer there would seem to be no doubt that the principal office or place of business of the plaintiff company, when its property was assessed, was in the third ward of the city of Milwaukee. That was the office of its president and secretary and vessel agent. There the accounts were kept of all the business of the company, the net earnings were returned to that office, and the dividends were there made and paid, and the vessels chartered. There the receipts and disbursements of all moneys were made, and the account thereof kept. All the account and stock books were kept there. In short, all the business, financial or otherwise, of the company was done there. The election of directors and officers was held at that house in the town of Lake, and at all other times, as an office for any purpose, it was closed. It could scarcely be seriously contended that the "principal office or place of business of the company" was in the town of Lake, or was not in the third ward of Milwaukee. The recent case of *Detroit Transp. Co. v. Detroit Assessors*, 91 Mich. 382, is strongly in point with this case.

In that case the property assessed was vessel property in the business of transportation on the lakes. In the articles of association it was stated "that the office for the transaction of the business of said corporation shall be in the township of Hamtramck, in the county of Wayne, and state of Michigan." The office in said township was at the residence of one Vorhees, a short distance out of the city of Detroit, and on one end of the stoop there was a small tin sign with the corporate name on it. No business was ever done there except the election of directors and officers, as in this case. After the enlargement of the corporate limits of Detroit, so as to include the residence of Vorhees, the company amended its articles and moved its sign and office to the house of one David Whitney in said township; but nothing else was ever done there by the company except such elections may have been held there. All the officers and agents of the company resided and did business in the city of Detroit; and the books of the company were kept there, and it receives and pays out money there, and the general manager of the company has his office there. The Michigan statute provides that "all corporate property shall be assessed to the corporation as to a natural person in the name of the corporation. The place where its principal office in this state is situated shall be deemed its residence." That statute does not differ essentially from our own. The court held that the principal office of the company was in the city of Detroit for the purpose of assessment of its property. In that case all the authorities cited by the plaintiff's counsel are reviewed and held inapplicable, except *Union S. B. Co. v. Buffalo*, 82 N. Y. 351, and *Pelton v. Northern Transp. Co.* 37 Ohio St. 450. In *Western Transp. Co. v. Scheu*, 19 N. Y. 408, and *Onwego Starch Factory v. Dolloway*, 21 N. Y. 449, cited in respondent's brief, it was held that the articles of association fixing "the principal office or place for transacting the financial concerns of the company" were according to the statute, and therefore conclusive. And so it may be said of the two above-excepted cases also. In the first of said cases the language in the articles of association is slightly different from the statute, but the court held that it was not materially different, and therefore conclu-

sive. In the last of said excepted cases the articles were authorized by the statute, and held conclusive of the question of the residence of the company for the purpose of taxation. If the articles of association of this company had stated that its "principal office or place of business" was at said house in the town of Lake, and the statute had provided that the articles should contain the principal office or place of business of the corporation, I am not prepared to intimate that it would be conclusive of the question, notwithstanding the above authorities. It would seem to give to a corporation the power to fix conclusively the place of its principal office or place of business falsely, to evade taxation in the place where its principal office or place of business actually and really is, when no other taxpayer has such a right or power. The rule of taxation must be uniform in this state. But the question is not before us in this case, for our statute does not authorize the articles to contain the "principal office" of the company, but only its "location." That word is not the same in language or meaning as the words "principal office or place of business." If required to say what the word "location" here means, I would say it probably means that its name shall be localized, as in this case the "Steamship Company" is made wrongly, by its location, the "Milwaukee Steamship Company." By its location it is not a Milwaukee company, and perhaps ought to be called, according to its articles, "Town of Lake Steamship Company." The words of the statute, or their obvious equivalents, should be used in the articles, to have the effect to determine the place where the corporation is to be assessed on its property by force of the articles themselves against the real facts. There is nothing in this case to break the force of the overwhelming evidence that the principal office and place of business of this corporation was within the third ward of the city of Milwaukee. The company was rightfully and properly assessed at that place on its property, and liable to pay the taxes thereon as there assessed. The motion should have been denied, or the demurrer overruled.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial therein.

MINNESOTA SUPREME COURT.

George S. GIFFORD, *Appt.*,

v.

John H. WIGGINS, *Respt.*

(.....Minn.....)

*1. A person who in good faith and

*Headnotes by MITCHELL, J.

NOTE.—*Lack of jurisdiction or of legal grounds of criminal prosecution as affecting the liability for false imprisonment of a complainant who acts in good faith.*

One who without malice, and without making any false statement, or asking that a warrant

without malice merely makes complaint before a magistrate of the commission of a public offense in a matter over which the magistrate has a general jurisdiction, and the magistrate issues a warrant, upon which the person charged is arrested, the party laying the complaint is not liable for an assault and false imprisonment, although the particular

should issue, goes before a magistrate and makes a statement of what he regards as constituting a criminal charge is not liable to an action for false imprisonment. *Nowak v. Waller*, 81 N. Y. S. R. 458.

And a magistrate issuing a criminal warrant, or

case may be one in which the magistrate had no jurisdiction.

2. Rule applied to a case where the complaint was for the violation of a municipal ordinance which was in fact invalid.

(July 7, 1892.)

APPEAL by plaintiff from a judgment of the District Court for Kandiyohi County in favor of defendant in an action brought to recover damages for alleged false imprisonment. *Affirmed.*

The facts are stated in the opinion.

Mr. Clarence H. Childs, for appellant:

In general a party procuring an arrest under a void writ is liable to an action for false imprisonment.

Gold v. Bissell, 1 Wend. 210; *Bonesteel v. Bonesteel*, 28 Wis. 245; *Chapman v. Dyett*, 11 Wend. 31, 25 Am. Dec. 598; *Painter v. Ives*, 4 Neb. 122; *Develling v. Sheldon*, 83 Ill. 390; *Vredenburg v. Hendricks*, 17 Barb. 179; *Fellows v. Goodman*, 49 Mo. 62; *Stensrud v. Delamater*, 56 Mich. 144; *Johnson v. Von Kettler*, 66 Ill. 63; *Kerr v. Mount*, 28 N. Y. 659.

Ir. Diehl v. Priester, 37 Ohio St. 478, the party procuring the arrest was held liable in an action for false imprisonment for merely making the affidavit upon which arrest was made.

The pleadings do not show that defendant acted in good faith, nor if it had been conceded, would "good faith" be available as a defense to an action of false imprisonment. *Judson v. Reardon*, 16 Minn. 431.

Mr. Samuel Porter, for respondent:

No private action can be maintained against

any person acting in a judicial capacity upon any of his acts, decisions, or omissions, however erroneous such acts, decisions, or omissions may have been, or by whatever motives prompted.

Tates v. Lansing, 5 Johns. 282; *Rochester White Lead Co. v. Rochester*, 8 N. Y. 463; *Stewart v. Hawley*, 21 Wend. 552; *Weater v. Devendorf*, 8 Denio, 117; *Harman v. Brotherhood*, 1 Denio, 537; *Wilson v. New York*, 1 Denio, 595; *Randall v. Brigham*, 74 U. S. 7 Wall. 523, 19 L. ed. 285; *Bradley v. Fisher*, 80 U. S. 18 Wall. 835, 20 L. ed. 646; *Brooks v. Mangam*, 86 Mich. 576, 24 Am. St. Rep. 137; *Stewart v. Cooley*, 23 Minn. 347, 28 Am. Rep. 690.

Therefore an action for false imprisonment would not lie against the justice who issued the warrant in the case at bar, however erroneous the issuance of the same may have been.

Gen. Stat. 1878, chap. 65, § 142, provides that upon complaint being made to any justice that an offense has been committed, he shall examine the complainant on oath, and if it appears that such offense has been committed, the said justice shall issue his warrant.

A person making a criminal complaint under these circumstances has no control over the justice, and knows or ought to know that the warrant will issue or not as the justice may determine.

Teal v. Fissel, 28 Fed. Rep. 351.

All the proceedings had in the matter of the arrest and imprisonment of the plaintiff after the making of the complaint were judicial in their character and no person was liable for the imprisonment of the plaintiff.

Newman v. Davis, 58 Iowa, 447; *McNeely v.*

one filing an affidavit for an arrest, is not made liable to an action for false imprisonment because the statute or ordinance under which the proceeding is brought is held unconstitutional or invalid. *Wheeler v. Gaires*, 5 Ohio C. Ct. Rep. 246.

Where the object in view is the protection or enforcement of a private right, and a warrant is procured where none is authorized, and an arrest made, the individual procuring it, and all others participating, are held liable. *Teal v. Tiesel*, 28 Fed. Rep. 351.

In *Von Latham v. Libby*, 38 Barb. 388, the defendants were held liable to an action for false imprisonment because the facts they stated to the justice did not constitute a criminal offense and the latter erroneously held that they did. On appeal judgment was reversed. This case is approved in *Teal v. Tiesel*, *supra*, where Butler, J., said that the failure to distinguish between that class of cases where individuals proceed on their own account, for their own private benefit, and public prosecutions for crime, had led to the confusion found in the books. The cases of *Maier v. Ashmead*, 30 Pa. 34; *Curry v. Pringle*, 11 Johns. 444; *Gold v. Bissell*, 1 Wend. 210; *Rogers v. Mulliner*, 6 Wend. 597, 22 Am. Dec. 546; *Vredenburg v. Hendricks*, 17 Barb. 179,—were said to belong to this class.

In *Collamer v. Elmore*, cited in *Mosher v. People*, 5 Barb. 575, it was held that a warrant of arrest had been issued on an insufficient affidavit; and that an action for false imprisonment might be sustained, even without reversing the proceedings upon certiorari. To the same effect, see *Vredenburg v. Hendricks*, 17 Barb. 179.

In *Wilson v. Robinson*, 6 How. Pr. 110, an answer to an action for false imprisonment was held in-
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sufficient which alleged that the defendant made a certain complaint to a magistrate averring a particular state of facts, upon affidavit, upon which a warrant was issued.

Emmott, J., commenting on this case in *Von Latham v. Libby*, 38 Barb. 389, said: "If this case would hold that a party who made a complaint to a magistrate in good faith charging a clearly criminal offense, would be liable for a consequent arrest made by the direction of the magistrate, because the facts stated or proved did not make out the offense, I should hesitate to accept the rule."

In *Cohen v. Morgan*, 6 Dowl. & R. 8, *Morgan* had lost a bill of exchange, which he supposed had been stolen. Having stated the facts to a magistrate, a warrant was issued; but he did not use the words, "feloniously stolen, taken and carried away," which appeared in the information. The case turned out no felony, but it was held that no action would lie for maliciously procuring the magistrate to grant his warrant.

Leigh v. Webb, 3 Esp. 165, was a case *not prius* before *Lord Eldon*, for malicious prosecution. The plaintiff was a brewer into whose house certain casks belonging to the defendant were sent. These, becoming empty, were transferred to the house of a third person, whereupon the defendant procured a warrant under which the plaintiff was taken into custody. The plaintiff complained that a charge of felony was imposed upon him, but the information contained no charge of felony, but a state of facts not amounting to a felony. The facts had been stated to a magistrate, who, thinking they amounted to a felony, committed the party. The plaintiff was nonsuited.

In *Barber v. Rollinson*, 1 Crompt. & M. 330, the plaintiff was arrested, at the instance of the de-

Driekill, 2 Blackf. 259; *Leigh v. Webb*, 8 Esp. 166; *Wheaton v. Beecher*, 49 Mich. 848.

Where a person does no more than to enter the complaint before the magistrate, he is not liable in trespass for the acts done under the warrant which the magistrate thereupon issues, even though the magistrate has no jurisdiction to issue the warrant.

Barker v. Stetson, 7 Gray, 54, 66 Am. Dec. 457; *Coupal v. Ward*, 106 Mass. 289; *Gelzenleuchter v. Niemeyer*, 64 Wis. 816; *Teal v. Fiesel*, 28 Fed. Rep. 851; *Murphy v. Walters*, 84 Mich. 180; *Marks v. Townsend*, 97 N. Y. 590; *Manning v. Mitchell*, 78 Ga. 660.

Mitchell, J., delivered the opinion of the court:

The material allegations of the complaint may be summarized as follows: The defendant made a complaint under oath to a justice of the peace in the village of Wilmar that plaintiff had violated the provisions of an ordinance of that village prohibiting peddling any goods, wares, merchandise or other articles not manufactured or grown within the county of Kandiyohi, without first having obtained a license therefor, and praying that the plaintiff might be arrested and dealt with according to law; that upon this complaint the justice issued a warrant, upon which the plaintiff was arrested and tried, and, upon the testimony of the defendant, adjudged guilty of a violation of the ordinance, that plaintiff was thereupon committed to jail, and there imprisoned until discharged on a writ of habeas corpus, on the ground that the ordinance in question was unconstitutional and void. There is no allegation that the complaint was made maliciously and without probable cause; hence the facts

stated do not constitute a cause of action for malicious prosecution. If the complaint states a cause of action at all, it must be for false imprisonment. It is not alleged that defendant participated or took part in plaintiff's arrest, or officiously interfered therewith by giving orders or directions to the officers or otherwise. It is true that in the complaint to the justice he prayed that the plaintiff might be arrested and dealt with according to law, but this is what is done, impliedly at least, in every case where a complaint is made to a magistrate or court charging any person with a violation of public law. The allegation that the plaintiff was convicted on the testimony of the defendant adds nothing to the complaint. By testifying as witness, certainly defendant did nothing that rendered him liable unless he testified falsely, which is not charged. It is alleged that the confinement of plaintiff was "on account and by reason of the procurement and direction of the defendant," but, in the absence of any allegations of specific facts, this must be construed as having reference to the act of making the complaint upon which the warrant was issued. It is also alleged that this confinement was wrongfully, maliciously, and unlawfully procured by defendant, and that said confinement was without probable cause; but this has reference to and is qualified by what immediately follows, to wit, "In this, that said ordinance was and is wholly void and unconstitutional." Hence, after stripping the complaint of all mere verbiage, we have a case where all that it is alleged that defendant did was to lay before the justice the complaint upon which the justice issued the warrant on which the plaintiff was arrested; and the sole ground upon which defendant is claimed to be

defendant, on a charge of felony. Being dismissed by the magistrate on a promise to appear, the defendant interposed another charge, on which a similar promise was exacted, the charges, being without foundation, were both dismissed, and *Lord Lyndhurst* held that the defendant was not liable for false imprisonment.

Where officers having a limited jurisdiction to issue process of a special nature in certain cases have arrested persons by such process in cases not within such authority, both officers and parties obtaining the process have been held liable for false imprisonment. In *Curry v. Pringle*, 11 Johns. 444, the defendant procured from a justice a warrant instead of a summons, without any oath of the facts which would authorize the issuance of the warrant, and when the plaintiff was not liable to arrest under the statute. *Gold v. Bissell*, 1 Wend. 210, and *Rogers v. Mulliner*, 6 Wend. 597, 23 Am. Dec. 546, were cases of a similar nature.

In *Maher v. Ashmead*, 80 Pa. 844, it was held that trespass was the proper remedy where a person is arrested on a warrant which charges an act not amounting to a crime.

In *Ahern v. Collins*, 39 Mo. 150, *Fogg, J.*, said: "It makes no difference whether the restraint of the person is caused without process or under color of process wholly illegal. It is trespass against the person, for which the plaintiff is entitled to compensation in damages upon the necessary proof of the facts."

If the court lacks jurisdiction all persons who aid in procuring the illegal arrest will be liable in trespass. *Johnson v. Von Kettler*, 66 Ill. 63.

In *Develing v. Sheldon*, 83 Ill. 390, the plaintiff 18 L. R. A.

had been arrested and fined for disobeying an injunction which was afterward held void. It was held that all aiding in the arrest were guilty of trespass.

In *Carratt v. Morley*, 1 Q. B. 18, *Morley* sued *Carratt* and obtained a judgment in a court which had no jurisdiction over his residence. It was held that the commissioners who signed the warrant and the arresting officer were liable, but *Morley* was not. *Lord Denman* said: "A party who merely originates a suit by stating his case to a court of justice is not guilty of trespass, though the proceedings should be erroneous or without jurisdiction."

In *West v. Smallwood*, 8 Mees. & W. 418, the plaintiff, a builder, ceased work in consequence of a dispute with the defendant, his employer. On complaint of the defendant the plaintiff was arrested under the Master and Servant Act, but the case was dismissed. Suit was brought for false imprisonment, but the plaintiff was nonsuited. The court of exchequer sustained the nonsuit and *Lord Abinger, C. B.*, said: "Where a magistrate has a general jurisdiction over the subject-matter, and a party comes before him and prefers a complaint, upon which the magistrate makes a mistake in thinking it a case within his authority, and grants a warrant which is not justifiable in point of law, the party complaining is not liable as a trespasser, but the only remedy against him is by an action upon the case if he has acted maliciously."

To the same effect, see *Brown v. Chapman*, 6 C. B. 885. A. P. W.

liable is that the ordinance under which the proceedings were instituted was void. There is no doubt of the invalidity of the ordinance as "class legislation," for we have not yet arrived at the point where it is permissible to protect "home industries" under the guise of an exercise of the police power. It is to be observed that the object of this prosecution was not the enforcement of any private right of the defendant. He did not make the complaint on his own account, or for his own private benefit. The complaint was for an alleged violation of public law, in which he represented, not himself, but the public,—an important distinction, which courts have sometimes overlooked, and which counsel for plaintiff seems to have failed to notice in the citation of cases. It seems to be settled by an almost unbroken line of authorities that if a person merely lays a criminal complaint before a magistrate, in a matter over which the magistrate has a general jurisdiction, and the magistrate issues a warrant upon which the person charged is arrested, the party laying the complaint is not liable for an assault and false imprisonment, although the particular case may be one in which the magistrate had no jurisdiction. The law on this subject was as well stated as anywhere by Lord Abinger in *West v. Smallwood*, 8 Mees. & W. 417, as follows: "Where a magistrate has a general jurisdiction over the subject-matter, and a party comes before him and prefers a complaint, upon which the magistrate makes a mistake in thinking it a case within his authority, and grants a warrant which is not justifiable in point of law, the party complaining is not liable as a trespasser, but the only remedy against him is by an action upon the case if he has acted maliciously." See also *Leigh v. Webb*, 3 Esp. 165; *Carratt v. Morley*, 1 Q. B. 18; *Murphy v. Walters*, 84 Mich. 180; *Von Latham v. Libby*, 38 Barb. 389; *Barker v. Sletson*, 7 Gray, 63, 66 Am. Dec. 457; *Langford v. Boston & A. R. Co.* 144 Mass. 431; *Teal v. Fissel*, 28 Fed. Rep. 351. This rule has been frequently applied where the facts stated in the complaint did not constitute a public offense, and it can make no difference in principle whether this is because the facts stated do not bring the case within a valid statute, or because the statute under which the proceedings were instituted is invalid. In either case, the acts charged constitute no offense, because there is no law making them such. *Barker v. Sletson*, *supra*, was a case of the latter class. The present case comes fully within the rule. The justice had a general jurisdiction over the subject-matter, to wit, prosecutions for the violations of village ordinances. The defendant merely stated the case to the magistrate in a complaint, without, so far as appears, bad faith or malice. The magistrate erred in thinking that the ordinance was valid, and that it was therefore a case within his authority, and issued a warrant which was not justifiable in point of law, and the plaintiff was arrested. Under such a state of facts the complainant is not liable. Under any other doctrine a person would never feel safe in making complaint of the commission of a public offense until the validity of the statute creating the offense

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had been passed upon by the court of last resort.

Order affirmed.

Ella M. MOORE, *Appt.*,

v.

H. G. NORMAN, *Resp.*

(.....Minn.....)

*1. A tender by a debtor to a creditor (who in good faith asserts that the amount tendered is insufficient) is not good as a tender if it be coupled with such conditions that the acceptance of the same will involve an admission by the creditor that no more is due.

2. In such a case a tender by the maker to the payee of promissory notes, (the same being mature, and still held by the payee,) coupled with a demand for the surrender of the notes,—*Held*, not effectual as a tender, so as to discharge a chattel mortgage securing the notes.

3. A direction by the maker of the notes, to one acting as his agent, to apply money in his hands to the payment of the notes, which notes such agent then held as the agent for the payee, does not, of itself, constitute or have the effect of such an application of the money.

(December 27, 1892.)

APPEAL by plaintiff from an order of the District Court for Jackson County refusing a new trial after verdict in favor of plaintiff in an action brought to recover possession of certain personal property which plaintiff claimed under a chattel mortgage. *Reversed.*

The facts are stated in the opinion.

Mr. T. J. Knox, for appellant:

To constitute a sufficient tender, it must be unconditional.

Where there is a dispute as to the amount that is due, the debtor cannot rightfully demand his note or evidence of debt.

Bowen v. Owen, 11 Q. B. 180; *Halpin v. Phoenix Ins. Co.* 118 N. Y. 165; *Noyes v. Wyckoff*, 114 N. Y. 207.

This court itself, when this case was before it on a former appeal, plainly and explicitly stated what was necessary to constitute a sufficient tender to discharge the lien of a chattel mortgage in cases like the one at bar, and said that it must be absolute and unconditional.

Moore v. Norman, 9 L. R. A. 55, 43 Minn. 428, 19 Am. St. Rep. 247.

Mr. George W. Wilson for respondent.

Dickinson, J., delivered the opinion of the court:

The defendant, to secure two promissory notes executed by him to the plaintiff, mort-

* Headnotes by *DICKINSON, J.*

NOTE.—On the question of the sufficiency of a tender, see, in connection with the authorities cited in the above case, *Union Mut. L. Ins. Co. v. Union Mills Plaster Co.* 3 L. R. A. 90, 37 Fed. Rep. 286; *Bailey v. Buchanan County*, 6 L. R. A. 562, 115 N. Y. 207; *Moore v. Norman*, 9 L. R. A. 55, 43 Minn. 428, 19 Am. St. Rep. 247 (former appeal in main case above); *Sanders v. Bryer*, 9 L. R. A. 255, 152 Mass. 141; *Welch v. Adams*, 9 L. R. A. 244, 152 Mass. 74.

gaged certain personal property to her. She prosecutes this action to recover possession of a part of the mortgaged property by virtue of her rights as such mortgagee. A former appeal in this action is reported in 43 Minn. 428, 9 L. R. A. 55, 19 Am. St. Rep. 247. The only issue to which reference is now necessary is as to whether certain payments and a tender of payment made by the defendant were sufficient and effectual to discharge the mortgages. The whole transaction on the part of the plaintiff was conducted by one George R. Moore, who was her general agent. Long after the maturity of the notes the defendant made a tender of payment to the plaintiff, which on his part is claimed to have been sufficient in amount, with payments which had been previously made, to complete the payment of the debt, and hence to discharge the mortgages. *Moore v. Norman*, 43 Minn. 428, 9 L. R. A. 55, 19 Am. St. Rep. 247. The plaintiff, however, then claimed that the amount tendered was not sufficient to pay the debt; and whether it was so or not was one of the issues in this case, in respect to which the plaintiff's contention, that the amount was insufficient, was supported by evidence which would have sustained a verdict in her favor. The evidence tended to show that the tender was accompanied by a demand that the notes be surrendered; that such surrender was refused, a larger sum being claimed to be due; but that the plaintiff (by her agent, who held the notes) offered to receive the money tendered, and indorse it on the notes, which offer the defendant refused to accept. The court, at the request of the defendant, charged the jury to the effect that if the amount tendered was sufficient the defendant had a right to demand the surrender of his notes. This constitutes one of the errors assigned. We think, as applied to the circumstances of this case, this instruction was erroneous. It may be stated as a general proposition, applicable at least where it appears that a larger sum than that tendered is in good faith claimed to be due, that the tender is not effectual as such if it be coupled with such conditions that the acceptance of it, as tendered, will involve an admission by the party accepting it that no more is due. *Leake*, Cont. 865, 866; *Addison*, Cont. 9th ed. 153; 2 Chitty, Cont. 1194; *Bowen v. Owen*, 11 Q. B. 180; *Finch v. Miller*, 5 C. B. 428; *Boans v. Judkins*, 4 Campb. 156; *Forrd v. Noll*, 2 Dowl. N. S. 617; *Thayer v. Brackett*, 12 Mass. 450; *Wood v. Hitchcock*, 20 Wend. 47; *Noyes v. Wyckoff*, 114 N. Y. 204; *Holton v. Brown*, 18 Vt. 224. See, further, in support of the general rule that a tender, to be effectual, must be absolute and unconditional, *Moore v. Norman*, 43 Minn. 428, 434, 9 L. R. A. 55, 19 Am. St. Rep. 247; *Bank of Benson v. Hove*, 45 Minn. 40, 42; *Balme v. Wambaugh*, 16 Minn. 116 (Gil. 106). The most common and familiar illustrations of the proposition above stated are cases where the tender is made as being all that is due, or as payment in full. It is everywhere held that such a tender is not good. The debtor has no right to the benefit of a tender, as having the effect of a payment, when it is burdened with such a condition that the creditor cannot accept the money without compromising his legal right to recover the further sum which he claims to be due. This case

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falls within the same principle. By offering to pay the money only upon the condition that the plaintiff deliver up the notes, (if such was the fact), the defendant insisted upon a condition the acceptance of which would at least seriously compromise the right of the plaintiff to recover any more, even though it should be true that the amount unpaid exceeded the sum tendered. The acceptance of the money and the surrender of the notes would be at least strong evidence against her, in the nature of an admission, that the notes were thereby fully paid. The defendant should not be heard to assert that a mere offer to pay a specified sum, less than what was supposed by the other party to be due, has the effect of a payment, so as to discharge the mortgage, when the offer was burdened with such a condition. It was enough for his protection that the plaintiff would have received the money offered and have indorsed its payment on the notes, which were already overdue and still in the hands of the plaintiff. If the defendant rejected this offer, and insisted upon the surrender of the notes, the natural and only reasonable construction to be put upon his conduct was that he insisted that the tender, if accepted, should be accepted as payment of the notes in full. If that was the effect of the tender, it was bad, under all the authorities. A mere tender should not be effectual to discharge the lien of a mortgage unless it be certainly sufficient in amount, and unburdened with any conditions which the debtor has not a clear right to impose. See *Moore v. Norman* and *Bank of Benson v. Hove*, *supra*. A new trial must be granted for the reason above stated.

We will refer to another matter, by way of caution.

While George R. Moore was the general agent of the plaintiff, there was evidence tending to show (although this is a matter of controversy) that on a certain occasion, when some property of the defendant was sold, he acted as an agent of the defendant, and as such agent received the proceeds of the sale. If such was the fact a mere direction by the defendant to him to apply on the plaintiff's notes the money which he (Moore) had received and held as the agent of the defendant would not, in itself, constitute, or be legally equivalent to, such an application of the money. If the defendant's agent disobeyed such instructions, and applied the money to his own use, the plaintiff would not be affected thereby, unless the circumstances were such that it could be considered that in behalf of the plaintiff, as her agent, he consented to apply the money as a payment on her notes. Such consent need not be express. If the defendant engaged Moore to be present at the sale, to receive the proceeds of sales made, and to apply the same on the plaintiff's notes, it might be inferred, in the absence of any dissent by Moore, that he acquiesced in this, and hence that, when he received the money, he received it as the agent of the plaintiff, even though, for some other purposes connected with the sale, he might have acted as the agent of the defendant. Of course, if the money was received by him as her agent, it was as though it had been received by her personally.

Order reversed.

OREGON SUPREME COURT.

A. N. KING, *Appt.*,

v.

J. R. BRIGHAM *et al.*, *Respts.*

(.....Or.....)

1. The jurisdiction in equity to ascertain boundaries under the Act of 1887, although it extends to cases of confused or uncertain boundaries which involve no other ground of equity jurisdiction, does not extend to the question of title to a disputed strip of land lying between the different lines alleged by the parties to be the boundaries.
2. An adjudication as to a boundary line in a suit under the Act of 1887 cannot operate as an estoppel or bar to a subsequent suit based on adverse possession to quiet title to the strip of land between the lines respectively claimed as the boundary.
3. Possession or intrusion upon land by mistake in consequence of confusion or uncertainty as to the true boundary without any intention to claim title beyond one's lawful boundary is not adverse.

(December 12, 1892.)

APPEAL by plaintiff from a decree of the Circuit Court for Multnomah County in favor of defendants in an action brought to quiet title to certain real estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. Killin, Starr & Thomas and J.

C. Moreland, for appellant:

Adverse possession of real property for the statutory period ripens into a perfect title and becomes a vested right as though evidenced by written title.

Parker v. Metzger, 12 Or. 407; *Joy v. Stump*, 14 Or. 361.

It must be an occupancy under claim of ownership though it need not be under color of title.

Swift v. Mulkey, 14 Or. 59.

There must be disseisin which must be an actual expulsion for the full statutory period. *Springer v. Young*, 14 Or. 280.

Where a person under a mistake as to the boundaries enters and occupies land not embraced in his title, claiming it as his own for the requisite statutory period, he thereby becomes vested with the title thereto by possession, although the entry and possession may have been founded upon a mistake.

Caulfield v. Clark, 17 Or. 478.

The effect of the former judgment *res judicata* is not limited or enlarged by the reasons given by the court for its rendition.

Freeman, Judgm. § 249; *Houston v. Williams*, 18 Cal. 24, 78 Am. Dec. 565; *Girardin v. Dean*, 49 Tex. 243; *Davis v. Millaudon*, 17 La. Ann. 97, 87 Am. Dec. 518.

For a judgment to be final the subject matter in controversy must have been brought in question and within the issue in the former proceedings and have terminated in a regular judgment on the merits.

Aspdon v. Nixon, 45 U. S. 4 How. 467, 11 L. ed. 1059.

It is not sufficient that in a prior proceeding the subject-matter was so involved that it might have been litigated. It must have been at issue and in fact litigated and decided.

Freeman, Judgm. § 258; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195; *Davis v. Brown*, 94 U. S. 428, 24 L. ed. 204; *Russell v. Place*, 94 U. S. 606, 24 L. ed. 214.

In all cases where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined.

Cromwell v. Sac County, *supra*. See *Freeman*, Judgm. § 256.

No judgment or decree is evidence in relation to any matter which came collaterally in question or in matters incidentally cognizable, or to be inferred from the judgment by argument or construction.

Lawrence v. Hunt, 10 Wend. 81, 25 Am. Dec. 539; *Jackson v. Wood*, 8 Wend. 27; *Wood v. Jackson*, 8 Wend. 85, 22 Am. Dec. 608; *Hopkins v. Lee*, 19 U. S. 6 Wheat. 109, 5 L. ed. 218; *Lewis & Nelson's Ap.* 67 Pa. 165; *Howard v. Kimball*, 65 Me. 308; *Hamner v. Pounds*, 57 Ala. 348; *Land v. Keirn*, 53 Miss. 341; *Henry v. Davis*, 13 W. Va. 230.

Messrs. R. Williams, E. B. Williams, and C. H. Carey, for respondents:

Mr. King's title by possession to one or the other of the two lines in controversy in the former suit was a matter involved in the issues set forth in the pleadings; evidence was directed to this point upon the trial, and was received and considered by the court; and the conclusion of the referee, the circuit court and the supreme court was based upon that issue and that evidence. That question was finally and completely determined and settled, and is now *res adjudicata* between these parties.

An equitable suit to settle and establish boundaries falls within that class that equity assumes jurisdiction of concurrently with law. And it is an example of those few suits in which equity, in administering relief, awards possession of the land in controversy as a law court would do.

Pom. Eq. Jur. § 180.

Equity jurisdiction embraces consideration of legal questions involved in a settlement of boundaries; the suit in its very nature involves a trial of the right of possession to the line. Unless the contestants can show title to the line they cannot prevail. Such is the inherent nature of the suit as shown by an examination of its history from the beginning.

Story, Eq. Jur. § 616, citing *Wake v. Conyers*, 1 Eden, 381; 2 Cox, Ch. 360.

In order to sustain a bill for a commission to ascertain boundaries, the plaintiff must establish, by the admission of the defendant, or by the evidence, a clear legal title to some land

NOTE.—The full review in the opinion and briefs of the jurisdiction of equity in cases of boundary 18 L. R. A.

constitutes an unusually valuable summary of the law on this question.

in the possession of the defendant, and also some ground for equitable relief.

Godfrey v. Little, 1 Russ. & M. 59, 2 Russ. & M. 630. See also *Perry v. Pratt*, 81 Conn. 438; *Cushing v. Miller*, 62 N. H. 517; *Fraley v. Peters*, 12 Bush, 470.

It is proper to consider the claim of adverse possession, and to fix the boundary accordingly.

Plank v. Reinhart, 81 Iowa, 756; *Davis v. Curtis*, 68 Iowa, 66; *Christian v. Weaver*, 79 Ga. 406.

The exercise of equitable jurisdiction in boundary cases, where the final relief granted is substantially a recovery or obtaining possession of specific portions of land is a matter of ordinary occurrence in suits for the adjustment of disputed boundaries, where some equitable incident or feature is involved and the dispute is not wholly confined to an assertion of mere conflicting legal titles or possessory rights.

1 Pom. Eq. Jur. §§ 174, 180, 185; 3 Pom. Eq. Jur. §§ 1878-1885. See Bigelow's note to Story, Eq. Jur. 13th ed. pp. 78-81.

If equity took cognizance of the case at all, it is folly to urge that it should drop the controversy without fully settling the issues.

Wilhelm's App. 79 Pa. 120; Pom. Eq. Jur. § 181; *Heatherly v. Hadley*, 4 Or. 1; *Howe v. Taylor*, 6 Or. 284; *Phipps v. Kelly*, 12 Or. 218.

Granting that the circuit and supreme courts passed upon the question of adverse possession in the *King Case*, the determination is final, even though erroneous; if the court therein assumed an authority as a court of equity to try an issue which was strictly legal and properly cognizable only by a court of law, still, although it exceeded its jurisdiction as a court of equity in one sense, the question was not *coram non judice* nor its findings void.

Pom. Eq. Jur. § 129; *Cumming v. Brooklyn*, 11 Paige, 596, 5 L. ed. 246; *Bank of Utica v. Mercereau*, 3 Barb. Ch. 574, 5 L. ed. 998, 49 Am. Dec. 189; *Amis v. Myers*, 57 U. S. 16 How. 492, 14 L. ed. 1029; *Sexton v. Pike*, 13 Ark. 193; *Creely v. Bay State Brick Co.* 103 Mass. 514; *Baker v. Woodward*, 12 Or. 21; *Kitcherside v. Myers*, 10 Or. 21.

Even if the supreme court were wrong in considering the question of possession, then this is hardly the time or the place to reverse the decision or raise the question.

Morrill v. Morrill, 11 L. R. A. 155, 20 Or. 102; *Crabill v. Crabill*, 23 Or. 588.

An adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have decided, as incident to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense.

Freeman, Judgm. p. 273, § 249; Herman, Estoppel, p. 481, § 411; *Rogers v. Higgins*, 57 Ill. 246; *Harmon v. Auditor of Public Accounts*, 128 Ill. 122; *Glenn v. Savage*, 14 Or. 573; *Barrett v. Failing*, 8 Or. 152.

The question is, Did it decide, and is the decision final?

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Chouteau v. Gibson, 76 Mo. 49; *Hurst v. Combs*, 12 Ky. L. Rep. 385.

The court is presumed to have passed upon the question of its jurisdiction.

1 Herman, Estoppel, p. 409, §§ 356, 357.

The same facts cannot be the basis of a second action between the same parties arising out of the same transaction, though in the former action the facts were pleaded as a defense only, and no claim was made thereon for affirmative relief.

Bierer v. Fretz, 37 Kan. 27.

A proposition assumed or decided by the court to be true, and which must be so assumed or decided in order to establish another proposition which expresses the conclusion of the court, is as effectually passed upon and settled in that court as the very matter directly decided.

Warren County School Dist. No. 23 Trustees v. Stocker, 42 N. J. L. 117.

The statement of the case and opinion of the court are admissible to show the ground upon which a decree was rendered.

Hood v. Hood, 110 Mass. 463; *Laird v. De Soto*, 32 Fed. Rep. 652; *Le Grand v. Rizey*, 83 Va. 862; *Glenn v. Savage*, 14 Or. 573.

King's possession to the Burrage line under a mistake could not ripen into title.

Causfield v. Clark, 17 Or. 473; *Howard v. Reedy*, 29 Ga. 152, 74 Am. Dec. 58; *Brown v. Cockerell*, 33 Ala. 45.

Taking plaintiff's own statement as true, his case is that set forth in *Worcester v. Lord*, 56 Me. 271, 96 Am. Dec. 456.

Throughout all the time, until the discovery of his present predicament, his claim of title has been according to the true line, that he intended to place his fence all the way upon that line, supposed he had done so, and did not discover his mistake until since the commencement of this suit. The court in that case held that such facts did not prove title to the strip.

See also 3 Washb. Real Prop. 5th ed. 172, 173; *Dow v. McKenney*, 64 Me. 138; *St. Louis University v. McCune*, 28 Mo. 482; *Lincoln v. Edgcomb*, 81 Me. 845; *Schad v. Sharp*, 95 Mo. 578; *Finch v. Ullman*, 105 Mo. 255; *Crawford v. Ahrens*, 103 Mo. 89; *Hockmoth v. Des Grand Champs*, 71 Mich. 520; *Wacha v. Brown*, 78 Iowa, 432; *Bewley v. Chapman*, 16 Or. 402; *Causfield v. Clark*, *supra*.

The possession was not hostile nor the claim notorious.

Hicklin v. McClear, 18 Or. 140; Wood, Limitations, pp. 510, 511, 589; *Comegys v. Carley*, 8 Watts, 280, 27 Am. Dec. 856.

Building a rude fence is held to be insufficient to oust the true owner, unless there be proof of actual notice to him that the possession is with intention to claim the land adversely.

Hicklin v. McClear, *supra*; *Coburn v. Hollis* 3 Met. 125; *Jackson v. Schoonmaker*, 2 Johns. 230; *Dem v. Hunt*, 20 N. J. L. 487; *Hale v. Glidden*, 10 N. H. 397; *Smith v. Hoemer*, 7 N. H. 436, 28 Am. Dec. 354; *Hutton v. Schumaker*, 31 Cal. 453; *Borel v. Rollins*, 30 Cal. 415; *Worcester v. Lord*, 56 Me. 265, 96 Am. Dec. 456; *Hockmoth v. Des Grand Champs*, *supra*; 3 Washb. Real Prop. 5th ed. 145.

He can claim nothing by construction or presumption.

Hale v. Glidden and Dem v. Hunt, supra.

Lord, Ch. J., delivered the opinion of the court:

This is a suit to quiet title to the strip of land lying immediately east of the eastern boundary of the plaintiff's donation land claim as established by this court in the suit of the plaintiff against Brigham *et al.*, and within the contiguous donation land claim of one Lowndale, in the city of Portland. The complaint alleges that the plaintiff has had adverse possession of the premises for ten years last past, and that the defendants wrongfully claim an interest in the same. The answer denies that the plaintiff is or has been in possession of the premises in controversy, and denies that the defendants wrongfully claim an interest or estate therein adverse to the plaintiff, but admits that they claim to own the same in fee simple, adversely to the plaintiff and all others; and for a further and separate answer, the defendants plead, in effect, that the plaintiff ought to be estopped from alleging or claiming that he is the owner or in possession of the real property described in the complaint, or from maintaining the suit, because of a suit brought by the plaintiff and the North Pacific Industrial Association as plaintiffs against these and other defendants to settle the boundary line between the lands owned by the plaintiff and the defendants, and which is the same line as that described as the westerly boundary of the tract mentioned in the complaint, etc., and that in said suit it was determined and decreed that the boundary line between the plaintiff's and defendants' land was a certain described line, (a portion of which is the same line mentioned in the complaint as the western boundary therein described,) etc., and that it was further ordered that the suit be remanded to the court below, with directions to appoint commissioners, as by law provided, to locate and mark out the line as determined by the court, etc.; and for a further and separate answer the defendants allege that they are the owners in fee simple of the tract of land in controversy by a chain of conveyances from the United States and others, and that they are in possession of the same, and the whole thereof; and for another defense the defendants allege the adverse possession of themselves and their predecessors in title for a period of ten years, etc. The reply denies the new matter set forth in the answer. Upon these issues the case was referred to a referee, who, in substance, found that the plaintiff has been in the continuous possession and claimed to be the owner of the property in dispute for a period of more than ten years, and that the defendants, nor either of them, have been in the open and continuous possession of the same for a period of ten years, but that the facts set up in this suit were fully heard and determined in the said suit wherein the plaintiff and the Northern Pacific Industrial Association were plaintiffs and J. R. Brigham and others were defendants, and that the supreme court by its decision and decree established

the line between the plaintiff and said defendants' lands in that suit, and that the plaintiff, King, did not own the land in controversy, (19 Or. 560;) and, as a conclusion of law, that the plaintiff is now estopped from claiming the land described in his complaint, and that the suit should be dismissed. Subsequently, upon proper proceedings had and taken, a decree was entered, affirming the report of the referee, and dismissing plaintiff's suit. From this decree the plaintiff has appealed.

The contention for the plaintiff is that the decree rendered in the former suit between these parties is no bar to the present suit to quiet title to the land in controversy. While it is admitted that the defendants set up as a defense in the former suit adverse possession for the statutory period to the land, and that issue was joined, and evidence taken upon it, and reported to the court, nevertheless it is insisted that such matter was outside of the jurisdiction of the court, as it affected title, and, consequently, that no valid decree could be founded on it; and, further, that such matter, as a defense, was not considered by the court, as its decree simply determined the location of the disputed line, and directs the appointment of viewers to locate the same by proper monuments upon the ground. This view is based on the fact that the decree in the former suit merely determined the boundary line between the adjoining lands of the plaintiff and the defendants, reinforced by the assumption that the Act of the Legislature of 1887 giving to courts of equity jurisdiction to try cases where a dispute exists between owners of adjoining lands concerning the boundaries thereof, as construed in *Love v. Morrill*, 19 Or. 545, limits and confines such jurisdiction to the ascertainment and location of the boundary lines, and cannot be extended to the determination of title. The question raised is important, and involves some consideration in respect to the jurisdiction conferred by the statute that requires further explanation. As cases of disputed boundary lines between the lands of adjacent owner are matters which concern legal estates, and are ordinarily settled in courts of law, there seems to be an impression in the profession that because of the statute conferring jurisdiction upon a court of equity to try all cases where a dispute exists as to the boundary lines of adjoining lands, and requiring each of the parties to designate such boundary line as he shall claim it to be, that such suit involves the recovery of the strip of land embraced between the lines as designated by them, and necessarily that title acquired by adverse possession may be set up by the defendant to establish such boundary line, as so designated and claimed. In the case of *Love v. Morrill, supra*, referred to, neither the pleadings nor the facts disclosed any dispute as to the boundary line, except that the defendant claimed title by adverse possession to that portion of the land covered by her building, which projected over their boundary line, in consequence of which she claimed that the line should be so located as to include it. As the case was brought under the statute, and presented simply the pure

legal question of the title to that portion of the land covered by the building of the defendant, it became important and necessary to ascertain the nature and extent of the jurisdiction conferred; for, if such a suit could be maintained under it, nothing was plainer than that jurisdiction might be exerted to usurp the place of an action at law to recover real property, and thereby deprive the defendant of his constitutional right to trial by jury. With these considerations in view, the court proceeded to construe the statute holding that courts of equity were invested with jurisdiction to try cases where a dispute exists between the owners of adjoining lands concerning the boundary line or lines thereof, without any equitable grounds, or equity superinduced by the act of the parties, to sustain it, but that such jurisdiction could not be extended to determine title to real property, or usurp the place of an action at law to recover real property; that the object of the jurisdiction conferred by the statute was to ascertain the true boundary between the lands of adjacent owners, which had become confused or unknown or lost, the subject-matter of such jurisdiction or the suit being the dispute concerning the boundary line, and not the title, and, as a consequence, that, within the purview of the statute the suit could not be maintained. It is true that disputes in respect to the boundaries of adjacent proprietors of land are ordinarily of legal cognizance, and that the statute on its face seemingly indicates an intention to oust the jurisdiction at law for the trial of such cases; but when the statute declares, in effect, that a suit may be maintained in equity, where a controversy exists between the owners of adjacent lands as to the location of the boundary line, it is not meant that a suit may be maintained when the dispute between them concerning such boundary line involves the determination of title,—as, where each owner, claiming a different line as the true boundary line of the adjacent lands, seeks to recover or establish title to the strip embraced between such lines. The distinction is between cases which are prosecuted with the ostensible object of determining the true boundary line between the parties and those brought to recover lands claimed by the defendant to be embraced within this boundary line as against the line claimed by the plaintiff.

The issuing of commissions to ascertain lost boundaries, or boundaries which from accident or other cause have become confused, uncertain, or obscure, is an ancient branch of equity jurisdiction, the origin of which cannot be ascertained with exactness, and still remains uncertain and conjectural. But the books show there are cases in which the court has granted commissions or directed issues on no other apparent ground than that the boundaries between contiguous lands were in controversy, from the fact of their being confused, or incapable of being distinguished with any certainty. It appears, however, that it is a jurisdiction which has been sparingly exercised, and watched with jealousy, and of late years that has not been favored or exercised unless some equitable

circumstances are shown to sustain it. Story, Eq. Jur. § 609 *et seq.*; Bispham, Eq. 552; Pom. Eq. Jur. §§ 1884, 1885; Tyler, Boundaries, 259. In *Speer v. Crawler*, 2 Meriv. 417, the master of rolls criticised the exercise of such jurisdiction without some equitable ground to support it, asking: "On what principle can a court of equity interfere between two independent proprietors, and force one of them to have his rights tried and determined in any other than the ordinary legal mode in which questions of property are tried? In some cases, certainly, the court has granted commissions or directed issues on no other apparent ground than that the boundaries of manors were in controversy. In *Wake v. Conyers*, 2 Cox, Ch. 860, however, Lord Northington held that it was in the case of manors that the exercise of the jurisdiction 'which had been assumed of late' was peculiarly objectionable. He refused either to grant a commission or to direct an issue. So did Lord Thurlow in the case of two parishes. *St. Luke's v. St. Leonard's* cited in 2 Anst. 393, 395. In the same case of *Wake v. Conyers*, Lord Northington says that, in his apprehension, this court has simply no jurisdiction to settle the boundaries even of land, unless some equity is superinduced by the act of the parties. I concur in that opinion, and think that the circumstance of a confusion of boundaries furnishes, *per se*, no ground for the interposition of the court." And the general rule now adopted is not to entertain jurisdiction, in cases of confusion of boundaries, upon the ground that the boundaries are in controversy, but to require that there should be some equity superinduced by the act of the parties. Story, Eq. Jur. § 615, and note of authorities. From this it is apparent that originally there was no jurisdiction in equity of mere questions of boundary; but there was jurisdiction where there was a confusion of boundaries, only it did not extend to every dispute as to boundary, because in such cases the law generally affords ample remedy. As a consequence, before equity would intervene to fix the boundary between two adjacent estates which had become obscure and controverted, there must be some equitable ground attaching itself to the controversy, such as fraud on the part of the defendant by which a confusion of the boundary has been produced, or there must be some relation between the parties which makes it the duty of one of them to preserve and protect the boundary, or it must be necessary to prevent a multiplicity of suits, or to prevent mischief otherwise irremediable. Story, Eq. Jur. §§ 619-621. Our statute is predicated upon the idea that whenever a controversy exists, arising from a confusion of boundaries between the owners of adjoining lands, it is necessary, in order to put an end to such controversy, that equity should intervene and ascertain the true boundary between such estates. Under this statute, the jurisdiction of equity is extended to a class of cases of disputed boundary, where no equitable circumstance attaches itself to the controversy. Under it, a court of equity may intervene in any case in which title is not involved,

where the boundary is confused or obscure, and a controversy exists between the owners of the adjacent lands to ascertain such boundary and fix its location. It is of no consequence, to sustain such jurisdiction, that the confusion of the boundary about which the controversy exists was not occasioned by the fraud or misconduct of the defendant, but was the result of accident or lapse of time, or was produced by natural causes, or the like. It is enough that a controversy exists concerning the boundary, which is uncertain or obscure, and needs to be ascertained and located. In such case either party may bring a suit in equity, in which each may designate the boundary as he claims it; but within the purview of the statute the suit is not brought to affect pre-existing titles, but to establish or restore the true boundary line between the adjacent estates. As Bean, J., said in *Lore v. Morrill*, *supra*: "The subject-matter of the suit is the dispute concerning the lines, and not the title; and the court is only authorized to determine these lines, leaving all questions of legal title to be determined in the proper forum, unless there exists some equity independent of the controversy about the lines to give a court of equity jurisdiction to try the question of title." The object of the suit, therefore, is to ascertain the true boundary line between the contiguous estates, and not to try the question of title on either side of the boundary. It follows, then, that the statute does not undertake to transfer to the jurisdiction of equity cases of disputed boundary which involve questions of title, and belong to the common-law jurisdiction. A statute of that kind would be clearly subject to the objection of violating the constitutional right of the defendant to a trial by jury. But the statute does give jurisdiction to try cases of disputed boundary between the owners of adjoining lands arising from other causes than an equity superinduced by the act of the parties. In other words, it has extended the jurisdiction of equity to a class of cases not of late years (although they may have been originally) embraced within that jurisdiction, because there was an adequate remedy at law. Now the equity for the ascertainment of boundary arises, according to the chancery jurisdiction, when the boundaries between the owners of adjoining estates have been confused by the misconduct of the defendant or those under whom he claims. The mere confusion will not create to, for the fact that a man cannot ascertain his property does not constitute an equity against another person. *Speer v. Crawler*, *supra*. Hence courts of equity have no jurisdiction to try cases for the ascertainment of boundary, unless some equity is superinduced by the act of the defendant; otherwise they are triable in the ordinary course of law, with the assistance of a jury, within the rule that equity will not interfere where there is an adequate remedy at law.

The important question then arises, in view of the provision of our Constitution which provides that "in all civil cases the right of trial by jury shall remain inviolate." (sec. 17, art. 1,) whether the Legislature

can confer upon a court of equity jurisdiction to try and determine controversies in respect to disputed boundary between independent proprietors of adjoining estates, where no equity has been superinduced by the act of the defendant, as has been done by the statute without transcending the limits of the Constitution. By an Act of the Legislature of the state of Pennsylvania jurisdiction is conferred upon the supreme court and the court of common pleas, all and singular, "the jurisdiction and powers of a court of chancery in all cases of disputed boundary between adjoining lands," etc. And by a supplement to the Act it is declared "that the jurisdiction and powers given by the Act," etc., "shall extend to and embrace the ascertainment and adjustment of disputed boundaries between adjoining lands," etc., where such boundaries are or shall have become confused or rendered uncertain either by lapse of time, by natural causes, or by the act, neglect, or default of any present or former occupant thereof." It will be noticed that the Act confers jurisdiction to try other cases of disputed boundary than those where the confusion was produced by the misconduct of the defendant. The Constitution of that state provides that "trial by jury shall be as heretofore, and the right thereof remain inviolate." In *Norris's App.*, 64 Pa. 279, no special equity affecting the defendant or other ground of equitable interposition was alleged or pretended, and it was conceded that within the rule of chancery jurisdiction a mere dispute as to the dividing line of two adjoining estates, not held under the same title, where there is no special equity affecting the defendant, would not give jurisdiction; and the court held that the Acts of the Legislature must be confined to cases which are properly the subject of equitable jurisdiction, and, consequently, that the plaintiff must be remanded to his legal remedies, as the case did not come within the jurisdiction of chancery to fix the boundaries of legal estates unless some equity is superinduced by the act of the parties. Sharswood, J., examined the constitutional question at some length, and presented some strong arguments adverse to its constitutionality, but in consideration of the fact that such a construction could be given to the acts as would not conflict with the Constitution, by confining them in their true intentment to cases which are properly the subject of equitable jurisdiction. But it follows from this argument that an Act of the Legislature authorizing a court of equity to ascertain or determine controversies as to boundaries where no equity has been superinduced by the act of the parties would be invalid, as transcending the limits which the Constitution prescribes. In so far as our statute undertakes to confer jurisdiction to try cases in equity of disputed boundary between the owners of legal estates, where no special equity exists to sustain such jurisdiction, it is vulnerable to this objection, unless we construe the statute as only intended to apply to cases which are properly the subject of equitable jurisdiction. This we cannot do without violating the plain intentment of the statute as construed in *Lore v. Morrill*, *supra*, and as

accepted and applied to other cases. Other states have passed statutes providing for special tribunals, or conferring jurisdiction upon courts of equity, to ascertain or fix the boundary line between the owners of adjoining lands, or the boundary line between adjoining towns. Tyler, *Boundaries*, 244, 256. The Connecticut statute is based upon a proceeding in equity brought in the superior court to ascertain and fix lost or uncertain boundaries, and extends such jurisdiction to many cases which it would not embrace without the statute; and in construing such statutes it was held that the jurisdiction conferred upon the court in respect to ascertaining such boundaries was not dependent on a want of an adequate remedy at law. Gen. Stat. Conn. p. 543, § 83; *Perry v. Pratt*, 81 Conn. 434. This is contrary to the rule that, unless there is some special equity to sustain such jurisdiction, the remedy at law must prevail, and renders the statute equally vulnerable to the constitutional objection of depriving the defendant of the right of trial by jury, unless the opinion expressed by the court that "the issuing of commissions to ascertain boundaries is a very ancient branch of equity jurisprudence, and that there can be no doubt that our statute conferring jurisdiction upon the superior court is broad enough to embrace that branch, as well as every other," may be considered as a valid ground for the exercise of equitable interposition in such cases. The principle applied in the construction of that statute, and the object it was intended to serve, alike applies to the construction and object of our statute as illustrated in *Love v. Morrill*, *supra*. In *West Hartford Ecclesiastical Soc. v. First Baptist Church*, 85 Conn. 120, Hinman, Ch. J., after repeating the language of the statute, and referring to the case of *Perry v. Pratt*, *supra*, said: "It was not the intention of this statute to withdraw cases relating to the title to land from the ordinary tribunals, assisted, as they are, in respect to the finding of facts by a jury. The Legislature intended to guard against this abuse of the statute in the first clause of it, which limits the action of the court, as a court of equity under it, to the cases where the boundaries between adjoining proprietors have been lost, etc. It presupposes that such monuments once existed, and have ceased to exist, or that they have become so obscure as to require the erection of new ones. It was not intended that every uncertain line of division between adjoining proprietors should be definitely fixed by a committee of the superior court. Suppose a proprietor had encroached upon an adjoining proprietor for so long a time, and under such circumstances, that he could not be divested of his possessions, no one would claim that he could call upon the court to fix a boundary for him up to the line he had occupied; "and there is little reason for claiming that his adjoining proprietor could call upon the court to determine by a committee where the original line really was, so long as the original monuments that defined that line remained. The object is not to try the question of title on either side of the line, but to mark the place of the old

line where the ancient monuments are gone." Some other cases might be cited within the purview of this decision, and those cases in which jurisdiction was formerly exercised on no other apparent ground than a confusion of boundary. Within the purview of the principles announced, without further reference, the jurisdiction conferred by our statute may be well maintained as a valid exercise of power for ascertaining the true boundary lines between adjacent estates which have become confused or uncertain, and do not involve the determination of legal title, although it would have been as well, or perhaps more in harmony with the chancery practice as it now exists,—if the statute would have borne such a construction,—to have confined its operation to cases which are properly the subject of equitable jurisdiction. It may be true in those cases where jurisdiction is acquired by some equity arising between the parties, or superinduced by the wrongful conduct of the defendant in obliterating the lines or destroying the monuments upon which the evidence of such boundary depends, that a suit in equity, although brought for ascertaining and fixing the boundary between adjacent estates, may involve the determination of conflicting titles or possessory rights; yet, when such is the case, a court of equity is competent to administer full and complete relief, and, if necessary, to grant the same kind of relief as that given at law. In such case the decree might operate as an estoppel and a bar in respect to the title involved and litigated. But there is a clear distinction between a dispute about the title to lands and a dispute about boundary lines. It is the confounding of these two questions, or regarding them as identical, that has sometimes misled parties in seeking their remedies.

In the previous suit between these parties the question determined was not title, but the boundary line between the King and Lownsdale claims. In that case the confusion of the boundary was occasioned by the displacement, from natural causes, of the tree or monument at the northeast corner of the King claim. It appears that the initial point of the King claim was undisputed, but, if the monument at the northeast corner of the claim, as actually located, could be ascertained, the boundary line in dispute would be a straight line. In his suit the plaintiff designated and claimed a certain line to be the boundary, which the defendants denied, and alleged and claimed another and different line to be the boundary of these adjoining lands. It is true that the defendant set up as a separate defense title by adverse possession, which the plaintiff denied; but the court properly ignored its consideration, and confined the jurisdiction to ascertaining and locating the boundary in dispute. It is clear, then, that the case not only related merely to the question of boundary, but that, within the purview of the statute, it did not, nor could not, extend to title. The title of the plaintiff to his land, and the title of the defendants to their lands, to the boundary—wherever that was—between the adjacent states, stood conceded, and the only question

sought to be litigated was as to the true location of such boundary. Upon the evidence submitted, the court ascertained that the boundary line in dispute was the line claimed by the defendants, and not the one designated by the plaintiff, and directed the same to be located as the boundary between their lands, whereupon the plaintiff has brought this suit to quiet his title to the strip of land included between the boundary line as he claimed it and the boundary line as the defendants claimed it in the former suit, alleging that he has acquired title to it by adverse possession, which the defendants deny, and, among other grounds, seek to defeat by pleading the decree in the former suit as an estoppel. To give the decree in the former suit the effect of an estoppel in the present suit, the title to the strip in question must have been directly in issue and determined. The rule is elementary that the estoppel only extends to the question directly involved in the issue, and not to any incidental or collateral matter which may have arisen. To ascertain whether a former judgment or decree is a bar to present litigation, the test is, Was the same right or title put directly in issue and determined? Plainly, upon the principles already stated, the court had no jurisdiction to try title to the strip in question: nor was it tried, as the decree plainly indicates. The controversy was as to the true location of the line, and not the title to the strip of land lying between the different lines alleged by the parties; and, consequently, the title to it, not being in issue, was not adjudicated, and cannot operate as an estoppel or bar to the present suit.

In the former case the evidence of the plaintiff was directed to showing that the location of the line was as he alleged it, and in the present case to showing adverse possession by occupancy to the same line, and necessarily his evidence covers a great deal of the same ground in this as in that. In the former suit, to the suggestion that the plaintiff had acquired title by adverse possession, the court said that "the evidence shows that Mr. King held this possession, if at all, under mistake or ignorance as to his true line, and with no intention to claim beyond the true line, when

discovered;" indicating that, in the opinion of the court, his evidence was not susceptible of that effect, and that it was consistent with the theory of his suit, as not intending to affect pre-existing titles, but to ascertain and locate a boundary line which was unknown or lost, and as explaining and showing that, if he occupied the land up to the fence or the line as he alleged it, he did it because he believed it to be the true line, but without any intention to claim up to it if it should turn out by the suit to be beyond the line. It did so turn out, as the court established another line. By an affirmative answer to a leading question the plaintiff is now made "to claim to own the land in controversy, whether it was covered by the patent or not." But claims of this sort, unless consistent with the acts of the parties and other circumstances of the case, are not very satisfactory proof to establish title by adverse possession to the lands covered by the title of others. Assuming that the plaintiff did occupy the land in question, his evidence, taken as a whole, judged in the light of surrounding facts, indicates that his possession or intrusion upon the land was by mistake, and, in consequence of the confusion or uncertainty as to the true line, was unsuspected by him or the defendants, because he believed it to be the true line, but without any intention on his part to claim the title to any other land than was embraced within the boundary of his claim. It is not the case of one occupying land under a mistake as to the boundary not embraced in his title, claiming it as his own for the requisite statutory period. All this becomes more apparent when his evidence is considered with reference to the other testimony, and in the light of the surrounding facts. Nor is this all. The greatest diversity exists between the witnesses as to the location of the fence upon which adverse possession is predicated; no two of them fixing it with certainty in the same place. In fact, the evidence lacks that certainty and convincing proof necessary to establish adverse possession. Besides, we are of the opinion that plaintiff has no sufficient possession to maintain this suit, so that, in any view, *the decree must be affirmed*, and suit dismissed.

INDIANA SUPREME COURT.

City of FORT WAYNE, *Appt.*,
v.
LAKE SHORE & MICHIGAN SOUTH-
ERN R. CO.

(.....Ind.....)

1. Before land purchased by a city for a park has been actually dedicated

NOTE.—Validity of vote of common council or similar body as affected by personal interest of members.

The decisions on this important subject are very few. That a quorum of village trustees cannot be made by counting members who are disqualified to vote by reason of interest was decided in *Coles v. Williamsburg*, 10 Wend. 659.

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to the public use the city may convey it to a railroad company for a yard and depot grounds if no limitation or restriction as to alienation was inserted in the deed to it.

2. A ratification of a resolution of a common council donating city land to a railroad company, passed when the vice-president of the road was a councilman and voted for it, is effected by a subsequent resolu-

So the vote by a member of a common council cast for himself as candidate for marshal makes his election void where he had not votes enough to elect him without his own vote. *State v. Hoyt*, 2 Or. 246.

Supervisors personally liable to the county as sureties for moneys converted by its treasurer are

tion of the council passed at a time when he was not a member, directing the execution of a deed, which will render valid a deed executed in pursuance of it.

3. The addition must be laid out before a city can avail itself of the right to cross land granted to a railroad company under a reservation in the deed of the right to cross the tracks whenever it should determine to lay off an addition composed of the remainder of the tract.

4. A city street cannot be extended across a railroad yard without authority from the Legislature express or necessarily implied when the effect will be to destroy the use of scales erected near the point of crossing as well as of a portion of the yard, to greatly discommode the company's business and impair the value of its franchise, and it will be dangerous to life for the public to attempt to use the street if so extended.

(November 5, 1882.)

APPEAL by defendant from a judgment of the Superior Court for Alien County in favor of plaintiff in an action brought to enjoin the opening of a street across plaintiff's railroad yard and tracks. *Affirmed.*

The facts are stated in the opinion.

Mr. Henry Colerick for appellant.

Messrs. George C. Green and O. G. Getzen-Danner, with *Mr. John H. Baker*, for appellee:

disqualified to vote on a resolution to release him from liability, and if there was no quorum without counting them a vote for such resolution is void. *Oconto County v. Hall*, 47 Wis. 308.

A town clerk who is a contractor for the building of a schoolhouse is disqualified to sit as member of the town board in proceedings to remove the moderator of the school district for neglect of duty in refusing to countersign orders for money alleged to be due on such contract, especially where the board go into a consideration of the validity of the contractor's claim as affecting their decision. *Stockwell v. White Lake Twp.* 22 Mich. 841.

Legislative power given to three justices to make an appointment to office cannot be executed by appointing one of their own number to the office. *People v. Thomas*, 33 Barb. 287.

And a board of supervisors cannot appoint some of the members of the board to be drain commissioners. In this case the court says: "Whether they voted for their own appointment does not affirmatively appear but they had as much right to do so as the others had to vote for them." *Kinyon v. Duchene*, 21 Mich. 498.

But members of the board of supervisors are not so much interested by the fact that they are taxpayers as to disqualify them to act as a board of audit in respect to expenses chargeable against a city for an appeal from the equalization of the valuation of property for taxation. *People v. Kingston*, 101 N. Y. 82.

A member of a council is not disqualified to vote for the establishment of a sewer district because he has property therein unless it appears that he has a pecuniary interest in the measure adverse to that of the city. *Topeka v. Huntoon*, 46 Kan. 634.

Where the vote of a city trustee was necessary to let a contract to a private corporation of which he was a director, the contract thus let is void. *San Diego v. San Diego & L. A. R. Co.* 44 Cal. 106.

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At common law, corporations might take and hold and dispose of real estate for any purpose not inconsistent with those for which they were created.

1 Washb. Real Prop. 3d ed. 64.

Municipal corporations possess the incidental or implied right to alienate or dispose of the property, real or personal, of the corporation, of a private nature, unless restrained by charter or statute.

2 Dill. Mun. Corp. 3d ed. § 575; *Reynolds v. Stark County Comrs.* 5 Ohio, 129.

In *Beach v. Haynes*, 12 Vt. 15, it was held that a municipal corporation might convey land held by it in fee, though purchased for the use of a common, if not in fact previously dedicated to such use, even though it appeared upon the face of the deed by which the land was conveyed to the corporation that it was purchased for a town common or park.

See also 1 Devlin, Deeds, § 345; *Jamison v. Fopiana*, 43 Mo. 565, 97 Am. Dec. 414; *Warren County Suprs. v. Patterson*, 56 Ill. 111; *Kings County F. Ins. Co. v. Stevens*, 87 N. Y. 287, 41 Am. Rep. 861; *Shannon v. O'Boyle*, 51 Ind. 565; *Plattier v. Elkhart County Comrs.* 103 Ind. 360; *Neubold v. Glenn*, 87 Md. 489.

The consideration of the deed was that the grantee, its successors, and assigns, should construct its railroad on the land conveyed, and should erect such shops and build such freight and passenger houses thereon as it might find needful. This was a valuable consideration,

And the grant of a franchise for the benefit of a corporation to be thereafter organized by subscribers, which was subsequently transferred to the corporation after it was formed, is void where one of the original subscribers was a trustee of the city and was one of a committee to whom the application was referred and by whom it was favorably reported. *Finch v. Riverside & A. R. Co.* 87 Cal. 597.

The same principle is involved in some other cases in which it does not appear that any formal vote was taken on the question of making a contract with one or more members of the representative body.

Thus a contract between a school district and one of its directors for the building of a schoolhouse was held void, especially where it was obtained by his active exertions. *Pickett v. School Dist. No. 1*, 26 Wis. 561, 3 Am. Rep. 105.

And under a statute prohibiting all contracts between public officers and the municipality or other divisions of the state which they serve which would call for any payment from the treasury a board of county commissioners cannot employ one of its own members to do any service which can be performed by one who is not a member of the board, such as the inspection, examination, and measurement of work performed under a contract with the board. *Waymire v. Powell*, 105 Ind. 825.

And a contract for street improvements let by the trustees of an incorporated town to one of their number and to an assessor of the town is void. *Case v. Johnson*, 91 Ind. 478.

On the question of an officer's power to contract with the public body or municipality which he represents, see further, *note* to *Tipecanoe County Comrs. v. Mitchell* (Ind.) 15 L. R. A. 520.

On the question of the recovery by a councilman for extra services, see *Tacoma v. Lillis* (Wash.) 208, 572.

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and abundantly sufficient to support the deed. *Olem v. Newcastle & D. R. Co.* 9 Ind. 488; *New Albany & S. R. Co. v. McCormick*, 10 Ind. 499.

As to the power of the city to convey, see especially *Reynolds v. Stark County Comrs.* 5 Ohio, 129; *Alves v. Henderson*, 16 B. Mon. 181; *Boskin v. Furman*, 28 Mo. 427; *Kennedy v. Covington*, 8 Dana, 50; *Knox County v. McComb*, 19 Ohio St. 320; *Shannon v. O'Boyle*, 51 Ind. 565.

A reservation or exception will not be given effect beyond the fair import of its terms.

Nicholson v. Caress, 45 Ind. 479; 2 Devlin, Deeds, § 979; *Jackson v. Hudson*, 3 Johns. 375, 3 Am. Dec. 500; *Jackson v. Gardner*, 8 Johns. 394; *Klaer v. Ridgway*, 86 Pa. 529; *Wiley v. Sirdorus*, 41 Iowa, 224.

A street cannot be extended over and across the yards, station grounds, or tracks used for storing cars and making up trains, and other parts of railroad grounds, when the construction of the street would essentially impair the franchise and operation of the railroad.

Indiana Cent. R. Co. v. State, 3 Ind. 421; *Crossley v. O'Brien*, 24 Ind. 325, 87 Am. Dec. 329; *Baltimore & O. & C. R. Co. v. North*, 108 Ind. 486; *Valparaiso v. Chicago & G. T. R. Co.* 128 Ind. 467; *Mills, Em. Dom.* §§ 83, 46; *Milwaukee & St. P. R. Co. v. Faribault*, 28 Minn. 167; *St. Paul Union Depot Co. v. St. Paul*, 80 Minn. 859; *St. Paul, M. & M. R. Co. v. Minneapolis*, 85 Minn. 141; *Boston & A. R. Co. v. Greenbush*, 52 N. Y. 511; *Delaware & H. Canal Co. v. Whitehall*, 90 N. Y. 25; *Prospect Park & O. I. R. Co. v. Williamson*, 91 N. Y. 552; *Little Miami & O. & X. R. Co. v. Dayton*, 28 Ohio St. 510.

The land in question was dedicated and devoted to another public use, and the court finds that the extension of the street would substantially defeat the use of the land for railroad purposes. In such a case the common council have no jurisdiction over the subject-matter.

Baltimore & O. & C. R. Co. v. North and *Valparaiso v. Chicago & G. T. R. Co.*, *supra*.

Valparaiso v. Chicago & G. T. R. Co., *supra*, holds that a city has no power to condemn real estate belonging to a railroad company, in actual use for right of way and for depot purposes, and to appropriate the same to the use of the public as a street, as the statute authorizing cities to condemn and take lands for public use as a street neither in terms nor by necessary implication, authorizes the taking of property already dedicated to a public use, and land held by a railroad for right of way and for the purpose of depots, when in actual use, is so dedicated.

See also *Milwaukee & St. P. R. Co. v. Faribault*, *St. Paul Union Depot Co. v. St. Paul*, *St. Paul, M. & M. R. Co. v. Minneapolis*, and *Boston & A. R. Co. v. Greenbush*, *supra*; *Re Boston & A. R. Co.* 53 N. Y. 574; *Re Buffalo*, 68 N. Y. 167; *Delaware & H. Canal Co. v. Whitehall*, *Prospect Park & O. I. R. Co. v. Williamson* and *Little Miami & O. & X. R. Co. v. Dayton*, *supra*; *Mills, Em. Dom.* §§ 83, 47.

Coffey, J., delivered the opinion of the court:

This was an action brought by the appellant

against the appellant, the city of Fort Wayne, to enjoin the latter from opening a street across the yard and tracks of the appellee situated within the limits of the city. The material facts in the case, as they appear in the special findings of the court, are that in the year 1866 the city of Fort Wayne acquired a tract of land in fee simple by purchase and deed, contiguous to the city, for the purpose of a public park. The deed to the city contained no limitation nor conditions as to the purpose for which the land was purchased or was to be used, nor did it contain any restrictions as to the power of the city to convey the same. On the 23d day of March, 1869, and before any steps had been taken to convert the ground into a public park, the common council of the city adopted a resolution, by the terms of which it granted to the Fort Wayne, Jackson & Saginaw Railroad Company 20 acres of the land off of the west side of the tract, upon the condition that the railroad company should run its line through the tract so granted, and locate its depots for local purposes thereon, and also locate any shops it might find necessary to build at Fort Wayne upon the same tract; and upon the further condition that the property and the north side addition to Fort Wayne should become annexed to and become a part of the city of Fort Wayne. The resolution further provided that, when the railroad company had complied with the conditions of the grant, the mayor of the city should execute to it a deed of conveyance for the land donated. The city also reserved the right to cross the tracks of the appellant whenever it should determine to lay off an addition composed of the remainder of the tract. The donation of the land was made for the purpose of inducing the railroad company to make the city of Fort Wayne its southern terminus, and to induce it to locate its depots for local purposes and its shops thereon. Prior to February, 1871, the railroad company accepted the donation on the terms and conditions expressed in the resolution, took possession of the land, and constructed its roadbed through the same, put in side tracks and switches, and erected depot buildings thereon, on the faith of the resolution, and located its yards on the ground, for making up its trains, storing cars, and conducting its business as a passenger and freight railroad, and prior to the 12th day of March, 1872, had expended in so doing several thousand dollars. On the 12th day of March, 1872, the common council of the city passed a resolution directing the mayor to execute to the railroad company a deed for the land, which he accordingly did on the 26th day of the same month. At the time the first resolution above referred to was adopted, one Edgerton was a member of the common council of the city of Fort Wayne, and he was at the same time vice-president of the railroad company. The common council consisted of sixteen members, nine of whom voted for the resolution and seven against it, Edgerton voting for the resolution; but when the last resolution, directing the mayor to execute the conveyance, was

passed, Edgerton was not a member of the common council. On the 8th day of April, 1878, the common council of the city of Fort Wayne passed a resolution attempting to rescind both the resolutions above mentioned, upon the alleged ground that the city had no power to bargain away the land therein described, and upon the alleged ground that the railroad company had not complied with the conditions of the grant. The resolution also required the city attorney to take such steps as might seem to him necessary to avoid the deed executed by the mayor of the city, but, so far as appears, no action was taken by him. On the 31st day of December, 1879, the Fort Wayne & Jackson Railroad Company succeeded to all the rights of the Fort Wayne, Jackson & Saginaw Railroad Company, and on the 24th day of August, 1882, the Fort Wayne & Jackson Railroad Company leased all of its property to the appellee for the period of 100 years. By a proceeding instituted for that purpose, regular on its face, the city of Fort Wayne, by its common council, has ordered an extension of Fourth street in said city, so as to cross the yard and tracks of the appellants about 250 feet from the south end of the yard. In this proceeding the property was treated as belonging to the city of Fort Wayne, and for this reason neither the appellee nor the railroad company from which it derives its title was made a party to the proceeding, or given any notice thereof in any manner whatever. At the point where Fourth street, if extended, will cross the appellee's yard it has six tracks, used for storing cars, weighing cars, making up trains, etc., and by opening Fourth street, as proposed, it will prevent the weighing of cars, and will render the south end of the yard useless for the purposes for which it was constructed. On an average, 140 cars are handled each day on these tracks, one half of which belongs to the Fort Wayne, Cincinnati & Louisville Railroad Company, which uses this yard as its northern terminus. This latter railroad company has built roundhouses and repair shops on the land donated as above mentioned, by and with the consent and aid of the city of Fort Wayne, and it has contracted with the appellee, by the terms of which it uses the tracks and depot of the latter in the transaction of its business at Fort Wayne as its southern terminus, and without the use of this yard it cannot transact its business. The extension of Fourth street will greatly discommode and diminish the business of the appellee and its yard and station grounds, and impair the value of its property and franchise. By reason of the number of tracks, and their necessary use in moving trains and transporting and weighing freight cars, it will be dangerous to life and limb for the public to travel on said street extended across the appellee's yard as proposed. In constructing and preparing this yard and depot there has been expended about the sum of \$13,000, and the use of this yard and station is necessary to the appellee in conducting its business at the city of Fort Wayne. Upon these facts the court stated

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as a conclusion of law that the appellee was entitled to a permanent injunction, enjoining the city of Fort Wayne from extending Fourth street across its yard and tracks at the point described in the complaint. The correctness of this conclusion is questioned by the assignments of error upon this appeal.

It is contended by the appellant that the conclusion of law stated by the court is erroneous, for the reasons—*First*, that the city of Fort Wayne had no power to donate or convey the land in question for the purpose of a railroad, because it was purchased to be used by the people as a public park; *second*, because Edgerton, who voted for the donation as a member of the common council, was at the time of so voting vice-president of the railroad company, and that the donation was for that reason void; *third*, because the city in its grant to the railroad company reserved the right to cross its tracks.

The general rule is that the municipal corporations possess the incidental or implied right to alienate or dispose of the property, real or personal, of the corporation, of a private nature, unless restrained by charter or statute. Dill. Mun. Corp. 3d ed. p. 569; *Shannon v. O'Boyle*, 51 Ind. 565; 8 Washb. Real Prop. 3d ed. 64; *Reynolds v. Stark County Comrs.* 5 Ohio, 204; *Beach v. Haynes*, 12 Vt. 15; *Jamison v. Fopiana*, 43 Mo. 565; 97 Am. Dec. 414; *Warren County Suprs. v. Patterson*, 56 Ill. 111; *Platter v. Elkhart County Comrs.* 108 Ind. 380; *Newbold v. Glenn*, 67 Md. 489.

Municipal corporations cannot dispose of property of a public nature in violation of the trusts upon which it is held, nor of a public common; but there is a distinction between property purchased for a public common and not yet dedicated, and property which is purchased for that purpose and actually dedicated to that use. The case of *Beach v. Haynes*, *supra*, is very much in point here. In that case land had been purchased for a public common, and it was so expressed in the deed of conveyance, but before it was actually dedicated to that use it was conveyed away by the town of Westford, in which was vested the fee-simple title, and it was held that such conveyance vested in the grantee a good title; but in the later case of *State v. Woodward*, 23 Vt. 92, it was held that a municipal corporation could not convey away a public common after it had been actually dedicated to the public use. Of course, the deed which vests title in the municipality may be of such a character as to dedicate the property to the public use; but such is not the case here. The deed to the city of Fort Wayne for the land in controversy vested in it the fee-simple title without limitation or restriction as to its alienation. Such being the case, we think the city had the power to convey it for private use at any time before it was dedicated as a public park. Such seems to be the tenor of all the authorities upon the subject.

We recognize the doctrine announced in the case of *Fort Wayne v. Rosenthal*, 75 Ind.

156, 89 Am. Rep. 127, as sound; but in that case Rosenthal made a contract with himself, while here the contract was not between Edgerton and the city, but between the city and the railroad company. If that contract depended upon the vote of Edgerton, and there had been no further action taken by the city council, we would have a question quite different from the one here presented, for in this case it appears by the findings of the court that a sufficient number of councilmen voted for the resolution granting the land to the railroad company to pass it without counting the vote of Edgerton, while the deed of conveyance was executed pursuant to a resolution passed by the common council at a time when he was not a member. Treating the first resolution as voidable on account of Edgerton's connection with its adoption, we think the subsequent action of the common council fully ratified it. The adoption of these resolutions was not a judicial act, but was legislative or ministerial. *Platter v. Elkhart County Comrs. supra.*

We are unable to perceive how the reservation of the right to cross the tracks of the railroad company in the event the city of Fort Wayne should lay off an addition can have a controlling influence in this case, for it does not appear that the city has laid out any addition. The general rule is that a reservation in a deed cannot be extended beyond its terms, and the right of the city to cross the railroad track is by the terms of the reservation limited to the time when the city shall elect to lay out an addition composed of the remainder of the land held by it under its purchase for a public park. *Nicholson v. Carass*, 45 Ind. 479; 2 Devlin Deeds, § 979; *Jackson v. Hudson*, 3 Johns. 875.

The question as to whether the city of Fort Wayne, under present legislation, possesses the power to appropriate the land described in its order for the extension of Fourth street is one of much more difficulty. That there is a broad distinction between taking a part of the right of way of a railroad company for a public street by constructing the street longitudinally, and by taking it by crossing the right of way at right angles, seems to be too plain for controversy. The right to take longitudinally is quite different from the right of crossing, and is governed by entirely different rules. All the authorities are, we believe, to the effect that a municipal corporation, in the absence of legislation expressly or by necessary implication authorizing it, cannot take part of the right of way of a railroad company by the construction of a public street opened longitudinally. The decisions so holding rest upon the ground that where property is once dedicated to a public use it cannot be taken for another and different public use without express authority. It is not doubted, however, that the Legislature may grant such authority. Private corporations acquire the right to construct roads, subject to the dominant right of the state to cross such road whenever the public necessity demands that new roads or streets shall be opened; and for this reason it is held that the general

power to construct and open streets or other public highways carries with it the power to construct them across railroad tracks. *Elliott, Roads & Streets*, p. 169; *Lake Erie & W. R. Co. v. Kokomo*, 180 Ind. 224; *State v. Easton & A. R. Co.* 86 N. J. L. 181; *Morris & E. R. Co. v. Central R. Co.* 81 N. J. L. 205; *Baltimore & H. T. R. Co. v. Union R. Co.* 85 Md. 225; *Little Miami & C. & X. R. Co. v. Dayton*, 23 Ohio St. 510; *St Paul, M. & M. R. Co. v. Minneapolis*, 85 Minn. 141; *Delaware & H. Canal Co. v. Whitehall*, 90 N. Y. 21; *Albany N. R. Co. v. Brownell*, 24 N. Y. 845. While the construction of a street or other public highway across a railroad track is generally attended with some inconvenience to the company, yet it is not ordinarily inconsistent with the use of the railroad for the purposes for which it was constructed. But even this rule, which allows the construction of streets and other public highways across railroad tracks, has its limitations. They cannot be so constructed where by doing so the railroad would be unable to use its tracks at the point of the crossing for the purposes for which they were constructed; in other words, the crossing must occur at a point where the use of the highway or street will not deprive the railroad of the use of its tracks. Thus in the case of *Little Miami & C. & X. R. Co. v. Dayton, supra*, it was said by the supreme court of Ohio: "But where land is appropriated, pursuant to legislative authority, to an important public use, a subsequent grant cannot be held to authorize the same land to be taken for a use wholly inconsistent with, and which, in the actual circumstances, must necessarily supersede, the former use, unless such appear by express words or by necessary implication to be the legislative intent." To the same effect is *Albany N. R. Co. v. Brownell, supra*. In each of these cases there was an attempt to construct highways across the railroad tracks of the companies involved in the controversy. It appears by the special findings in the case now under consideration that the extension of Fourth street across the tracks and yard of the appellee will prevent the weighing of freight at that point, and will render the south end of the yard useless for the purposes for which it was constructed; that it will greatly discommode and diminish the business and its yard and station grounds, and impair the value of its property and franchise; and that it will be dangerous to life and limb for the public to travel over the street when so extended, by reason of the number of tracks, and the use to which they are necessarily put.

In view of these facts, we are constrained to hold, under the authorities above cited, that under present legislation the city of Fort Wayne is not authorized to extend Fourth street in the manner contemplated. The use of such a crossing would be destructive of the use of the tracks of the appellee at this point in the manner they are now used. In such case the authority of the municipal corporation to make such a crossing must appear in some statute, either expressly or by necessary implication. Our

attention has not been called to any such statute, and we know of none.

There are some other questions in the case of minor importance, but, as we have reached the conclusion that the city of Fort Wayne is without power to make the crossing in

dispute, they need not be noticed. We are of the opinion that there is no error in the record for which the judgment should be reversed.

Judgment affirmed.

WASHINGTON SUPREME COURT.

City of TACOMA, *Reapt.*,

v.

H. M. LILIS, *Appt.*

(.....Wash.....)

1. A city cannot recover back money paid to a councilman for his services in pursuance of a vote or resolution, on the sole ground that it had failed to pass an ordinance authorizing the payment, if it had legal authority to compensate him.
2. Valid ordinances have the force of laws, and are as binding upon inhabitants of a municipality as are the statutes of the state upon its citizens generally.
3. A valid ordinance limiting the salary of councilmen is not repealed or modified by merely allowing and paying a larger salary, but the payment thereof is as to the excess unlawful.
4. A payment of salary in excess of the lawful amount by order of a municipal council to one of its members is not within the rule which precludes recovery of money voluntarily paid.
5. A councilman can perform "no extra services" in his official capacity for which he can receive compensation in addition to his salary, even if the services rendered greatly exceed in value the amount of his salary.
6. Payments for services outside the scope of his official duties, rendered by a city councilman, and which could have been appropriately performed by a private individual under a contract which is contrary to public policy, cannot be recovered back by the city in the absence of corruption or fraud.

(October 3, 1892.)

A PPEAL by defendant from a judgment of the Superior Court for Pierce County in favor of plaintiff in an action brought to recover money which was alleged to have been wrongfully paid to defendant for services as councilman of the city. *Reversed.*

The facts are stated in the opinion.

Messrs. Crowley & Sullivan and Judson & Sharpstein, for appellant:

Admitting, for the sake of the argument, that all these allowances were made as a salary to appellant as a member of the council, for services performed coming within his ordinary duties, the council still had the power to make such additional compensation at any time and in any manner it deemed proper. There was no limitation in the organic Act.

Mechem, Pub. Off. § 857.

Appellant offered to prove what the services actually were which he did perform, and for which he received the moneys sued for. He also offered to show that as a salary the sums received by him were not excessive, but were less than a reasonable compensation for his services performed as a councilman. He offered to show that in receiving the said money he acted in the utmost good faith, without any fraud or collusion. This proof should have been received.

McBride v. Grand Rapids, 47 Mich. 286; *Detroit v. Redfield*, 19 Mich. 377; *Evans v. Trenton*, 24 N. J. L. 764; *Niles v. Muzzy*, 33 Mich. 62; *Reif v. Paige*, 55 Wis. 496; *Ellsworth v. Rosnier*, 49 Kan. 237; *McBride v. Grand Rapids*, 49 Mich. 289; *Langdon v. Castleton*, 30 Vt. 285; *Butler v. National Home for Disabled Volunteer Soldiers*, 144 U. S. 64, 36 L. ed. 846.

Mr. S. C. Milligan for respondent.

Anders, Ch. J., delivered the opinion of the court:

From the year 1887 to May 12, 1890, appellant was a member of the city council of the city of Tacoma. At the time of his election, in 1887, and for two years thereafter, no fees or salary was attached to the office of councilman, either by statute or ordinance, but, under the power given to the council by the charter of the city "to establish and regulate the fees and compensation of all its officers, excepting when otherwise provided," (Laws 1885-86, p. 203,) an ordinance was passed on April 7 and approved April 10, 1888, wherein and whereby it was provided that each of the councilmen of the city should receive a salary of \$200 per annum, payable quarterly, and that said salary should begin on the second Saturday of May, 1889. Prior to the going into effect of this ordinance, appellant presented to the city council of said city bills for services performed during the year 1887-88 and the year 1888-89, amounting in the aggregate to \$344. On January 12, 1890, a claim for \$100 was presented for services, and on April 12, 1890, a further bill was presented to the council for \$750, for services rendered from May 1, 1889, to March 1, 1890. All of these claims were allowed by the city council, and audited and ordered paid. Warrants were subsequently issued therefor, which were paid by the city treasurer out of the general fund of said city. The aggregate amount of these sums was \$1,194. Appellant was also paid, in addition to the above amount, the salary of \$200 per

NOTE.—On the question of the validity of the employment of a member of a common council or similar officer by the body he represents, see notes 18 L. R. A.

to *Tippecanoe County Comrs. v. Mitchell* (Ind.) 15 L. R. A. 580; *Fort Wayne v. Lake Shore & M. S. R. Co.* (Ind.) ante, 367.

annum, after the ordinance above mentioned went into operation. The city, having elected a new council, brought this action to recover from the appellant the said sum of \$1,194 so paid to him, basing its right of recovery upon the alleged ground that appellant demanded and received the same without being entitled thereto, and without any authority of law therefor. A general demurrer to the complaint having been overruled, an answer and a reply were filed, and, by consent of the parties, the cause was tried by the court without a jury.

Counsel for both parties to this controversy agree that the city government of the city of Tacoma was authorized by the city charter to fix the compensation of its own members. The case was tried upon that theory, both in this court and in the court below, and that question is, therefore, not before us for consideration. It is claimed, however, by counsel for the respondent, that payment of the salary of a councilman could only be authorized by law, contract, or ordinance; that there was no contract between appellant and the city in this instance; and, consequently, that the several payments made to appellant for services as a member of the council were received without authority of law, and should be refunded. On the other hand, it is contended by the appellant that the city, having the undisputed power, and having paid for the services rendered, is bound by the action of the council, in the absence of fraud or collusion, and that no recovery can be had against him for the money thus received. These contentions raise the first question to be considered. It cannot be doubted that the city council possessed only such powers as were specially conferred upon it by the charter, together with such other powers as were necessary to carry into effect those thus granted. A city's charter is its constitution, and its council can legally do no act not within the limits prescribed thereby. The inhabitants of the city are the incorporators, and the council are its trustees and agents, clothed only with such power to represent and act for the corporation as the charter gives them. If they transcend the authority conferred by the charter, their acts are not binding upon the city. It was the duty of the council to disburse the funds of the city for purposes authorized by law only, and, if they appropriated money to themselves which they had no right to receive, we think the city may recover it back as money had and received for its use.

The question is, then, Did the council, in any event, have the right to pay to appellant any part of the money which the city now seeks to recover? Respondent admits that appellant preformed services as one of its councilmen, and also admits, and alleges in its complaint, in substance, that the city, through its council, was authorized by the charter to fix and regulate his compensation, but insists, in effect, that because the city paid what it was authorized to pay, but did it without the sanction of an ordinance, it should now be allowed to recover it back, regardless of whether it was paid in good or bad faith. We think the position of re-

spondent is not tenable in so far as the \$344 is concerned. If the city had legal authority to compensate appellant for his official services during the time preceding the going into effect of the ordinance establishing the salary of councilmen, it cannot, after having done so in pursuance of a vote or resolution, turn round, and recover back the amount paid, on the sole ground that it failed to pass an ordinance authorizing the payment. If it was within the province of the council, as admitted by the respondent, to fix the compensation of its members, a mere irregular exercise of the authority vested in it would not render such action, in the absence of fraud or collusion, absolutely void, and of no binding effect upon the city. *Ward v. Forest Grove*, 20 Or. 855; *Tyler v. Tualatin Academy & P. U. Trustees*, 14 Or. 485. We are therefore of the opinion that the \$144 and the \$200 items cannot be recovered by the respondent, even if paid, as claimed by respondent, for services falling strictly within the scope of appellant's duties as councilman. Nor do we think the authorities cited by counsel for respondent militate against this conclusion. See 1 Dill. Mun. Corp. 4th ed. § 230; *Sikes v. Hatfield*, 18 Gray, 347; *Farnsworth v. Melrose*, 123 Mass. 268; *Abright v. Bedford*, 106 Pa. 582; *Garvie v. Hartford*, 54 Conn. 440.

In the section above cited from *Judge Dillon's* valuable work, and which is sustained by the authorities cited, that learned author says: "There is no such implied obligation on the part of municipal corporations, and no such relation between them and officers which they are required by law to elect, as will oblige them to make compensation to such officers unless the right to it is expressly given by law, ordinance, or by contract. Officers of a municipal corporation are deemed to have accepted their office with knowledge of, and with reference to, the provisions of the charter or incorporating statute relating to the services which they may be called upon to render, and the compensation provided therefor. Aside from this, or some proper by-law, there is no implied assumpsit on the part of a corporation with respect to the services of its officers. In the absence of express contract, these determine and regulate the right of recovery, and the amount." It is undoubtedly true that there is no such implied obligation on the part of municipal corporations as will oblige them to make compensation to their officers, unless the right to it is expressly given by law, ordinance, or contract; but it by no means follows that, if such a corporation has a right to pay its officers a salary, and does pay them, without violating any law, it can or ought to recover back the money simply for the reason that it was not obliged to make the payment in the first instance; and no authority has been cited by respondent to sustain such a proposition. The cases cited by respondent are either to the effect that a public officer cannot recover compensation not allowed by law, or that an illegal payment may be enjoined.

The remaining portion of the sum sought to be recovered, viz., \$850, was paid to ap-

pellant at different times after the Ordinance of April 10, 1888, went into operation, and it now becomes necessary to determine the effect of that ordinance upon the power of the council to compensate its members. It may be stated as a general legal proposition that valid ordinances have the force of laws, and are as binding upon the inhabitants of a municipality as are the statutes of the state upon its citizens generally. 1 Dill. Mun. Corp. 4th ed. § 308; *Milne v. Davidson*, 5 Mart. N. S. 409. When the city council passed that ordinance they established the law upon the subject of salary of councilmen, and they were as firmly bound by its provisions as if it had been a law passed by the Legislature of the territory. And, this being so, they had thereafter no right or authority to pay themselves any other or greater sum for services rendered in their official capacity than that specified in the ordinance, so long as it remained in force. But it is argued by the learned counsel for appellant that the city council were not prohibited either by law or by the organic Act of the territory from changing an officer's salary or fees at any time they saw proper to do so, either by ordinance or resolution, and that they did so in this case. Undoubtedly the lawmaking body of the corporation had, prior to the taking effect of the state Constitution, the right and power to increase or diminish the salary of appellant. The right to pass ordinances implies the right to repeal them, but in this instance we nowhere find in the record that the council ever attempted to change or repeal the ordinance fixing the salary of its members. It can hardly be said that the allowing and paying of claims for services alleged to have been rendered effected a repeal, or even a modification, of the ordinance, which, as we have already intimated, was the measure of the city's liability to appellant, as well as of his right to compensation. It has been held by some authorities—and we have observed none to the contrary—that a municipal ordinance cannot be repealed by mere resolution. To accomplish that result, a new ordinance must be passed. *Horr & B. Mun. Ord. § 161; Jones v. McAlpine*, 64 Ala. 511.

The effect upon this case would be the same, however, if we should hold that the resolutions authorizing the extra payments which were made after the ordinance went into effect changed, modified, or repealed that ordinance, for the resolutions were passed, not only after the passage of the ordinance, but after the Constitution of the state became operative. After that date, (November 11, 1889,) the city no longer had the power in any manner to change the salary of appellant during his term of office, whatever may have been its power previous to that time. It is provided in section 8, art. 11, of that instrument that "the salary of any county, city, town, or municipal officer shall not be increased or diminished after his election, or during his term of office." This is an express limitation upon the power of the council, and no increase of appellant's salary thereafter would have been legal, even if authorized by ordinance. And the principle

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of law that money voluntarily paid, with full knowledge of the facts, and without fraud or duress, which is invoked by appellant, seems to us to be inapplicable to this case. Appellant was an agent of the city, and was intrusted with the care and management of its funds, and, if he appropriated any of such funds to his own use, contrary to law, he is liable therefor as such agent, although he may have done it under a claim of right, and with no dishonest motive.

Another reason why the doctrine contended for by counsel ought not to be held applicable to cases like the one now under consideration is that it would enable a municipal council to violate with impunity a plain provision of the Constitution. This question was before the court in *Weeks v. Tezakana*, 50 Ark. 81. The case was this: Weeks was city recorder, and his salary had been reduced. He claimed to be entitled to the salary as originally fixed, and sued the city to recover it. The city claimed a set-off on account of overpayment after the ordinance reducing his salary took effect. The trial court held that the money, having been voluntarily paid, could not be recovered back. The supreme court ruled otherwise, using this language: "But the court below seems to have considered that the town, having voluntarily paid Weeks this salary, under no misapprehension of the facts, could not recover it back. However true this may be as a general rule, it ought not to be extended to cases where the officer receiving payment was a member of the council or body which ordered such payment. This would enable every municipal body to evade the salutary restraints imposed by the statute. They might vote themselves extravagant salaries, after induction into office, and, when they had once received the money, might set the municipality at defiance." See also *Petersburg v. Mappin*, 14 Ill. 193, 56 Am. Dec. 501; *East Missouri v. Horseman*, 16 U. C. Q. B. 582; *Daniels v. Burford*, 10 U. C. Q. B. 478.

We have not overlooked the objection made by appellant that the testimony on the part of plaintiff fails to prove that the moneys received by him were received as compensation for services which he was bound to perform by virtue of his office, and that the judgment of the court below was, therefore, wrong, even on plaintiff's own showing; but we think the objection should not be sustained. The bill for \$750, presented by appellant, and which was ordered paid, and which it is admitted was paid, purports upon its face to be for services as councilman from the 1st of May, 1889, to 1st of March, 1890. This was at least prima facie proof of the character of the claim, and we do not think it was destroyed or neutralized by the record of the proceedings of the council, which was introduced in evidence by the plaintiff, and which is as follows. "The several committees have reported in favor of allowing bills for seventy-five dollars per month each for extra services of the mayor, Councilmen Fuller, Horsfall, Lillis, Houghton, Douglass, and Unhliman. The same were ordered paid by unanimous vote."

A councilman, while acting as such, can perform no "extra services" for the city. By accepting the office, he undertakes to discharge all of its duties, whatever they may be, and whether they are increased or diminished during his term. *Evans v. Trenton*, 24 N. J. L. 766; 1 Dill. Mun. Corp. 4th ed. § 233. But it may be true, as claimed by appellant, that the \$350 which he received in 1890 was paid to him for services which were no part of his official duties. If so, he ought not to be compelled to refund it, even though the contract under which the services were rendered was in contravention of section 165 of the charter. If appellant performed labor for the city which was beneficial, and which was outside of the scope of his official duties, and might have been done by any other person, and for which he has been paid, it cannot now retain the benefit, and recover back the consideration paid. Such a proceeding would be highly inequitable, and could not be tolerated for a moment in a court of justice. See *Macon v. Huff*, 60 Ga. 231; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 960. Although we agree with counsel for respondent that the contract between the city council and appellant in relation to the services for which the latter claims to have been paid was unauthorized by law, and contrary to public policy, yet, inasmuch as it was fully executed by both parties, the city, in the absence of any allegation of corruption or fraud in the transaction, cannot now be permitted to take unjust advantage of appellant on the ground that the contract was originally invalid. *Argenti v. San Francisco*, 16 Cal. 256.

Appellant alleges, in substance, in his answer as an affirmative defense, and offered to prove at the trial in the superior court, that the services for which the extra compensation was paid were not such as were required of him in the performance of his duties as councilman; that said services were authorized by the city; and that the city received the benefit thereof. The charter does not undertake to prescribe in detail the duties of councilman, and it would be difficult, if it were necessary, for the court to enumerate them all. But it certainly cannot be true in all cases that a councilman discharges all of his official duties by attending the meetings of the council, and taking part

in its deliberations. As in other legislative bodies, much of the work is performed by committees; and when a member is serving on a committee of the council he is only discharging the ordinary duties of his office, and is not entitled to extra compensation therefor. Nor is the amount of time or labor required to properly discharge the duties of a public office material. If necessary, the public is entitled to his whole time. He cannot be compelled to retain his office longer than he desires; and, if the salary is inadequate, or the duties of the office require more time than he can afford to devote to them, he is at liberty to resign. Neither is it material that the amount claimed as extra compensation is a reasonable one for the services performed. When the compensation is fixed by law, nothing more can be claimed, whether the amount so established is reasonable or unreasonable. While we do not think that appellant was entitled to any compensation beyond his regular salary for "examining machinery, hose, and equipments connected with the fire department of the city, or for examining the condition of the streets, and the work done thereon, or for looking after the public property generally," it seems plain to our minds that it was no part of his official duty to act as superintendent of the work of contractors upon the streets, bridges, or buildings of the city, or to set up or adjust machinery; and if he could have shown that he did such work at the request of the city, and that it was meritorious, we think he should have been permitted to do so, or that he performed any other services of such a character that they might as appropriately have been performed by a private individual, and for which the latter would have been entitled to compensation. What he did in the capacity of councilman he was bound to do for the salary fixed by the ordinance, although the amount so fixed may have been deemed a very inadequate remuneration for the services rendered. *Evans v. Trenton*, *supra*. We think the complaint states a cause of action, and that the demurrer was properly overruled.

The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

Dunbar, Stiles, and Scott, JJ., concur.

CALIFORNIA SUPREME COURT.

Rudolph FRANKE, *Resp't.*,

v.

Wilhelmine Augusta FRANKE, *Appt.*

(.....Cal.....)

1. False representations by a woman

NOTE.—Antenuptial pregnancy or unchastity as a ground of divorce or annulment of marriage.

1. Pregnancy.

Antenuptial pregnancy by another man is, if concealed from the husband, a fraud upon him which 18 L. R. A.

to a man with whom she had had illicit intercourse and who knew her to be pregnant, that he was the only person with whom she had been incontinent, made to induce him to marry her, are not fraud for which the marriage will be annulled.

2. Pregnancy of a wife at the time of

will justify a decree of divorce or annulment of the marriage. *Morris v. Morris*, Wright (Ohio) 630; *Carris v. Carris*, 24 N. J. Eq. 516; *Baker v. Baker*, 13 Cal. 87; *Donovan v. Donovan*, 9 Allen, 140; *Reynolds v. Reynolds*, 3 Allen, 606; *Montgomery v.*

marriage does not constitute physical incapacity for which the marriage will be annulled under Civ. Code, §§ 53, 55; but such incapacity must be such physical defect or incurable disease as will prevent sexual coition.

(November 30, 1892.)

APPEAL by defendant from a judgment of the Superior Court for Alameda County in favor of plaintiff and from an order denying a motion for new trial in an action brought to annul a marriage on the alleged grounds of fraud and incompetency. *Reversed.*

The facts are stated in the opinion.

Messrs. Carroll Cook and J. E. Foulds, for appellant:

Under the findings the plaintiff is entitled to no relief, and the judgment should be reversed.

Foss v. Foss, 12 Allen, 26; *Crehore v. Crehore*, 97 Mass. 330, 93 Am. Dec. 98; *Carris v. Carris*, 24 N. J. Eq. 522; *Baker v. Baker*, 18 Cal. 87; *Reynolds v. Reynolds*, 3 Allen, 609.

A husband, to be qualified to ask relief of

this nature against the woman whom he has taken as his wife, must be pure himself—pure at least so far as she is concerned.

Selheimer v. Selheimer, 40 N. J. Eq. 413.

If he has been guilty of antenuptial incontinence with her, if before marriage he tempted her, and she yielded, he has no right to complain of her impurity or deception. He is just as unclean as she is.

Caton v. Caton, 6 Mackey, 809; *Scroggins v. Scroggins*, 14 N. C. 535.

Messrs. Reed & Nusbaumer, with Messrs. A. A. Moore and C. Tuttle, for respondent:

One of the essentials of marriage is that at the time of entering into the marriage state the wife should be physically competent to bear a child to her husband.

Incapacity may consist of inability to bear a child to her husband at the time of the marriage by reason of her pregnancy by another man, which is the broad consideration set forth in Cal. Civ. Code, § 53.

Baker v. Baker, 18 Cal. 88; *Barden v.*

Montgomery, 3 Barb. Ch. 122, 5 L. ed. 845; *Ritter v. Ritter*, 5 Blackf. 81.

This is true even if there is no statute specifying such cause for relief from the marriage. *Carris v. Carris* and *Morris v. Morris*, *supra*.

But antenuptial pregnancy by the husband is no ground for a decree of nullity. *McCulloch v. McCulloch*, 69 Tex. 682.

And fully supporting the main case the decisions almost uniformly hold that if the husband had himself been guilty of illicit intercourse with the wife before marriage he can have no relief from it on account of her pregnancy by another man, although he was ignorant of it at the time of the marriage. *States v. States*, 37 N. J. Eq. 196; *Selheimer v. Selheimer*, 40 N. J. Eq. 412; *Crehore v. Crehore*, 97 Mass. 330, 93 Am. Dec. 98; *Foss v. Foss*, 12 Allen, 26; *Hoffman v. Hoffman*, 30 Pa. 417.

In the *Crehore* Case the woman, in order to induce the husband to enter into marriage, denied that she was pregnant after having first told him that she was, when he declared that in that case he would not marry her as the child could not be his.

And this is the rule although the statute makes fraud a ground of divorce. *Foss v. Foss*, *supra*.

But in the *Todd* Case it was not proved that the representations were believed.

In *Slesung v. Slesung*, 65 Mich. 163, a decision contrary to those above that the husband was entitled to relief for such false representations as to the paternity of the child was affirmed by an equal division of the court on the ground that a fraud had been practiced upon him.

And the false representations of the wife by which the husband was induced to enter into the marriage to the effect that she was pregnant by him will not be ground for relief against the marriage if he had in fact had illicit intercourse with her before marriage. *Fairchild v. Fairchild*, 43 N. J. Eq. 473.

At least if such false representations are not believed by the husband at the time of the marriage. *Todd v. Todd*, 17 L. R. A. 350, 1 Pa. Adv. Rep. 643.

But contrary to the decisions cited to the first proposition is a North Carolina decision to the effect that concealed pregnancy is no ground for divorce although the husband supposed the wife to be chaste. *Long v. Long*, 77 N. C. 304.

This rule was laid down broadly in this case, although in fact the petitioner for the divorce failed to allege that he was not the father of the child or 18 L. R. A.

that he had not had intercourse with his wife before marriage.

This case was decided under a statute specifically providing for a divorce only on the ground of adultery or impotence. (See as to the present statute *Steel v. Steel*, *infra*.) But it was based largely on an earlier decision in the same state under a statute which allowed a divorce whenever the court was satisfied of the justice of the application. In the earlier case it was decided that one who married a woman who had been then pregnant four and a half months during all of which time he had been frequently in her society, was not entitled to a divorce if he knew of her lewdness at the time of the marriage or continued to cohabit with her after discovering her condition up to the time of the birth of the child. *Scroggins v. Scroggins*, 14 N. C. 535.

On the other hand, in *Ritter v. Ritter*, 5 Blackf. 81, under a similar statute which allowed a divorce in addition to certain specified causes "for any other cause and in any other case where the court in their discretion shall consider it reasonable and proper," it was held that the refusal of the divorce for concealed antenuptial pregnancy resulting from the intercourse with another man was not a reasonable exercise of the discretion of the court, and the decision was reversed by the appellate court.

In *Dawson v. Dawson*, 18 Mich. 335, the right to a divorce in such a case is recognized, but it is held that the husband must prove satisfactorily that he was actually deceived and must negative any legal inference that he knew or as a man of ordinary intelligence had reasonable ground to believe what the wife's condition was at the time of the marriage.

The fraudulent concealment of pregnancy from intercourse with a black man and from which a colored child is subsequently born for which a legislative divorce is granted between white persons does not make the marriage void *ab initio* so as to prevent the wife from obtaining a settlement at her husband's residence. *Guilford v. Oxford*, 9 Conn. 321.

The right of a wife to alimony *pendente lite* is not defeated in a suit by her husband for divorce by the fact of her fraud in concealing her antenuptial pregnancy, although this may be ground for divorce. *Frith v. Frith*, 18 Ga. 273.

In harmony with the majority of authorities

Barden, 14 N. C. 548; *Scott v. Shufeldt*, 5 Paige, 43, 3 L. ed. 630; *Sissung v. Sissung*, 65 Mich. 168.

Vanellief, C., filed the following opinion: Action to annul marriage, on the ground that plaintiff's consent to marry was obtained by fraud, and upon the further and distinct ground that the defendant was physically incapable of entering into the marriage state. The cause having been tried by the court, judgment was rendered in favor of plaintiff, from which, and from an order denying her motion for a new trial, the defendant has appealed.

The complaint, after stating the marriage on the 15th day of September, 1889, generally and meagerly alleges the cause of action as follows: "(3) For the purpose of inducing the plaintiff to consent to the said marriage, the defendant falsely and fraudulently represented that she was chaste and

virtuous, and physically competent to marry plaintiff, and concealed from plaintiff her real condition, claiming then to be pregnant by plaintiff, but chaste and virtuous as to all other men, and that, save plaintiff, she had never had sexual intercourse or connection with any man. All which representations were false and fraudulent. (4) That defendant was not then and there physically competent to marry plaintiff, but was at the time of said marriage pregnant by some other man than plaintiff. (5) That plaintiff relied upon said representations, and was induced to consent to the said marriage by the said representations, and, if the same had not been made, and said concealment practiced, he would have never consented to the said marriage. (6) That upon the discovery of the falsity of the said representations the plaintiff ceased to cohabit with the defendant, and has never since cohabited with her." The answer of the defendant specially denies

above cited it is held that antenuptial pregnancy by a third person makes a woman "physically incapacitated" for marriage with an innocent man within the meaning of D. C. Rev. Stat., § 738, prescribing grounds for divorce. *Caton v. Caton*, 6 Mackey, 809.

Somewhat connected with this subject also is a decision that a man by whom a woman became pregnant and who has been arrested for aiding an abortion cannot have a marriage annulled because he entered into it to escape the prosecution. *Frost v. Frost*, 42 N. J. Eq. 55.

The statutes of the following states as shown by *Simson's American Statute Law* now expressly provide that antenuptial pregnancy by a third person shall be ground for a divorce, viz.: Alabama, Georgia, Iowa, Kansas, Kentucky, Mississippi, Missouri, North Carolina, Tennessee, Virginia, West Virginia, Wyoming.

These statutes cannot be said to change the law except in North Carolina. The change of statute in that state is recited in *Steel v. Steel*, 104 N. C. 631.

Where the wife was pregnant at the time of the marriage the presumption is that the child is that of the husband, but this is not conclusive. *Baker v. Baker*, 13 Cal. 87; *Wright v. Hicks*, 15 Ga. 160, 60 Am. Dec. 687, 12 Ga. 156; *State v. Herman*, 35 N. C. 502; *Dennison v. Page*, 29 Pa. 420, 72 Am. Dec. 644; *McCulloch v. McCulloch*, 69 Tex. 682; *Bowles v. Bingham*, 3 Munf. 442, 5 Am. Dec. 497; *Stegall v. Stegall*, 2 Brock. 256; *Montgomery v. Montgomery*, 3 Barb. Ch. 182, 5 L. ed. 845; *Miller v. Anderson*, 43 Ohio St. 473.

On the general question of the presumption of the legitimacy of a child born in wedlock see notes to *Woodward v. Blue* (N. C.) 10 L. R. A. 662, and *Goss v. Froman* (Ky.) 8 L. R. A. 102.

2. Existence of a bastard child.

The same court that decided against the right to a divorce for antenuptial pregnancy in *Soroggrins v. Soroggrins*, 14 N. C. 535, decided at the same term that a white man who marries a woman knowing that she has then an illegitimate child which she artfully leads him to believe is his but which he subsequently finds to be the child of a black man is entitled to a divorce. *Barden v. Barden*, 14 N. C. 548.

And so in *Scott v. Shufeldt*, 5 Paige, 43, 3 L. ed. 630, a woman's fraud and perjury in charging a white man with the paternity of her bastard child which has then been born and which she knows from its color if for no other reason to be the child of a negro is ground for annulling a marriage which the white man enters into to avoid the bas-

tardy prosecution, although he may have had some reason to suspect that the child was his own.

On the other hand, the fact that a woman at the time of marriage was the mother of an illegitimate child, and that she falsely alleged that she was a widow and that the child was that of a former husband, is not a ground for divorce. *Farr v. Farr*, 2 McArthur, 35.

And the concealment by a woman of the fact that she had been the mother of an illegitimate child some years before is not ground for annulling the marriage. *Smith v. Smith*, 8 Or. 100. But see, as to statutes concerning unchastity, *infra*.

3. Unchastity.

The prior unchastity of a woman, concealed from her husband, does not constitute such a fraud on him as to avoid the marriage. *Allen's App.* 99 Pa. 196.

In *Leavitt v. Leavitt*, 13 Mich. 452, the same decision is made although in that case the husband had lived with the wife for many years and they had reared a large family of children before he discovered the alleged fact of her antenuptial unchastity.

The same rule is declared in the English cases. *Reeves v. Reeves*, 2 Phillim. 125, 1 Eng. Ecol. Rep. 208; *Perrin v. Perrin*, 1 Add. Ecol. Rep. 1, 2 Eng. Ecol. Rep. 11; *Best v. Best*, 1 Add. Ecol. Rep. 411, 2 Eng. Ecol. Rep. 158; *Graves v. Graves*, 3 Curt. Ecol. Rep. 235, 7 Eng. Ecol. Rep. 425.

Even where the statute provides for the nullity of a marriage "obtained by force or fraud," the concealment of antenuptial unchastity is not a ground of nullity. *Varney v. Varney*, 52 Wis. 120, 28 Am. Rep. 728.

In a case where a wife had before marriage been guilty of incest with her uncle, and her husband entered into the marriage supposing her to be chaste, the court said: "If this application rested solely upon the ground of fraud practiced prior to the marriage the unusual circumstances would naturally incline a court to add another exception to the general rule." But as adultery after marriage was another ground of relief the court did not rest its decision upon the prior incest alone. *Steel v. Steel*, 104 N. C. 631.

But in Virginia and West Virginia prior prostitution of the wife unknown to the husband at the time of the marriage is ground of divorce, and in Maryland any prior fornication by the wife is sufficient ground therefor, while in West Virginia the notoriously licentious character of the husband not known to the wife at the time of the marriage is ground for divorce in her favor. B. A. R.

that she made the false and fraudulent representations charged, and denies that she was physically incompetent to marry the plaintiff; admits that she was pregnant by the plaintiff at and before the marriage, and denies that she was so by any other man, and alleges that before the marriage she fully informed the plaintiff of her true condition.

The court found as follows: "(1) That on the 15th day of September, 1889, at the city and county of San Francisco, state of California, plaintiff and defendant intermarried. (2) That on or about the 20th day of April, 1889, plaintiff and defendant had voluntary sexual intercourse with each other, and that on or about the 14th day of August, 1889, and at divers other times in said month before the date of said marriage, defendant and defendant's then attorney, James Herrmann, represented to plaintiff that defendant was pregnant and with child by plaintiff, and that she was chaste and virtuous as to all other men, and that she was physically competent to marry plaintiff. (3) That plaintiff, to satisfy himself of the truth or falsity of these representations, did, before his said marriage with said defendant, act as a careful and prudent man should act, and in all respects used due and proper care. (4) That at and after the making of said representations, and at and after the marriage of said plaintiff and defendant, defendant concealed from plaintiff her true condition. That defendant, at and prior to the making of said representations, and at the time of her marriage with said plaintiff, was pregnant, not by plaintiff, but by a man other than plaintiff. (5) That plaintiff, at and after the time of his marriage with defendant, believed in and relied upon the said representations, and in consequence of said representations and belief plaintiff was deceived into and induced to consent to said marriage; and if said representations had not been made, and said concealment of her true condition practiced by defendant upon plaintiff, plaintiff would not have intermarried with defendant. That the said representations, and each and all of them, were untrue and false and fraudulent, and at the time said representations were made by defendant to plaintiff defendant well knew that they were untrue, false, and fraudulent. (6) That defendant, by reason of the fact that she was pregnant by a man other than plaintiff, was at the time she married plaintiff physically incompetent to marry him, and that her concealment from plaintiff of her true condition was a fraud upon plaintiff. (7) That plaintiff did not discover the fraud which had been practiced upon him by defendant until on or about the 28th day of October, 1889, and that immediately upon such discovery he ceased to cohabit with defendant, has never since cohabited with her, and acted promptly and with the highest good faith to procure an annulment of his marriage."

It is claimed by appellant that the evidence is insufficient to justify the findings of fact in several material particulars, and also that the findings do not warrant the judgment. The only evidence of sexual intercourse be-

tween the parties before their marriage is the testimony of the plaintiff, which is not fully nor quite fairly represented by the findings, either as to the first time nor the number of times it occurred, or as to the period during which it continued, since these circumstances were material as we shall see, as bearing upon plaintiff's antenuptial knowledge of defendant's character for chastity. The plaintiff testified that in March, 1889, he was a widower, forty years of age, residing in Oakland, Alameda county, with his family of five children.—a son aged fourteen years, a daughter aged eleven years, and three younger children. That the defendant then resided with her parents in San Francisco, and (as appears by other testimony) was only seventeen years of age. That for some time plaintiff had been acquainted with her parents, but had not known the defendant until she came to his house in Oakland, to visit his children, in March, 1889. He did not meet her again until the 18th or 19th day of April following, when she again visited his children, and remained at his house all night. After playing cards with her and his children until about nine o'clock that evening, he directed her and his children to retire to bed, which they did, she going to a bedroom with some of the children, and he remaining in the sitting room on a sofa, where he fell asleep. About an hour after defendant had gone to her bedroom, she returned to the room where he was sleeping on the sofa, and awoke him by tickling his nose with a feather duster. He then told her "that was dangerous business, and that she had better go to bed, and have nothing to do with it." She persisted, however, "fooling around him and playing," and the result was that both went to his bedroom, and there, for the first time, had sexual intercourse, which was repeated the next day about 11 o'clock A. M. Thereafter she visited at his house about once a week, staying all night, and going to his bed. He does not remember how often these visits occurred, but thinks ten or twelve times. They must have continued through the month of May and a part of June. He further testified that on the first occasion he told her he "was afraid of the business," and that she said: "You needn't be afraid; that is all right; I have got my protector," (meaning her beau.) As a matter of precaution, however, he used what he called "a protector," to prevent conception, which he seems to have had at hand on the first occasion, but which he says was not successful about the third time it was used, and within the month of April. The use of this instrument is one of the reasons assigned by him for doubting at the time of the marriage, that he was the father of the child.

On August 22, 1889, the defendant—then Miss Bruhn, and still a minor—by her guardian, Peter F. Bruhn, her father, commenced an action against the plaintiff herein to recover \$50,000 damages for seduction, alleged to have been accomplished on the 18th day of March, 1889. It appears that plaintiff herein had notice that defendant was pregnant, and claimed that he was the father of

the child, before the action for seduction was commenced, but it does not appear by what means he was notified, nor that any demand had been made upon him either to marry or pay damages before the commencement of that action. Nor does it appear that he was ever requested by defendant or her parents to marry her. He testified that he called upon her at her father's house a day or two after the action for seduction was commenced, and complained that no effort had been made to settle the matter quietly with him before commencing the action, and that she then said she had not advised the action, and that her father had commenced it without her approval. He then told her in the presence of her mother that if he was the father of the child, he was willing to marry her, and "that they had no business to go to law about it." Plaintiff further testified that the defendant first told him that he and no other man was the father of the child at her lawyer's office, on the day they got their marriage license, (September 15,) and that her lawyer—Mr. Herrmann—then made her swear to it; and that her lawyer promised that if the time of the birth of the child should not correspond with plaintiff's reckoning, he (the lawyer) "would get plaintiff free without a cent." It also appears that while the seduction suit was pending the plaintiff therein and her lawyer offered to settle and dismiss the suit for \$1,300 if plaintiff was not content to marry. He preferred to marry, though, he said, he always doubted that he was the father, rather than "throw money away" in payment of alleged damages. The child was born October 27th, six months and nine days after the first admitted act of coition, and one month and twelve days after the marriage, and, in the opinion of medical witnesses, had the appearance of a child not prematurely born. The circumstances, with the testimony of plaintiff as to the time of his first intercourse with defendant, must be regarded as sufficient to justify the findings that plaintiff was not the father of the child, and that defendant's representations before marriage, that she had been virtuous as to all other men than plaintiff, were willfully false. Yet, considering her age and inexperience, she may not have known before marriage that plaintiff was not the father, though for good reason she may have doubted that he was. But assuming, as we must, that the finding that he was not the father is true, she willfully asserted what she did not know to be true, and what she had good reason to doubt, at least; and to this extent the finding that "she well knew" that her representation that plaintiff was the father "was false and fraudulent" should be qualified. The finding that plaintiff and defendant had sexual intercourse "on or about the 20th day of April, 1889," should also be qualified and characterized by the circumstances of the intercourse, shown by the testimony of the plaintiff; otherwise, material traits and features of the character of that intercourse are hidden from view. The comparative ages and experience of the parties, his relation to her as a visitor of his

children at his house, the conduct of both parties on the first occasion, the frequency of the intercourse, the length of time it continued, and the absence of any pretense of virtue on her part while it continued, are material, as tending to show her then apparent character for virtue, the extent to which he was *particeps criminis* in her incontinence, and that he had not sufficient reason to be deceived by her false representations made to him for the first time on the day he procured the marriage license.

But, accepting the findings as they appear in the record, I think they do not warrant the judgment on the ground of fraud. The Civil Code, § 82, provides that a marriage may be annulled on the ground "that the consent of either party was obtained by fraud." The only case in this state in which a marriage has been annulled on this ground is that of *Baker v. Baker*, 13 Cal. 88. In that case the defendant (wife) was pregnant by a stranger at the time of marriage, but the husband had no sexual intercourse with her, or any other reason to suspect her chastity, before marriage, and did not know or suspect that she was pregnant at the time of marriage; whereas, in this case, the plaintiff participated in the incontinence of his wife before marriage, and also knew her to be pregnant at the time of marriage, and even then doubted, as well he might, that he was the father. Our Civil Code does not define the kind or degree of fraud required to annul a marriage, but no one will contend that every kind and degree of fraud which would be sufficient to annul an ordinary contract would also be sufficient to annul a marriage contract, consent to which had been induced by it. Under these circumstances, it is proper to consult the decisions of the highest courts of other states construing similar statutes. Bishop, Mar. & Div. § 496. Statutes of other states similar to sections 58 and 82 of our Civil Code, authorizing the nullification of marriage on the ground of fraud simply, without defining the kind or degree of the fraud, have been uniformly construed as being merely jurisdictional, and to mean that kind of fraud defined by the unwritten law applicable to marriage contracts, (Bishop, Mar. & Div. §§ 475 and 478; *Foss v. Foss*, 12 Allen, 26; *Scroggins v. Scroggins*, 14 N. C. 535;) and under such statutes it has been held almost uniformly that where a man marries a woman whom he has debauched before marriage, and whom he knew to be pregnant with child at the time of marriage, the marriage will not be annulled on the ground that he was deceived by the false assurances of the wife before marriage that he was the father of the child, and that she had been chaste with all other men. Having experienced and participated in her incontinence before marriage, he is thereby sufficiently apprised of her want of chastity to deprive him of the right to complain that he was deceived by her false assurances that he was the only participant in her illicit intercourse. *Reynolds v. Reynolds*, 8 Allen, 609; *Foss v. Foss*, 12 Allen, 26; *Crehore v. Crehore*, 97 Mass. 330, 93 Am. Dec. 98;

Scroggins v. Scroggins, 14 N. C. 535; *Long v. Long*, 77 N. C. 805; *Carris v. Carris*, 24 N. J. Eq. 517; *Seilheimer v. Seilheimer*, 40 N. J. Eq. 412; *Varney v. Varney*, 52 Wis. 120, 88 Am. Rep. 726; *Bishop, Mar. & Div. § 483 et seq.*

The only authority for any exception to the rule, as above stated, which I have been able to find, is to be found in the extreme cases of *Barden v. Barden*, 14 N. C. 548, and *Scott v. Shufeldt*, 5 Paige, 43, 8 L. ed. 620, in each of which the parties were white, and the child begotten before marriage was a mulatto. Each of these cases was decided upon the facts stated in the complaint, and upon a demurrer. In the first, *Ruffin, J.*, who delivered the opinion of the court, expressly characterized his concurrence in it as "a concession to the deep-rooted and virtuous prejudices of the community upon the subject." Another distinguishing attribute upon which the exception is said to have been grounded is that "the blood of the woman, as physiologists tell us, has been tainted by mingling with that of the first (mulatto) child, and she is incapable of bearing children that will not show the mixture of African blood." See dissenting opinion of *Rodman, J.*, in *Long v. Long*, 77 N. C. 804. In each of those cases the mulatto child had been born before the marriage, but the putative father, in one case, had not seen it, and in the other had not discovered that it was a mulatto, until after marriage. In the New York case (*Scott v. Shufeldt*) the court said: "If the child had not been born at the time of the marriage, the complainant would have had some difficulty in showing that he had been intentionally deceived and defrauded by the defendant, as she might possibly have supposed the child to be his, although she had also had connection with a negro about the same time." Possibly other extremely hard cases may occur sufficiently distinguishable from the cases above cited to justify additional exceptions to the rule, but such cases need not be anticipated, since this case certainly is not one of them.

So far as plaintiff's alleged grievance is founded upon fraud, the substance of it is, according to his own testimony, that at the mature age of forty years, after a matrimonial experience during which five children were born to him he was seduced by a girl aged seventeen years,—the daughter of a neighbor,—while visiting his children at his own house, and therefore virtually under his protection, and whom, indeed, he says, he endeavored to protect from the natural consequence of her indiscretion, so far as he could, in his then helpless condition, by the use of "a protector," which it seems he had prudently provided for such an occasion. Nevertheless she afterwards claimed that

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such natural consequence had not been averted, and brought suit against him for seduction, falsely charging that he was the father of her unborn child, and praying judgment for damages. That, rather than "give money away" in settlement of that suit, he elected to marry her on her assurance that he was the father, and the further assurance of her attorney that if the time of the birth of the child should not correspond with plaintiff's reckoning, the attorney would get him free "without a cent;" though at the time of the marriage he doubted that he was the father of the child, and although by postponing the nuptials two months he might have verified his reckoning. The whole substance of the fraud proved consisted of her false representations that she had been chaste with all other men than plaintiff, which, under the circumstances of this case, partly on grounds of public policy, has been deemed insufficient in degree to warrant the annulment of a marriage. The reasons for the rule are fully set forth in the case above cited.

The finding that defendant was physically incompetent to marry the plaintiff is not justified by the evidence, as there is no evidence tending to prove that she was diseased or defective in physical organization. This ground for annulment of marriage, as expressed in sections 58 and 82 of the Civil Code, is entirely distinct from that of fraud. It consists solely of such physical defect or incurable disease existing at the time of marriage as will prevent sexual coition. *Bishop, Mar. & Div. §§ 757, 766, 768.* The case of *Baker v. Baker*, 13 Cal. 88, has no bearing whatever upon the question of physical incapacity as a cause for the annulment of a marriage. That was an action for a divorce on the sole ground of fraud, and the judgment of the appellate court was placed upon that ground alone, in accordance with the fifth subdivision of section 4 of the Act of March 25, 1851, (Wood's Dig. [1st ed.] p. 491.) which section also made "natural impotence, existing at the time of marriage," a cause of divorce; but there was no pretense of such impotence in that case; nor was there any statute in this state, prior to the decision in that case, providing for the annulment of a marriage on the ground of physical incapacity. The case of *Baker v. Baker* was considered in *Carris v. Carris*, 24 N. J. Eq. 522, and construed as being consistent with the decision in the latter case. I think the judgment should be reversed, and the cause remanded for a new trial.

We concur: **Haynes, C.; Belcher, C.**

Per Curiam:

For the reasons given in the foregoing opinion the judgment and order are reversed.

ILLINOIS SUPREME COURT.

Edward H. R. GREEN *et al.*, *Appts.*,v.
R. Suydam GRANT *et al.*

(.....III.....)

The issue of a woman has not a vested interest in the real estate devised in trust during her life to apply the income to her use and upon her death to convey to her issue if she leaves any surviving in such shares as she shall appoint, otherwise to them in equal shares per stirpes and if she leaves none then to other persons, which will make such issue necessary parties to a suit against the trustees as the latter take the title in fee.

(October 31, 1892.)

A PPEAL by plaintiffs from a decree of the Circuit Court for Cook County dismissing their bill filed to review and set aside a decree directing the sale of certain real estate. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Walker & Eddy*, for appellants: Appellants' bill is an original bill in the nature of a review, impeaching a decree for want of necessary parties.

Story, Eq. Pl. § 426.

Where an improper decree has been made against an infant, although the same were not gained by fraud or collusion, or surprise, it ought to be impeached by original bill; and the infant aggrieved by it need not stay till he is of age, but he may apply to reverse it as soon as he thinks fit.

Story, Eq. Pl. § 427; *Gayles v. Franklin Sav. Bank*, 85 Ill. 256; *Grinoid v. Hicks*, 132 Ill. 494; *Loyd v. Malone*, 23 Ill. 42, 74 Am. Dec. 179.

It is not opposed to any rule of law to create a life estate, with power to sell and convey, and limit a remainder after its termination.

Hamlin v. United States Rep. Co. 107 Ill. 443; *Rountree v. Talbot*, 89 Ill. 249; *Brownfield v. Wilson*, 78 Ill. 467; *Peoria v. Dares*, 101 Ill. 609; *Bland v. Bland*, 103 Ill. 11; *Henderson v. Blackburn*, 104 Ill. 237, 44 Am. Rep. 780; *Bergan v. Cahill*, 55 Ill. 160; *Friedman v. Steiner*, 107 Ill. 125; *Smith v. Bell*, 31 U. S. 6 Pet. 68, 8 L. ed. 322; *Burleigh v. Clough*, 52 N. H. 287, 13 Am. Rep. 23; *Morford v. Dieffenbacher*, 54 Mich. 593; *Patrick v. Morehead*, 85 N. C. 62, 39 Am. Rep. 684; *Smyth v. Taylor*, 21 Ill. 296; *Willis v. Watson*, 5 Ill. 64; *Caruthers v. McNeill*, 97 Ill. 256; *Johnson v. Johnson*, 98 Ill. 564; *Jones v. Bramblett*, 2 Ill. 276; *Heuser v. Harris*, 42 Ill. 425; *People v. Jennings*, 44 Ill. 488; *Holliday v. Dixon*, 27 Ill. 83; *Pool v. Blake*, 53 Ill. 495; *Markille v. Ragland*, 77 Ill. 98; *Nicoll v. Scott*, 99 Ill. 531.

The interest of the trustees of the Robinson estate in the piece of realty known as section 21 was an estate for the life of Mrs. Green.

8 Redf. Wills, 617.

The trustee takes exactly that quantity of interest that the purposes of the trust require. 2 Jarman, Wills, 805; *Ward v. Amory*, 1 Curt. C. C. 419; *Coulter v. Robertson*, 24 Miss. 278, 57 Am. Dec. 168; *Norton v. Norton*, 2 Sandf. 296.

The legal estate in the trustee shall not be carried further than is required for the complete execution of the trust.

Lewin, Tr. 6th Eng. ed. 189; *Young v. Bradley*, 101 U. S. 782, 25 L. ed. 1044; *Norton v. Norton*, *supra*; *Williman v. Holmes*, 4 Rich. Eq. 475; *Smith v. Metcalf*, 1 Head, 64; *Ellis v. Fisher*, 3 Sneed, 231, 65 Am. Dec. 53; *Farrow v. Farrow*, 12 S. C. 168; *Adams v. Adams*, 6 Q. B. 860; *Cook v. Blake*, 1 Exch. 220.

Though a fee simple be given in appropriate terms to trustees, and though appointees or heirs are to take interests only upon the happening of a contingency, still, when that contingency happens, if the trust has then been fully performed, the appointees or heirs, as the case may be, will at once take a legal estate of the extent given by the will as purchasers.

Ward v. Amory, *supra*; *Pearce v. Savage*, 45 Me. 90; *Doe v. Harris*, 2 Dowl. & R. 36; *Goodtills v. Whitby*, 1 Burr. 228; *Edwards v. Symons*, 6 Taunt. 212; *Ackland v. Lutley*, 1 Perry & D. 689, 9 Ad. & El. 879; *Tucker v. Johnson*, 16 Sim. 841; *Plenty v. West*, 3 C. B. 201; *Doe v. Cafe*, 7 Exch. 675; *Baker v. White*, L. R. 20 Eq. 176; 2 Jarman, Wills, 292.

If there be a devise to trustees and heirs during the minority of a beneficial devisee, and then to him, or upon trust to convey to him, it conveys a vested remainder in fee, and takes effect in possession when the devisee attains twenty-one.

4 Kent, Com. 205.

The sixth clause of the will, which gave to the trustees "power to lease any of the real estate, etc., and likewise power to sell and convey any of such real estate," did not so enlarge the estate of the trustees as to make it an estate in fee, but simply conferred upon the trustees certain powers of disposition which may be executed without any legal title.

Burke v. Valentine, 52 Barb. 412; *Reeve v. Atty. Gen.* 2 Atk. 223; *Hilton v. Kenworthy*, 3 East, 553; *Bateman v. Bateman*, 1 Atk. 421; *Foule v. Green*, 1 Ch. Cas. 262; *Lancaster v. Thornton*, 2 Burr. 1027; *Yates v. Compton*, 2 P. Wms. 308; *Fay v. Fay*, 1 Cush. 94; *Shelton v. Homer*, 5 Met. 462; *Bank of United States v. Beverly*, 85 U. S. 10 Pet. 582, 9 L. ed. 522, 42 U. S. 1 How. 184, 11 L. ed. 75; *Deering v. Adams*, 87 Me. 264; *Jackson v. Schaubert*, 7 Cow. 187; *Schauber v. Jackson*, 2 Wend. 12; *Burr v. Sim*, 1 Whart. 266, 29 Am. Dec. 48; *Guyer v. Maynard*, 6 Gill & J. 420; *Dabney v. Manning*, 3 Ohio, 321, 17 Am. Dec. 697; *Jameison v. Smith*, 4 Bibb, 507; *Hope v. Johnson*, 2 Yerg. 123; *Bradshaw v. Ellis*, 22 N. C. 20; 1 Perry, Tr. § 308; *Mandlebaum v. McDonell*,

NOTE.—The above decision is noticeable for the distinction therein made between it and other cases in which the estate of a *cestui que trust* is held to be vested before the termination of a life estate during the continuance of which the trust is to continue.

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For notes on vested and contingent remainders, see *Hills v. Barnard* (Mass.) 9 L. R. A. 211; *Pennington v. Pennington* (Md.) 8 L. R. A. 616; *Bunting v. Speaks* (Kan.) 3 L. R. A. 690; *Culbreth v. Smith* (Md.) 1 L. R. A. 538; *Myers v. Adler* (D. C.) 1 L. R. A. 432.

29 Mich. 78, 18 Am. Rep. 61; *Santa Clara Female Academy v. Sullivan*, 116 Ill. 390, 56 Am. Rep. 776; *Walker v. Pritchard*, 121 Ill. 221.

Immediately upon the death of Mrs. Green, both the legal and equitable title to the estate will vest instantly in her children, regardless of whether or not the trustees execute any deed or conveyance. No act on their part will be necessary.

Parker v. Converse, 5 Gray, 386; *Greenwood v. Coleman*, 84 Ala. 150; *Churchill v. Corker*, 25 Ga. 479; *Stokes' App.* 80 Pa. 387; *Dodson v. Ball*, 60 Pa. 492, 100 Am. Dec. 586; *Wells v. McCall*, 64 Pa. 207; *Yarnall's App.* 70 Pa. 335; *Megargee v. Naglee*, 64 Pa. 216; *Belote v. White*, 2 Head, 703; *Simonds v. Simonds*, 112 Mass. 157, 121 Mass. 191; *Procoat v. Procoat*, 70 N. Y. 141; *Stevenson v. Lesley*, 70 N. Y. 512; *Farrow v. Farrow*, 12 S. C. 168; *Lynch v. Swayne*, 83 Ill. 336; *Meacham v. Steele*, 93 Ill. 135; *West v. Fitz*, 109 Ill. 425.

Appellant's interest is a vested remainder.

1 Jarman, Wills, 799; 2 Washb. Real Prop. 545, 550; *McArthur v. Scott*, 113 U. S. 878, 28 L. ed. 1026; *Scotfield v. Olcott*, 120 Ill. 362; *Crisfield v. Storr*, 86 Md. 129, 11 Am. Rep. 490; *Oriley v. Chamberlain*, 80 Pa. 161; *Burleigh v. Clough*, 52 N. H. 267, 13 Am. Rep. 23; *Manice v. Manice*, 43 N. Y. 303; *Cooper v. Hepburn*, 15 Gratt. 551; *Davidson v. Koehler*, 76 Ind. 398; *Ellwood v. Plummer*, 78 N. C. 392; *Rogers v. Rogers*, 11 R. I. 88; *Rood v. Hovey*, 60 Mich. 395.

The "present capacity of taking effect in possession on the termination of the life interest, is the prime badge of a vested remainder. Appellants have a present capacity of taking the remainder in possession on the termination of Mrs. Green's life interest at her death; that event must happen, and it not only may but probably will happen before the death of either complainant.

1 Preston, Estates, 70; 2 Washb. Real Prop. 542, 547; 4 Kent, Com. 202; *Fearne, Contingent Remainders*, 2; *McArthur v. Scott*, 113 U. S. 840, 28 L. ed. 1015; *Doe v. Considine*, 73 U. S. 6 Wall. 458, 18 L. ed. 869; *Ches's App.* 37 Pa. 28; *Hill v. Bacon*, 106 Mass. 578; *Gourley v. Woodbury*, 42 Vt. 895; *Blanchard v. Blanchard*, 1 Allen, 227; *Daniel v. Whartenby*, 84 U. S. 17 Wall. 639, 21 L. ed. 661; *Lehndorf v. Cope*, 122 Ill. 317; *Nicoll v. Scott*, 99 Ill. 531; *Scotfield v. Olcott*, *supra*; *Railsback v. Lovejoy*, 116 Ill. 442; *Smith v. West*, 103 Ill. 337; *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375, 56 Am. Rep. 776.

No degree of uncertainty as to the remainderman's ever enjoying the estate which is limited to him by way of remainder will render such remainder a contingent one, provided he has by such limitation a present absolute right to have the estate the instant the prior estate shall determine.

8 Washb. Real Prop. 547; *Oropley v. Cooper*, 86 U. S. 19 Wall. 176, 22 L. ed. 113; *Bowen v. Chase*, 94 U. S. 812, 24 L. ed. 184; *Lehndorf v. Cope*, *McArthur v. Scott*, and *Blanchard v. Blanchard*, *supra*; *Smither v. Willock*, 9 Ves. Jr. 233; *Doe v. Nowell*, 1 Maule & S. 327; *Bentley v. Long*, 1 Strobh. Eq. 43, 47 Am. Dec. 523; *Phillips v. Phillips*, 19 Ga. 261, 65 Am. Dec. 591; *Johnson v. Valentine*, 4 Sandf. 36; *Yeaton v. Roberts*, 28 N. H. 465; *Ross v. Drake*, 18 L. R. A.

87 Pa. 373; *Abbott v. Bradstreet*, 3 Allen, 589; 2 Washb. Real Prop. 551; *Rood v. Hovey*, 50 Mich. 395; *Porter v. Porter*, 50 Mich. 456.

A remainder limited after a life estate to children or issue of either the life tenant or any other party, vests in the children or issue as rapidly as they come in being.

Doe v. Prigg, 8 Barn. & C. 231; *Doe v. Provest*, 4 Johns. 61, 4 Am. Dec. 249; *Ballard v. Ballard*, 18 Pick. 41; *Viner v. Francis*, 2 Cox, Ch. 190, and notes, 2 Bro. Ch. 658; *Swinton v. Legare*, 2 McCord, Ch. 440; *Myers v. Myers*, Id. 257; *Jenkins v. Freyer*, 4 Paige, 47, 3 L. ed. 836; 2 Jarman, Wills, 75; *Dingley v. Dingley*, 5 Mass. 535; *Wight v. Shaw*, 5 Cush. 56; *Parker v. Converse*, 5 Gray, 386; *Yeaton v. Roberts*, *supra*; *Carroll v. Hancock*, 48 N. C. 471; *Doe v. Considine*, 73 U. S. 6 Wall. 475, 18 L. ed. 874; 2 Washb. Real Prop. 552; *Coursey v. Davis*, 46 Pa. 25, 84 Am. Dec. 519; *Walker v. Johnston*, 70 N. C. 578.

The power of appointment does not affect the vesting of the estate.

Fearne, Contingent Remainders, 226; 3 Cruise, Dig. 121; 4 Cruise, Dig. 146; 2 Washb. Real Prop. 542, 578; *Bowen v. Chase*, 94 U. S. 812, 24 L. ed. 184; *Rogers v. Rogers*, 11 R. I. 38; *Railsback v. Lovejoy*, 116 Ill. 442; 4 Kent, Com. p. 205; *Breit v. Yeaton*, 101 Ill. 242; *Smith v. West*, 103 Ill. 332; *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375, 56 Am. Rep. 776; *McArthur v. Scott*, 113 U. S. 840, 28 L. ed. 1015.

Appellants were necessary parties to the Peters suit.

Story, Eq. Pl. § 76a; *Spear v. Campbell*, 5 Ill. 424; *Scott v. Bennett*, 6 Ill. 646; *Alexander v. Hoffman*, 70 Ill. 114; *Montgomery v. Brown*, 7 Ill. 581; *Howell v. Foster*, 122 Ill. 378; *Smith v. Rotan*, 44 Ill. 506; *Lynch v. Rotan*, 39 Ill. 14; *Mittf. Eq. Pl. (Jeremy) 4th ed. 16*; *Calvert, Parties to Suits in Eq. p. 3, chap. 1, § 1*; *Palk v. Clinton*, 12 Ves. Jr. 58; *Cockburn v. Thompson*, 16 Ves. Jr. 325; *Hawkins v. Hawkins*, 1 Hare, 543; *Weatherly v. St. Giorgio*, 2 Hare, 624; *Harrison v. Stewardson*, 2 Hare, 580; *Hussey v. Dole*, 24 Me. 20; *Poor v. Clark*, 2 Atk. 515; *Caldwell v. Taggart*, 29 U. S. 4 Pet. 190, 7 L. ed. 828; *Whitney v. Mayo*, 15 Ill. 251; *Hopkins v. Roseclare Lead Co.* 72 Ill. 878; *Anonymous*, 1 Ves. Jr. 29.

In no case can the tenant for life represent the estate of inheritance. How much truer must it necessarily be that a trustee whose estate is for the life of another, cannot represent the remaindermen.

Story, Eq. Pl. § 144; *Calvert, Parties to Suits in Eq. chap. 1, § 1*; *Mittf. Eq. Pl. (Jeremy) 178*; 1 Montague, Eq. Pl. 63, 64; *Cooper, Eq. Pl. 35, 36, 185, 186*; *Finch v. Finch*, 1 Ves. Jr. 534; *Lloyd v. Johns*, 9 Ves. Jr. 337; *Cockburn v. Thompson*, *supra*; *Reynoldson v. Perkins*, Amb. 565.

In suits respecting the trust property, brought either by or against the trustees, the *cestuis que trust* (or beneficiaries), as well as the trustees are necessary parties.

Cooper, Eq. Pl. 84; *Mittf. Eq. Pl. (Jeremy) 176, 279*; *Barbour, Parties to Actions*, 525, 529; *Adams v. St. Leger*, 1 Ball & B. 181; *Court v. Jeffrey*, 1 Sim. & Stu. 105; *Wood v. Williams*, 4 Madd. 186; *Burt v. Dennet*, 2 Bro. Ch. 225; *Osborn v. Fallows*, 1 Russ. & M. 741; *Malin v. Malin*, 2 Johns. Ch. 238, 1 L. ed. 861; *Fish*

v. *Howland*, 1 Paige, 20, 2 L. ed. 545; *Stillwell v. McNeely*, 2 N. J. Eq. 805; *Holland v. Baker*, 8 Hare, 68; *Roberts v. Tunstall*, 4 Hare, 261; *Chicago & G. W. R. L. Co. v. Peck*, 112 Ill. 409; *Breit v. Yeaton*, 101 Ill. 242.

The trustees did not and could not represent appellants in the Peters suit.

Gordon v. Green, 118 Mass. 259; *Sears v. Hardy*, 120 Mass. 524; *Breit v. Yeaton*, *supra*; *Hill v. Printup*, 48 Ga. 452; *Horspool v. Davis*, 6 Bosw. 581; *Hunt v. Booth*, 1 Freem. Ch. 215.

Messrs. Smith & Harlan, Lyman & Jackson and C. H. Kelsey for appellees.

Wilkin, J., delivered the opinion of the court:

To the May term, 1891, of the circuit court of Cook county, appellants filed their bill, in the nature of a bill of review against appellees, to set aside a decree, and sale in pursuance thereof of section 21, township 39 N., range 18 E., Cook county, Ill., the decree having been rendered on the bill of William H. Peters, receiver of the Norfolk National Bank, of Virginia, against the administrator and heirs-at-law of Robert W. Hyman, deceased, and Henry A. Barling, Edward D. Mandell, and Edward H. Green, trustees under the last will and testament of Edward Mott Robinson, deceased, together with Hetty H. R. Green, daughter of said Robinson, and others, filed in said circuit court of Cook county, August 24, 1887. The record of that cause has been twice before us. See *Barling v. Peters*, 181 Ill. 78, 184 Ill. 606. The present bill sets out at length the various steps in that proceeding, but they will sufficiently appear, for the purposes of this decision, by reference to the above cited cases.

The following facts are pertinent to the present inquiry: On the 14th of June, 1865, Edward Mott Robinson died, leaving a last will and testament, which was afterwards duly probated. He left surviving him an unmarried daughter, Hetty Howland Robinson, to whom he willed certain real estate in the city of San Francisco, and a large money legacy. He also gave certain other specific legacies, and then made the following residuary bequest: "Fifth. All the rest, residue, and remainder of my estate, both real and personal, remaining after the payment of my debts, after satisfying the bequests and dispositions heretofore contained, I give, devise, and bequeath unto Henry A. Barling and Abner H. Davis, of the city of New York, and Edward D. Mandell, of New Bedford, in the state of Massachusetts, as trustees, to be holden by them, and the survivors and survivor of them, upon the trusts following: that is to say, as to the real estate, to collect and receive the rents, issues and profits thereof, and, as to the personal estate, to invest and keep invested the same, with power to call in and change the investments from time to time; such investments and reinvestments to be in such securities and property, and in such manner, as such trustee shall deem safe and prudent; and to continue so to hold the same in trust during the life of my said daughter, Hetty Howland Robinson, and to apply the net rents, issues, profits, interest, and income arising from the property embraced in such 18 L. R. A.

trust to the sole and separate use of my said daughter, Hetty Howland Robinson, during her life, separate and apart from any husband she may marry, and free from the debts, control, or interference of any such husband; such application to be of such income only from time to time as it shall accrue and be received, and not be subject to any previous disposition or incumbrance by way of anticipation, and, upon the death of my said daughter, Hetty Howland Robinson, to convey, transfer and deliver over the capital of such trust estate, real and personal, as the same shall then exist, to the issue of my said daughter, Hetty Howland Robinson, if any issue she shall leave her surviving, in such shares and proportions as my said daughter, Hetty Howland Robinson, shall appoint by her last will and testament, and, if she shall make no direction or appointment, then to such issue in equal shares, *per stirpes*, and not *per capita*; and in case my said daughter, Hetty Howland Robinson, shall leave no issue her surviving, then upon her death to convey, transfer and deliver over the capital of such trust estate, real and personal, as the same shall then exist, excepting four hundred thousand dollars thereof hereinafter disposed of, in such event, to such person or persons, and for such estate, as my said daughter, Hetty Howland Robinson, shall by her last will and testament direct or appoint, and in default of such direction or appointment, or so far as the same may not extend or be effectual, then to the person or persons who by the present laws of the state of New York would have taken the same as heirs-at-law and next of kin of my said daughter, Hetty Howland Robinson, if she had died seised and possessed thereof intestate; and as to the said above reserved four hundred thousand dollars of such trust estate, I give and bequeath the same, at the termination of the said trust, upon such contingency of my said daughter dying without leaving issue, in manner following: that is to say, I give and bequeath one hundred thousand dollars thereof to my brother William A. Robinson, of Providence, Rhode Island, if he be then living, and, if he be not living, then to the issue then living of said William A. Robinson, in equal shares, *per stirpes*, and not *per capita*; and one hundred thousand dollars thereof to my sister Annie A. Chase, of Salem, Massachusetts, if she be then living, and, if she be not then living, then to the issue then living of said Annie A. Chase, in equal shares, *per stirpes*, and not *per capita*; and one hundred thousand dollars thereof to my brother Attmore Robinson, of South Kingston, Rhode Island, if he be then living, and, if he be not then living, then to the issue then living of said Attmore Robinson in equal shares, *per stirpes*, and not *per capita*; and the remaining one hundred thousand dollars thereof to my brother Sylvester C. Robinson, of Salem, Massachusetts, if he be then living, and, if he be not then living, then to the issue then living of said Sylvester C. Robinson, in equal shares, *per stirpes*, and not *per capita*. Sixth. I give to the trustees of the trust above created, and to the survivors and survivor of them, power to lease any of the real estate embraced in such trust for any lawful term or terms, and likewise power to sell and convey

any of such real estate. And I will and direct that, as to such part of my estate as at the time of my death shall be invested in ships or interest in ships, it shall be at the option of said trustees, and likewise of my executors, in their discretion, when to sell the same, and they may continue to hold and run any such ship or ships, for the benefit and at the risk and charge of my estate, for such time as to them may seem fit." In 1866, the daughter, Hetty Howland, married Edward H. Green, and of that marriage the complainants in this bill were born,—the son, Edward H. R., August 23, 1868, and the daughter, Hetty S. H., January 7, 1871.

The theory of this action is that, upon their births, these children, the issue of the daughter of said Robinson, took, under said fifth clause of his will, a present interest in the residuum of his estate, to which belonged said section 21, and that, therefore, before their rights in that real estate could be sold under a decree of court, they must have been parties to that decree; hence this is denominated by their counsel "an original bill, in the nature of a bill of review, impeaching a decree for want of proper parties." There are also allegations in the bill charging fraud and collusion on the part of said trustees in suffering said decree to be rendered. The rights of appellants, however, when the Peters bill was filed, were precisely the same as they are now, and, therefore, unless they were necessary parties to that bill, they can have no standing in the present action for want of interest in the subject-matter. The case may therefore be properly considered on the single question, had appellants at the time the former bill was filed such an interest in the subject-matter of that suit as made them necessary parties thereto? It is scarcely necessary to reiterate the rule in chancery pleading and practice that all persons who are legally or equitably interested in the subject-matter and result of the suit must be made parties. The interest must, however, always be a present, substantial interest, as distinguished from a mere expectancy, or future, contingent interest. *American Bible Soc. v. Price*, 115 Ill. 623; *Story, Eq. Pl. §§ 141, 145, 150*. While many points are raised and discussed by counsel for appellants, the pivotal question in the case is, Did appellants, as issue of Hetty Howland Robinson, upon coming into being, take a vested interest, under the foregoing fifth clause, in all the real estate therein devised? The first proposition asserted in support of the affirmative of that question is that "the interest of the trustees of the Robinson estate in the piece of realty known as 'section 21' was an estate for the life of Mrs. Green." From this premise it is argued that the issue of Mrs. Green took, under said clause, an estate in remainder in said section as soon as they were born, which became a vested remainder under the rule that "when a remainder is so limited as to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event which must happen immediately by the efflux of time, the remainder vests in interest as soon as the remainderman is *in esse* and ascertained, provided nothing but his own death before the determination of the particular

estate will prevent such remainder from vesting in possession." It is also insisted, and many authorities are cited as supporting the contention, that "immediately upon the death of Mrs. Green both the legal and equitable title to the estate will vest instantly in her children, regardless of whether or not the trustees execute any deed or conveyance." Manifestly, unless the first of the foregoing propositions can be sustained, the argument must fall with it. If the trustees took the title to said real estate in fee simple, no remainder was left to vest in the issue of Mrs. Green, or any one else, and hence there could be no vesting of title upon the death of Mrs. Green, without a conveyance by said trustees. The language in said fifth clause, "I give, devise, and bequeath unto Henry A. Barling," etc., "as trustees" prima facie vests in said trustees the title in fee, the effect being the same as though the devise had been to them and their heirs. *Rev. Stat. § 13, chap. 80, entitled, Conveyances; West v. Fite*, 109 Ill. 436. While in conveyances and devises of real estate in trust, words of inheritance will not necessarily pass the title in fee, they will have that effect unless it appears that the trust can be discharged by the trustees taking a less estate. Prima facie the absolute title in fee passes. Even in the absence of statutory provision as to the effect of the omission of the word "heirs," the rule, as stated by Perry in his work on Trusts, (sec. 815), is as follows: "So if land is devised to trustees without the word 'heirs,' and a trust is declared which cannot be fully executed but by the trustees taking an inheritance, the court will enlarge or extend their estate into a fee simple, to enable them to carry out the intention of the donors. Thus, if land is conveyed to trustees without the word 'heirs,' in trust to sell, they must have the fee; otherwise they could not sell." And he adds: "*A fortiori*, if an estate is limited to trustees and their heirs in trust to sell or mortgage or to lease, at discretion, or if they are to convey the property in fee, or to divide it equally among certain persons, for to do any or all of these acts requires a legal fee." By the terms of this will, the absolute title is not only prima facie vested in the trustees by the terms of the devise, but it is clear that they cannot perform the duties imposed upon them without having that title. To say that they take the title only during the life of Mrs. Green is to wholly ignore the fact that, by the express terms of their trust, they are to perform active duties after her death.

They must then convey to the issue of Mrs. Green, if she leaves any, not jointly, or as tenants in common, (as seems to be assumed), but in such shares as the mother may by her last will and testament direct. Had section 21 continued to be a part of the trust estate until the period of distribution, and Mrs. Green leaves issue, the trustees might have been directed by her, in her last will, to convey it all to one of such issue, to the exclusion of all others, giving them other property. If it had continued to be a part of such estate, and she made no appointment or direction as to the shares and proportions in which it should be conveyed, still more responsible duties would devolve upon the trustees. They must, in that event, first divide the estate into equal shares among

the issue of Mrs. Green, if she leaves any, and then convey it in such equal shares. They might unquestionably under that power convey all or any portion of said section to one of such issue, if in doing so they could at the same time make an equal division of the entire estate. Moreover, the will contemplates that no issue may survive the daughter, and therefore directs the trustees in that event to convey to other parties. There is no more reason for saying the title to the trust estate will vest in the issue of the daughter at her death without a conveyance, than, if she dies without issue, it will without conveyance vest in "the person or persons who, by the present laws of the state of New York, would have taken the same as heirs-at-law and next of kin of Hetty Howland Robinson, if she had died seised and possessed thereof intestate." In any event the trustees must convey. In *Kirkland v. Coz*, 94 Ill. 400, we were called upon to determine what title passed to trustees under the will of Michael Walsh, deceased, in which the devise was not different in effect from that in this will. Among other directions in the declaration of trust was the following: "The balance of my estate, upon the happening of such contingency, viz., the death of my daughter without issue, I wish divided equally between," etc., naming four corporations. After quoting the foregoing rule from *Perry on Trusts*, we said: "The property is devised to the trustees to sell and convey, if they deem it advisable, or to hold and control it until it is to be transferred as directed; and in the contingency that has arisen it was intended that it should be the duty of the trustees to make the equal division of the property between the corporations designated, and convey it accordingly; for the grant to these corporations is in severalty, and not as tenants in common, and their title must necessarily rest on the conveyance of the trustees." So here, if for no other purpose, the trustees must hold the title after the death of the daughter, in order that they may, if the contingency named in the trust arises, divide the estate, and convey it in severalty. Many cases are cited by the learned counsel for appellants in support of their contention that the estate of the trustees is only for the life of Mrs. Green, some

of which are said to be directly in point. They are all distinguishable from this case in the fact that here active duties are imposed upon these trustees to be performed after the death, and which cannot be known until that time. No beneficial results could be obtained by a review of those cases. We have been unable to find in any one of them a principle in conflict with the views here expressed. It is also to be observed that by the sixth clause of this will the trustees are given power to sell and convey any or all of the realty belonging to the trust estate, and by the fifth clause they are to "convey, transfer," etc., the estate, real and personal, as it exists at the death of the daughter; thus showing that the testator contemplated that a change in his realty between the time of his death and the time of distribution, by sales and conveyances by the trustees, might take place. If we keep in mind the distinction between a mere contingent future interest in the trust estate generally, and a present title or interest in said section 31, the case is free from difficulty. Notwithstanding the fact that these appellants may have an expectancy in the trust estate as it shall exist at the death of their mother, that does not entitle them to be made parties to every suit that the trustees may be called upon to bring or defend, in order to preserve their trust. As we said in *American Bible Soc. v. Price*, 115 Ill. 644: "The title is in the trustees, and the duty is imposed upon them to protect and preserve this interest for whomsoever shall be ultimately entitled to it. They are parties to the suit, and they stand for and represent, in this litigation, the ownership ultimately entitled to this fund, and such ownership is bound by their representation." So we say here, the title was in the trustees when the Peters suit was brought; they were parties to the action; and they stood for and represented, in that litigation, all parties having a future interest in the trust estate. These appellants are bound by that representation. See also *Temple v. Scott* (Ill.) 82 N. E. Rep. 866, (filed at October Term, 1892).

The decree of the Circuit Court is in harmony with the views here expressed, and will be affirmed.

NEW YORK COURT OF APPEALS (2d Div.).

Enoch C. SWAIN, *Resp't.*,

v.

William H. SCHIEFFELIN *et al.*, *Appts.*

(.....N. Y.....)

The damages recoverable from one who sells poisonous coloring matter to be

used in the manufacture of ice cream, representing it to be harmless, may include the value of the cream ignorantly spoiled by its use, and also compensation for loss of business by the manufacturer which results from his innocently delivering the poisoned cream to his customers.

(October 1, 1892.)

NOTE.—Measure of damages for breach of implied warranty.

Whether the warranty is express or implied is immaterial, as in legal effect they are the same. *Callender Insulating & Waterproofing Co. v. Badger*, 30 Ill. App. 317.

In this case the measure of damages for selling defective electric wires unfit for the purpose for which they were intended was the sum paid.

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In *Randall v. Newson*, L. R. 2 Q. B. Div. 102, where a carriage pole which had been furnished by the defendant broke, and as a result the horses were injured, it was held that the sale of the pole carried with it an implied warranty that it was fit for the use to which it was to be put, and that it should be left to the jury whether or not the injury to the horses naturally resulted from the defective pole.

APPPEAL by defendants from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the Kings County Circuit in favor of plaintiff in an action brought to recover damages for the sale to plaintiff of poisonous coloring matter to be used in the manufacture of ice cream.

Affirmed.

The facts are stated in the opinions.

Messrs. Jay & Candler, for appellant:

The court erred in permitting evidence of general decline in business, as the complaint was insufficient to entitle the plaintiff to give evidence on that subject.

Wherever the gist of an action is special damages, and the damage alleged is loss of business, it is perfectly well established that the customers must be named who are claimed to have given up dealing with the plaintiff.

A general allegation, such as that in the complaint in this action, is insufficient.

Havemeyer v. Fuller, 10 Abb. N. C. 9; *Childs v. Tuttle*, 43 Hun, 230; *Tobias v. Harland*, 4 Wend. 540; *Knickerbocker L. Ins. Co. v. Ecclesine*, 11 Abb. Pr. N. S. 385; *Linden v. Graham*, 1 Duer, 670; *Hallock v. Miller*, 2 Barb. 630.

In *Hoe v. Sanborn*, 36 N. Y. 98, it was said that whether the warranty was considered as express or implied the rule of damages for its breach was the difference between the value of the goods if they had corresponded with the warranty, and their actual value. See also Benjamin, Sales, Bennett's ed. 906.

In *Reggio v. Braggiotti*, 7 Cush. 166, the court held that the measure of damages for breach of an implied warranty in sale of goods supposed to be opium was the difference between the value of the goods sold and the value of goods that would have corresponded to the warranty.

In *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 123, where seed which had been sold as of a certain variety of cabbage seed produced no crop the rule of damages was laid down to be the fair value of the crop had the seed been as asserted.

In *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 12, the facts being similar to those in the above case, the rule was held to be the difference in value between the crop actually produced, and the crop that would naturally have been produced that year.

Van Wyck v. Allen and *White v. Miller*, *supra*, followed the rule laid down in *Passinger v. Thornburn*, 34 N. Y. 634, 90 Am. Dec. 753, which was the case of a special warranty.

But in Kansas it has been held that all the losses necessarily sustained by the failure of seed to germinate may be recovered in an action for breach of an implied warranty that it was suitable for sowing. *Shaw v. Smith*, 11 L. R. A. 681, 45 Kan. 334; *Shaw v. Jones*, 45 Kan. 339.

For breach of the implied warranty in a sale of a drug to be used for destroying the cotton worm it was held that the seller was liable for the actual expenses incurred in the purchase and application of the compound to the cotton, and for the loss of time, and for every other element of actual damages resulting as a natural or legal sequence from the breach. *Jones v. George*, 56 Tex. 149, 42 Am. Rep. 699.

In *French v. Vining*, 102 Mass. 122, 3 Am. Rep. 440, where a cow had died from the effects of poison in hay sold by defendant, it was held that the measure of damages was the value of the cow.

Copas v. Anglo-American Provision Co., 73 Mich. 541, where hams were sold, there was held to be an 18 L. R. A.

This principle, that the defendants have a right to force the plaintiff to prove the individual third persons whom the plaintiff claims were induced to do something injurious to the plaintiff, or prevented from doing something beneficial to the plaintiff, is of general application.

Cheeseborough v. Kimberly, 24 N. Y. S. R. 807; *Post Express Print. Co. v. Adams*, 55 Hun, 35.

The court erred in refusing to direct a verdict for the defendants because the damage to the plaintiff's business, if any, was the result of persons losing confidence in the plaintiff himself.

Crain v. Petrie, 6 Hill, 522, 41 Am. Rep. 765, citing 1 Chitty, Pl. 395, 396; 1 Saund. Pl. & Pr. 344; *Morris v. Langdale*, 2 Bos. & P. 284; *Vicars v. Wilcocks*, 8 East, 1.

The case of *Crain v. Petrie*, *supra*, has never been overruled. It is a wise decision by a great judge and is constantly cited.

Lowery v. Western U. Teleg. Co. 60 N. Y. 193, 19 Am. Rep. 154; *People v. Albany*, 5 Lans. 524; *Bajus v. Syracuse, B. & N. Y. R. Co.* 34 Hun, 153; *Williams v. Delaware, L. & W. R.*

implied warranty that they were fit for food, and that if wholly worthless the purchaser could recover back the price paid, if not wholly worthless the difference between the price paid and the actual value.

In *Best v. Flint*, 58 Vt. 543, it was said that the plaintiff who in selling unmarketable hogs to the defendant had broken the implied warranty that they should be fit for the purpose for which they were intended, must allow the damages sustained in reduction of the price.

The purchaser of corn which was held not to have fulfilled the implied warranty was entitled to recover the difference between the price paid for the corn and the price which he obtained for it. *Holloway v. Jacoby*, 120 Pa. 533.

Where a manufacturer undertakes to manufacture goods for a particular purpose he impliedly warrants that they shall be fit for the purpose for which they were intended. *Curtis Mfg. Co. v. Williams*, 48 Ark. 325.

In this case the vendee reckoned his loss by reason of defects in machinery, \$110. A verdict for \$100 was affirmed.

A sale of ice to a retail dealer with knowledge that he intends to use it to supply his customers without disclosing the fact, known to the vendor, that it is unfit for the purpose, is a deceit entitling the purchaser to an abatement of price, although he has sold the ice, and no representations were made by the vendor as to the quality, and the purchaser made inquiries of others in respect thereto. *Joplin Water Co. v. Bathe*, 41 Mo. App. 285.

In *Smith v. Hightower*, 78 Ga. 629, the jury was authorized to find for the defendant in an action on a note given for the exclusive right to sell a machine, when the machine turned out worthless for the purpose for which it was intended.

In notes on damages for breach of contract, see *Shaw v. Smith* (Kan.) 11 L. R. A. 681; *Hunt v. Oregon Pac. R. Co.* (Or.) 1 L. R. A. 842; *Western U. Teleg. Co. v. Brown* (Tex.) 2 L. R. A. 766; *Taylor Mfg. Co. v. Hatcher* (Ga.) 3 L. R. A. 587; *Boettler v. Tendick* (Tex.) 5 L. R. A. 275; *Hathaway v. Lynn* (W.V.) 6 L. R. A. 551.

And for notes on implied warranty on sale of goods, see *Shaw v. Smith*, *supra*; *Murchie v. Cornell* (Mass.) 14 L. R. A. 492.

A. P. W.

Co. 39 Hun, 430; *Van Ostran v. New York Cent. & H. R. Co.* 85 Hun, 590.

Messrs. Payne, McGuire & Low, for respondent:

The allowance of damages for the injury to the plaintiff's business was proper.

The wrongdoer is responsible for the natural and direct consequences of his wrongful act.

Any person who wrongfully causes another without contributing negligence by that other to sell poisonous food is legally responsible for the consequent loss of trade.

St. John v. Mayor, 6 Duer, 820; *Walter v. Post*, 6 Duer, 373; *Lowrey v. Western U. Teleg. Co.* 60 N. Y. 188, 19 Am. Rep. 154; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 23 L. ed. 256.

Follett, Ch. J., delivered the opinion of the court:

In 1888 and 1889 the defendants were druggists and engaged in business at the city of New York. In those years the plaintiff was a manufacturer of ice cream and ices at the city of Brooklyn, which he sold to persons and families for immediate consumption. The defendants knew the character of the business in which the plaintiff was engaged. December 28, 1888, the defendants, for \$2, sold and delivered to the plaintiff a bottle of "carlet red," which they had previously manufactured, representing "that it was absolutely pure and harmless." The defendants knew that it was purchased for coloring certain kinds of ice creams and ices. One of the defendants testified that the formula for "carlet red" is "one ounce of red aniline, half a gallon of alcohol, and two pounds of glycerine, which, when mixed, makes 96 fluid ounces of 'carlet red.'" March 4, 1889, the plaintiff manufactured some strawberry ice cream and apricot ice, using "carlet red" to give them color, and sold them to about forty different families, who were customers of his. About 200 persons who ate of the cream and apricot ice were sick with symptoms of arsenical poisoning. An analysis of the "carlet red" showed that it contained arsenic. Some of the persons who ate of these articles became slightly, and others seriously, ill. By reason of the sickness, complaints, and the discovery by the chemists of arsenic in the "carlet red," the plaintiff destroyed all of the ice creams and ices colored with that material, and he asserts that the occurrences greatly injured his business. He brings this action to recover (1) the value of the ice cream and ices destroyed, and (2) the damages occasioned by the loss of customers, of sales, and profits thereon subsequent to the occurrences complained of. The trial court submitted the questions of fact to the jury in a charge which was not excepted to in any respect except as to the rule of damages laid down, and we must determine the case upon the theory that the issues of fact were well found for the plaintiff.

The important question presented by this appeal is, What damages was the plaintiff entitled to recover? The principle on which damages should be assessed is well stated in the recent case of *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205, 54 Am. Rep. 676, 18 L. R. A.

where it is said: "When it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain. It is not true that loss of profits cannot be allowed as damages for a breach of contract. Losses sustained and gains prevented are proper elements of damage." That the plaintiff was damaged by reason of the impurity of the "carlet red" has been found by the jury upon conflicting evidence, and the verdict is binding upon this court upon the questions of fact. This injury was brought about by the breach of the contract by the defendants. When one violates his contract or his duty to another, the theory of the law is that compensation shall be made for the injury directly and proximately caused by the breach of contract or duty. Ordinarily, upon the sale and delivery of a chattel, accompanied by a warranty of its quality, which is broken, the measure of damages is the difference between its value, had it been as warranted, and as it proved to be. But it seems to be conceded that this rule is not applicable to the case at bar, if it is, the plaintiff was not entitled to recover the value of the property destroyed, but the difference in the value of the "carlet red" as it was warranted to be and as it was found to be, which could not have exceeded the purchase price of \$2. In case a manufacturer of goods sells them to a purchaser to be used for a particular purpose, which is known by the vendor at the time of the sale, a more liberal rule prevails than in cases where like articles are sold as merchandise, for general purposes. In the former cases, profits lost and expenses incurred may be recovered. *Passinger v. Thorburn*, 84 N. Y. 634, 90 Am. Dec. 753; *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *White v. Miller*, 78 N. Y. 893, 34 Am. Rep. 544; *Messmore v. New York Shot & Lead Co.* 40 N. Y. 422; *Booth v. Spuyten Duyvil Roll. Mill Co.* 60 N. Y. 487. This broader rule rests on the theory that the vendor, having sold the articles with the knowledge that they were purchased for a particular purpose, should be held liable for such damages as naturally flow from the breach of his contract, and which he, or any reasonable man, might apprehend would follow from the breach. In the present case the defendants knew the precise use which the "carlet red" was to be put to, and we think it is reasonable to hold that they should have apprehended that the use by the plaintiff of a poisonous or deleterious article would destroy his business. It seems to us that the natural and probable result of the sale of a poisonous for a wholesale article, to be used by the purchaser in the preparation of food to be distributed to and eaten by its patrons, would entail a loss of business and of profit to the purchaser. Had the defendants incorrectly, but without malice, reported that the plaintiff had sold unwholesome or

poisonous ice cream, they would have been liable for the plaintiff's loss of custom, (*Hallock v. Miller*, 2 Barb. 630; *Bergmann v. Jones*, 94 N. Y. 51;) although not, in the case supposed, for punitive or exemplary damages. The rules governing the assessment of damages are the same in contract as in tort unless exemplary damages are recoverable. *Baker v. Drake*, 58 N. Y. 211, 18 Am. Rep. 507; 2 Sedgw. Damages, 8th ed. p. 29, § 80; Id. p. 4, § 429.

In *Crain v. Petrie*, 6 Hill, 522, 41 Am. Rep. 765, an executory contract existed between Petrie and Gage, a butcher, by which the latter agreed to purchase of the former a quantity of mutton. Gage refused to accept of the mutton, because he learned that Crain had sold diseased sheep to Petrie. The action was to recover damages for selling diseased sheep. The plaintiff sought to recover the damages occasioned him by the nonfulfillment of Gage's contract, and also the damages sustained by the refusal of others to purchase mutton of him. The court, in discussing the right to recover special damages, said that such damages "must appear to be the legal and natural consequences arising from the tort, and not from the wrongful act of a third party, remotely induced thereby.

That the refusal of Gage to receive and sell good and well-cured hams, shoulders," etc., "contrary to a previous arrangement with him, in consequence of the reports that the plaintiff had purchased a lot of diseased sheep of the defendant, was a wrongful breach of contract by Gage, for which the plaintiff had an adequate remedy against him, and therefore such damages could not be recovered against Crain, who sold the sheep." The court in its opinion cites *Vicars v. Wilcocks*, 8 East, 1, and *Morris v. Langdale*, 2 Bos. & P. 284, which lay down the same rule, but these cases have been expressly overruled. *Lumley v. Gye*, 2 El. & Bl. 216; *Lynch v. Knight*, 9 H. L. Cas. 577, 586, 590, 600; *Green v. Button*, 2 Crompt. M. & R. 707, Tyrw. & G. 118; Mayne, Damages, 4th ed. 661; Starkie, Slander & Libel, 4th Eng. ed. 320, 488; 1 Suth. Damages, 68; 2 Smith, Lead. Cas. 464. The only authorities referred to by the two text-writers cited in *Crain v. Petrie*, *supra*, are the two overruled cases. Petrie's case is distinguishable from the one at bar in the fact that he did not purchase the sheep to sell to persons who were to use them for food, but he intended to sell them to a butcher, who was to sell to consumers; besides, it was not shown in that case that the defendant knew that the plaintiff purchased the sheep for the purpose of having them converted into food, even by others. Again, Petrie did not sell the diseased sheep, so he sustained no loss by reason of their sale.

The case at bar is distinguishable from a class of cases in which the damages sought to be recovered arise from a breach of the contract or of duty, or from the wrongful act of a third person, which breach of contract, duty, or wrongful act may have been remotely caused by the person sued. In such cases the person injured has a right of action against those who have violated their contract or duty, or have committed a wrongful

act, to his injury, but here this plaintiff has no cause of action against his former customers, who refused to patronize him because of his sale of poisonous ice cream.

The judgment should be affirmed, with costs.

Parker, Brown, and Landon, JJ., concur.

Bradley, J., concurring:

The jury found that the plaintiff's product of ice cream, etc., which became useless by reason of its infection with the compound purchased of the defendants, and was destroyed, had the value of \$50. To that extent the damages sustained clearly came within the rule of relief. But the plaintiff claims, further, that he was injured in his business by this act of the defendants, and the evidence in its support was that of his average monthly receipts for the year ending in March, 1889, and those for the three months following that time. This basis of estimate was somewhat speculative or uncertain, as there may, within that period of three months, have been some other causes for a less average of monthly receipts during such time than for the entire year preceding. But, as no exception was taken to the charge as made by the court, or to its refusal to charge on the subject of damages, other than such as went to the right of the plaintiff to recover anything, the question whether the plaintiff should be allowed to recover special damages for injury to his business was not specifically or necessarily raised after the close of the evidence. Nor is the exception taken to the denial of the motion to reduce the damages awarded by the verdict available on this review. *Oldfield v. New York & H. R. Co.* 14 N. Y. 310; *Standard Oil Co. v. Amazon Ins. Co.* 79 N. Y. 506. The only question here in that respect arises upon the exception taken to the reception of the evidence on the subject of the average monthly receipts, before referred to, of the plaintiff's business; and the admissibility or the inadmissibility of that evidence is dependent upon the question whether or not the plaintiff's loss, occasioned by injury to his business, may be deemed a proper element of damages. It may be if there was no intermediate efficient course to which the injury may have been imputed. In such case the result usually may be attributed to the primary as the proximate cause. Such was the case of the lighted squib thrown by the party charged into a crowd of people, and then, for self-protection, thrown by one after another until it injured the party who recovered damages for the injury, (*Scott v. Shepherd*, 2 W. Bl. 892, 3 Wils. 408;) and where the boy, in escaping the threatened attack of the party pursuing him, ran against and knocked out the faucet of a cask of wine, the pursuing party was held liable for the loss, (*Vandenburgh v. Truax*, 4 Denio, 464.) The injurious results which may or ought to be foreseen of a wrongful or negligent act are also deemed the proximate consequences of it. This was illustrated in the familiar case of the person in the balloon descending into the garden under circumstances which

invited people to go to his assistance, and in doing so trampled the vegetables, etc., for which he was held liable. *Guille v. Swan*, 19 Johns. 381. In those cases, and others similar in principle, the damages suffered were deemed the proximate result of the wrongful or negligent acts of the parties charged.

In the present case, so far as the plaintiff's property was injuriously affected or contaminated by the use of the compound sold him by the defendants, the damages were attributable directly to the act complained of, and to that extent he was properly permitted to recover. *Jeffrey v. Bigelow*, 13 Wend. 518; *Mullett v. Mason*, L. R. 1 C. P. 559. Beyond that, the damages claimed for injury to business, and for loss of profits which the plaintiff may otherwise have realized from his trade, were special and consequential. The question is whether they were the natural and proximate result of the act chargeable to the defendants. In *Crain v. Petrie*, 6 Hill, 522, the defendant was charged with fraudulently selling diseased sheep to the plaintiff, who was engaged in the butchering business and selling mutton. The plaintiff there gave evidence, subject to exception, that one Gage, who had agreed to take mutton from him, and also other customers of the plaintiff, declined to do so in consequence of the report that he had purchased the diseased sheep. The court, on review, held that the reception of the evidence was error; that, so far as related to the refusal of Gage to take mutton, it was a breach of contract, for which the plaintiff had his remedy against him, and that the discontinuance of purchases by others "resulted from a want of confidence in the care, skill, or integrity of the plaintiff himself; the people assuming that he might sell the meat of diseased sheep for a good and merchantable article." And *Chief Justice Nelson* there said: "The consequential loss which the plaintiff was allowed to prove at the trial was too remote and speculative to come within any established rule on the subject;" and that "to maintain a claim for special damages this must appear to be the legal and natural consequences arising from the tort, and not from the wrongful act of a third party, remotely induced thereby; in other words, the damages must proceed wholly and exclusively from the injury complained of." The proposition there, in its relation to the claim founded upon the refusal of Gage to take mutton as he had agreed, is clearly distinguishable in principle from that in the case at bar. The refusal of Gage was a violation of his contract, and it might be treated as the efficient and immediate cause of the damages so occasioned to the plaintiff within the doctrine that when the original wrong is rendered injurious by reason only of the intervention of some independent wrongful act of another, the latter will be treated as the proximate cause of the injury, which will be imputed to it alone. *Hoey v. Felton*, 11 C. B. N. S. 142; *Vicars v. Wilcocks*, 8 East, 1; *Ward v. Weeks*, 7 Bing. 211; *Terrwilliger v. Wanda*, 17 N. Y. 54, 72 Am. Dec. 420; *Louvery v. Western U. Tel. Co.* 60 N. Y. 18 L. R. A.

198, 19 Am. Rep. 154. This rule was not applicable to his other customers, who for like reason had ceased to buy his meat; and apparently there is no distinction in principle between the *Crain Case*, in that respect, and the present one, so far as relates to the claim for special damages resulting from the loss or reduction of the business of the plaintiff; and therefore, by giving controlling application to this case of the views of *Mr. Chief Justice Nelson*, as broadly as expressed in *Crain v. Petrie*, the consequential injury to the plaintiff's business might not be treated as imputed to the act of the defendants as the legal or proximate cause, but would be deemed attributable, in that sense, to the want of confidence in the care, skill or integrity of the plaintiff. As has already been observed, there may be in the causation a succession of dependent acts or events, through which may be traced the primary as the proximate cause of the resulting injury; and, when injurious consequences which proceed from a wrongful or negligent act may or ought to have been foreseen, the author of it is responsible. A dealer in food products, who is known to use deleterious substances in their production, cannot expect much patronage in that line of trade, and it could, with ordinary forecast, be foreseen that the supply to him of poisonous compounds to use for such purpose would, if made public, be materially prejudicial to his business. The publicity of the fact of the purchase by him of poisons to be so used would have an effect in that direction similar to that of the report of his use of them for such purpose, and differing, if at all, in degree only.

In the present case, the published imputation that the plaintiff had sold poisonous ice cream seems to have been justified by the fact, and the compound by which his product was so infected was innocently used by the plaintiff, upon the faith of the defendants' representation that it was wholesome. The disposition made of the *Crain Case* was not dependent upon the exception to evidence offered to prove that the customers other than Gage had ceased to deal with Petrie. It could rest upon the proposition that the violation by Gage of his contract was the only cause to which the damages resulting from his refusal to take mutton were legally imputable, and for which he alone was liable to Petrie, the plaintiff in that action at the trial, and defendant in error on the review; and, in view of the legal principles to which advertence has been made, the *Crain Case* may properly and should be limited to that proposition in its application to the present one. There was here no intermediate wrongful or negligent act to which the consequential injury to the plaintiff or the special damages sustained by him can be imputed. In view of the facts as found by the jury in respect to the nature of the compound, those damages followed, according to the ordinary course of events, from the cause complained of, and may be deemed the legitimate sequence of it. The judgment should be affirmed.

Vann and Haight, JJ., concur.

ILLINOIS SUPREME COURT.

JOSEPH SCHLITZ BREWING CO., *Appt.*,
v.
Sophie COMPTON.

(.....Ill.....)

Damages for injuries after the commencement of a suit cannot be given in an action for a continuing nuisance such as a roof and eave trough so placed as to send water against plaintiff's house upon the occurrence of every rain storm.

(November 2, 1892.)

A PPEAL by defendant from a judgment of the Appellate Court, Third District, affirming a judgment of the Circuit Court for Sangamon County in favor of plaintiff in an action brought to recover damages for the alleged wrongful erection of a building so near to plaintiff's property that water was thereby cast upon and into plaintiff's buildings in such a manner as to diminish their value. *Reversed.*

Statement by **Magruder, J.:**

This is an action on the case, begun on April 17, 1890, in the circuit court of Sangamon county, by the appellee against the appellant company. In the trial court the verdict and judgment were in favor of the plaintiff, which judgment has been affirmed by the appellate court. The declaration consists of two counts. The first count alleges that plaintiff was possessed of certain premises in Springfield, in which she and her family resided, and that the defendant, to wit, on April 20, 1885, wrongfully erected a certain building near said premises in so careless, negligent, and improper a manner that on said day and afterwards, "and before the commencement of this suit," large quantities of rain water flowed upon, against, and into said premises and the walls, roofs, ceilings, beams, papering, floors, stairs, doors, cellar, basement, and other parts thereof, and weakened, impaired, and damaged the same, by reason whereof said messuage and premises became and are damp and less fit for habitation. The second count alleges that plaintiff was the possessor, occupier, and owner of said messuage and premises, in which she and her family dwelt, and the defendant to wit, on said day, caused quantities of water to run into, against, and upon the same, and the walls, roofs, floors, cellars, etc., thereof, and thereby greatly weakened, impaired, wetted, and damaged the same. By reason whereof said premises became and were and are damp, inconvenient, and less fit for habitation. The plea was not guilty. The proof tends to show that plaintiff's building is a two-story brick building, with a cellar underneath, the front room on the first floor being used as a butcher's shop, and the rest of the building being used as a dwelling; that the building

was erected several years before that of the defendant; that defendant's building is on the lot west of plaintiff's lot, and is about sixty feet long, having an office in front and a beer-bottling establishment in the rear, and has one roof, which slants towards plaintiff's property; that there are three windows on the west side of plaintiff's house, besides the three cellar windows; that her wall is a little over two feet from the west line of her lot; that when it rains the water flows against her west wall, and some of it into her windows and cellar from the roof of defendant's building; that the eave trough is so far below the eave that the water runs over it into the windows, etc.

Messrs. Palmer & Shutt, for appellant:

The defendant's breach of duty was the building of the roof and its pitch which caused the injury to the extent of the flow of the water upon the roof. It was against this he was bound to protect the plaintiff.

Gould v. McKenna, 86 Pa. 297, 27 Am. Rep. 707.

The right of the defendant to erect and maintain a building upon its own premises is not questioned; and it may construct it in such manner as it chooses. It is only when, and so long as, it injures, or continues to injure others, by such use of property, that it can be regarded as a wrongdoer.

In such a case a party can only recover damages for acts done before the suit was commenced.

Cooper v. Randall, 59 Ill. 321.

One may bring a suit for the deterioration in value of real property from a nuisance, alleging its permanency, and by such an action the plaintiff consents to the continuance of the nuisance, and accepts the judgments recovered, as a compensation therefor,—such recovery will have the effect to give the defendant a permanent right to do the acts which constitute the nuisance, as fully as though there had been a condemnation of the property by the exercise of the right of eminent domain.

Chicago & E. I. R. Co. v. Loeb, 118 Ill. 208.

In the case of nuisances which are transient rather than permanent in their character, the continuance of the injurious acts is considered a new nuisance, for which a fresh action will lie.

Chicago & E. I. R. Co. v. McAuley, 121 Ill. 164; *Wood*, Limitations, 371.

There is a distinction between damages resulting from authorized structures, and those arising from wrongful acts amounting to negligence.

Ohio & M. R. Co. v. Wachter, 128 Ill. 440; *Chicago, B. & Q. R. Co. v. Schaffer*, 124 Ill. 112.

Where deterioration of the value of land is occasioned by a nuisance created by the construction of a railroad, such a nuisance is a permanent one, so that all damages for past and

NOTE.—Without attempting to review all the numerous cases touching the question of damages for a continuing nuisance many of which are cited by the court in its opinion we refer especially to 18 L. R. A.

Aldworth v. Lynn, 10 L. R. A. 210, 158 Mass. 53, and *Nashville v. Comer*, 7 L. R. A. 465, 88 Tenn. 415, for illustrations of the law on this subject.

future injury to the property may be recovered in one suit, and such recovery will be a bar to all future actions therefor.

Kankakee & S. R. Co. v. Horan, 181 Ill. 301.

The above cases demonstrate that there is no purpose to depart from the well-recognized common-law rules, limiting damages for nuisances of a transient or private character, or those where the future damages can only result from the continued wrongdoing of the defendant to such as arise from acts committed prior to the commencement of the action. No injury can be deemed a permanent one within the rule, but such as results from the existence of a lawful structure, and where the legal right to maintain it in its then condition exists, and where the judgment is to be deemed in effect the conveyance or recognition of such right.

See *Uline v. New York Cent. & H. R. R. Co.* 101 N. Y. 125; *Aldworth v. Lynn*, 10 L. R. A. 210, 153 Mass. 58.

The maintenance of a structure which will continue to cause a wrongful diversion of water upon plaintiff's land, in quantities varying with the seasons, is a continuing nuisance and invasion of the plaintiff's right from day to day, and he may select his own time for bringing his action thereon.

Wells v. New Haven & N. Co. 151 Mass. 46; *Reed v. State*, 108 N. Y. 407; *Silsby Mfg. Co. v. State*, 104 N. Y. 562; *Cooke v. England*, 27 Md. 14, 92 Am. Dec. 680, note; *Barrick v. Schifferdecker*, 128 N. Y. 52; *Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121.

Mr. C. A. Keyes also for appellant.

Messrs. Patton & Hamilton, for appellee:

When property is depreciated in value by a nuisance of a permanent character, or which is treated as permanent by the parties, all damages for the past and future injury of the property may be recovered in one action.

Chicago & E. I. R. Co. v. Loeb, 118 Ill. 208; *Kankakee & S. R. Co. v. Horan*, 181 Ill. 288.

In ascertaining the depreciation in the value of the property, all the facts and circumstances should be considered.

Ottawa Gas Light & C. Co. v. Graham, 28 Ill. 78, 81 Am. Dec. 263; *Illinois Cent. R. Co. v. Grabill*, 50 Ill. 241; *Chicago & E. I. R. Co. v. Loeb*, and *Kankakee & S. R. Co. v. Horan*, *supra*.

When a wrongful act is done which produces an injury, which is not only immediate, but from its very nature is permanent, all damages resulting, both before and after the commencement of the suit, may be estimated and recovered in one action.

Cooper v. Randall, 59 Ill. 817; *Chicago & E. I. R. Co. v. Loeb*, *Kankakee & S. R. Co. v. Horan*, and *Chicago & N. W. R. Co. v. Hoag*, *supra*.

Magruder, J., delivered the opinion of the court:

Proof was introduced of damage done to plaintiff's property after the commencement of the suit by reason of rain storms then occurring. The defendant asked, and the court refused to give, the following instruction: "The court instructs the jury that the suit now being tried was commenced in the month of April, 1890, and that they are not to take into consideration the question as to whether or not

any damage has accrued to plaintiff's property since the commencement of this suit." The question presented is whether plaintiff was entitled to recover only such damages as accrued before and up to the beginning of her suit, leaving subsequent damages to be sued for in subsequent suits, or whether she was entitled to estimate and recover in one action all damages resulting both before and after the commencement of this suit. The rule originally, at common law, was that in personal actions damages could be recovered only up to the time of the commencement of the action. 8 Com. Dig. title, *Damages*, D. The rule subsequently prevailing in such actions is that damages accruing after the commencement of the suit may be recovered, if they are the natural and necessary result of the act complained of, and where they do not themselves constitute a new cause of action. Wood's *Mayne*, *Damages*, § 108; *Birchard v. Booth*, 4 Wis. 67; *Slater v. Rink*, 18 Ill. 527; *Fetter v. Beale*, 1 Salk. 11; *Honell v. Goodrich*, 69 Ill. 556. In actions of trespass to the realty, it is said that damages may be recovered up to the time of the verdict, (Com. Dig. 863, title, *Damages*, D;) and the reason why, in such cases, all the damages may be recovered in a single action, is that the trespass is the cause of action, and the injury resulting is merely the result of damages. 5 Am. & Eng. Encyclop. Law, p. 16, case cited in note 2. But in the case of nuisances or repeated trespasses recovery can ordinarily be had only up to the commencement of the suit, because every continuance or repetition of the nuisance gives rise to a new cause of action, and the plaintiff may bring successive actions as long as the nuisance lasts. *McConnell v. Kibbe*, 29 Ill. 488, and 33 Ill. 175; *Chicago, R. I. & P. E. Co. v. Moffitt*, 75 Ill. 524; *Chicago, B. & Q. E. Co. v. Schaffer*, 124 Ill. 112. The cause of action, in case of an ordinary nuisance, is not so much the act of the defendant as the injurious consequences resulting from his act, and hence the cause of action does not arise until such consequences occur; nor can the damages be estimated beyond the date of bringing the first suit. 5 Am. & Eng. Encyclop. Law, p. 17, and cases in notes. It has been held, however, that where permanent structures are erected, resulting in injury to adjacent realty, all damages may be recovered in a single suit. *Id.* p. 20, and cases in note.

But there is much confusion among the authorities which attempt to distinguish between cases where successive actions lie and those in which only one action may be distinguished. This confusion seems to arise from the different views entertained in regard to the circumstances under which the injury suffered by the plaintiff from the act of the defendant shall be regarded as a permanent injury. "The chief difficulty in this subject concerns acts which result in what effects a permanent change in the plaintiff's land, and is at the same time a nuisance or trespass." Sedgw. *Damages*, 8th ed. § 94. Some cases hold it to be unreasonable to assume that a nuisance or illegal act will continue forever, and therefore refuse to give entire damages as for a permanent injury, but allow such damages for the continuation of the wrong as accrued up

to the date of the bringing of the suit. Other cases take the ground that the entire controversy should be settled in a single suit, and that damages should be allowed for the whole injury, past and prospective, if such injury be proven with reasonable certainty to be permanent in its character. *Id.* § 94. We think, upon the whole, that the more correct view is presented in the former class of cases. 1 *Suth. Damages*, 199-202; 3 *Suth. Damages*, 869-899; 1 *Sedgw. Damages*, 8th ed. §§ 91-94; *Uline v. New York Cent. & H. R. R. Co.* 101 N. Y. 98; *Duryea v. New York*, 26 Hun, 120; *Blunt v. McCormick*, 3 Denio, 288; *Cooke v. England*, 27 Md. 14, 92 Am. Dec. 680, notes; *Reed v. State*, 108 N. Y. 407; *Hargreaves v. Kimberly*, 28 W. Va. 787, 53 Am. Rep. 121; *Ottenot v. New York, L. & W. R. Co.* 119 N. Y. 603; *Cobb v. Smith*, 38 Wis. 21; *Delaware & H. Canal Co. v. Wright*, 21 N. J. L. 489; *Wells v. New Haven & N. Co.* 151 Mass. 46; *Barriek v. Schif-ferdecker*, 123 N. Y. 52; *Sibley Mfg. Co. v. State*, 104 N. Y. 562; *Aldworth v. Lynn*, 153 Mass. 58, 10 L. R. A. 210; *Troy v. Cheshire R. Co.* 28 N. H. 83, 55 Am. Dec. 177; *Cooper v. Randall*, 59 Ill. 817; *Chicago & N. W. R. Co. v. Hoag*, 90 Ill. 389. We do not wish to be understood, however, as holding that the rule laid down in the second class of cases is not applicable under some circumstances, as in the case of permanent injury caused by lawful public structures, properly constructed and permanent in their character. In *Uline v. New York Cent. & H. R. R. Co.*, *supra*, a railroad company raised the grade of the street in front of plaintiff's lots so as to pour the water therefrom down over the sidewalk into the basement of the houses, flooding the same with water, and rendering them damp, unhealthy, etc., and injuring the rental value, etc. In discussing the question of the damages to which the plaintiff was entitled the court says: "The question, however, still remains, what damages? All her damages upon the assumption that the nuisance was to be permanent, or only such damages as she sustained up to the commencement of the action? . . . There has never been in this state before this case the least doubt expressed in any judicial decision . . . that the plaintiff, in such a case, is entitled to recover only up to the commencement of the action. That such is the rule is as well settled here as any rule of law can be by repeated and uniform decisions of all the courts, and it is the prevailing doctrine elsewhere." Then follows an exhaustive review of the authorities, which sustain the conclusion of the court as above announced. In *Duryea v. New York*, *supra*, the action was brought to recover damages occasioned by the wrongful acts of one who had discharged water and sewage upon the land of another, and it was held that no recovery could be had for damages occasioned by the discharge of the water and sewage upon the land after the commencement of the action. In *Blunt v. McCormick*, *supra*, the action was brought by a tenant to recover damages against his landlord because of the latter's erection of a building adjoining the demised premises, which shut out the light from the tenant's windows and doors; and it was held that damages could only be recovered for the time which had elapsed when the suit

was commenced, and not for the whole term. In *Hargreaves v. Kimberly*, *supra*, the action was case to recover damages for causing surface water to flow on plaintiff's lot, and for injury to his trees by the use of coke ovens near said lot, and for injury thereby to his health and comfort; and it was held to be error to permit a witness to answer the following question: "What will be the future damage to the property from the acts of the defendant?" the court saying: "In all those cases where the cause of the injury is in its nature permanent, and a recovery for such injury would confer a license on the defendant to continue the cause, the entire damage may be recovered in a single action, but where the cause of the injury is in the nature of a nuisance, and not permanent in its character, but of such a character that it may be supposed that the defendant would remove it rather than suffer at once the entire damage which it may inflict if permanent, then the entire damage cannot be recovered in a single action; but actions may be maintained from time to time as long as the cause of the injury continues." In *Wells v. New Haven & N. Co.*, *supra*, where a railroad company maintained a culvert under its embankment, which impaired land by discharging water on it, it was held that the case fell within the ordinary rule applicable to continuing nuisances and continuing trespasses. Reference was made to *Uline v. New York Cent. & H. R. R. Co.*, *supra*, and the following language was used by the court: "If the defendant's act was wrongful at the outset, as the jury have found, we see no way in which the continuance of its structure in its wrongful form could become rightful as against the plaintiff, unless by release or grant by prescription or by the payment of damages. If originally wrongful, it has not become rightful merely by being built in an enduring manner." In *Aldworth v. Lynn*, *supra*, where the action was for damages sustained by a landowner through the improper erection and maintenance of a dam and reservoir by the city of Lynn on adjoining land, the Supreme Court of Massachusetts says: "The plaintiff excepted to the ruling that she was entitled to recover damages only to the date of her writ, and contended that the dam and pond were permanent, and that she was entitled to damages for a permanent injury to her property. An erection unlawfully maintained on one's own land, to the detriment of the land of a neighbor, is a continuing nuisance, for the maintenance of which an action may be brought at any time, and damages recovered up to the time of bringing the suit. . . . That it is of a permanent character, or that it has been continued for any length of time less than what is necessary to acquire a prescriptive right, does not make it lawful, nor deprive the adjacent landowner of his right to recover damages. Nor can the adjacent landowner, in such a case, who sues for damage to his property, compel the defendant to pay damages for the future. The defendant may prefer to change his use of his property so far as to make his conduct lawful. In the present case we cannot say that the defendant may not repair or reconstruct its dam and reservoir in such a way as to prevent percolation with

much less expenditure than would be required to pay damages for a permanent injury to the plaintiff's land."

In the case at bar the defendant did not erect the house upon plaintiff's land, but upon its own land. It does not appear that such change might not be made in the roof, or in the manner of discharging the water from the roof, as to avoid the injury complained of. The first count of the declaration, by its express terms, limits the recovery for damages arising from the negligent and improper construction of defendant's building to such injuries as were inflicted "before the commencement of the suit." The second count was framed in such a way as to authorize a recovery of damages for the flow of water upon plaintiff's premises from some other cause than the wrongful construction of the defendant's building; and accordingly plaintiff's evidence tends to show that the eave trough, designed to carry off the water from the roof, was so placed as to fail of the purpose for which it was intended. It cannot be said that the eave trough was a structure of such a permanent character that it might not be changed, nor can it be said that the defendant would not remove the cause of the injury rather than submit to a recovery of entire damages for a permanent injury, or suffer repeated recoveries during the continuance of the injury. The facts in the record tend to show a continuing nuisance, as the same is defined in *Aldworth v. Lynn*, *supra*. There is a legal obligation to remove a nuisance; and "the law will not presume the continuance of the wrong, nor allow a licensee to continue a wrong, or a trespass of title, to result from the recovery of damages for prospective misconduct." 1 *Suth. Damages*, 199, and *notes*. The question now under consideration has been before this court in *Cooper v. Randall*, *supra*. The action was for damages to plaintiff's premises, caused by constructing and operating a flouring mill on a lot near said premises, whereby chaff, dust, dirt, etc., were thrown from the mill into plaintiff's house. It was there held that the trial court committed no error in refusing to permit the plaintiff to prove that the chaff thrown upon his premises by the mill after the suit was commenced had seriously impaired the value of the property, and prevented the renting of the house; and we there said:

"When subsequent damages are produced by subsequent acts, then the damages should be strictly confined to those sustained before suit brought." It is true that the operation of the mill, causing the dust to fly, was the act of the defendant; but it cannot be said that it was not the continuing act of the present appellant to allow the roof or the eave trough to remain in such a condition as to send the water against appellee's house upon the occurrence of a rain storm. Nor is appellant's house or eave trough any more permanent than was the mill in the *Cooper Case*. In *Chicago & N. W. R. Co. v. Hoag*, *supra*, a railroad company had turned its waste water from a tank upon the premises of the plaintiff, where it spread and froze, and a recovery was allowed for damages suffered after the commencement of the suit; but it there appeared that the ice, which caused the damage, was upon plaintiff's premises before the beginning of the suit, and the damage caused resulted from the melting of the ice after the suit was brought. It was there said: "The injury sustained by appellee between the commencement of the suit and the trial was not from any wrongful act done by appellant during that time, but followed from acts done before the suit was commenced." Here, the water, which caused the injury, was not upon plaintiff's premises, either in a congealed or liquid state, before the beginning of the suit, but flowed thereon as the result of rain storms which occurred after the suit was commenced. We think the correct rule upon this subject is stated as follows: "If a private structure or other work on land is the cause of a nuisance or other tort to the plaintiff, the law cannot regard it as permanent, no matter with what intention it was built; and damages can therefore be recovered only to the date of the action." 1 *Sedgw. Damages*, 8th ed. § 98. It follows from the foregoing observations that it was error to allow the plaintiff to introduce proof of damage to her property caused by rain storms occurring after the commencement of her suit, and that the instruction asked by the defendant upon that subject, as the same is above set forth, should have been given.

The judgments of the Appellate and Circuit Courts are reversed, and the cause is remanded to the Circuit Court.

NORTH CAROLINA SUPREME COURT.

ATLANTIC EXPRESS CO., *Appt.*,
v.
WILMINGTON & WELDON R. CO.
et al.

(.....N. C.)

1. Investing a railroad commission with authority to make just and rea-

sonable rules and regulations to prevent excessive charges and unjust discriminations and preferences by carriers, the reasonableness and legality of which is reviewable by the courts, is not unconstitutional as a delegation of legislative power.

2. Authority is given to the railroad commission to hear and determine complaints of unjust discriminations and pref-

NOTE.—The conflict of decisions on the question of a railroad company's obligation to give equal facilities for transportation to express companies makes any new decision on that question important. The North Carolina court adopts the decision 18 L. R. A.

ion of the Supreme Court of the United States in *Memphis & L. R. Co. v. Southern Exp. Co.* 117 U. S. 1, 29 L. ed. 791.

But the great weight of that decision is lessened by the fact that it was made against the dissent of

erences under the North Carolina Railroad Commission Act which expressly provides that if a railroad company is guilty of a violation of the rules of the commission and after due notice of such violation does not make full recompense for the wrong or injury done, it shall incur a penalty, and also constitutes such commission a court of record.

3. The details of practice and pleading may be supplied by a railroad commission which is constituted a court of record under the inherent power of every court of record to make such rules not inconsistent with the law as are necessary to the exercise of the powers conferred upon it.
4. A statute making it unlawful for any common carrier to give undue or unreasonable preference to any person, company, firm, corporation or locality does not require equal facilities to be given to express companies for carrying on business over a railroad unless it holds itself out as a common carrier of such companies.
5. A railroad company is not under obligation to furnish an express company with facilities for doing an express business upon its road such as it provides for itself or some other express company, unless it holds itself out as a common carrier of express companies.

(December 13, 1892.)

APPEAL by complainant from a judgment of the Superior Court for Wake County dismissing the complaint in an action brought to compel defendants to afford plaintiff proper facilities for carrying on its business. *Affirmed*.

The facts are stated in the opinion.

Messrs. W. W. Clark and O. H. Guion for appellant.

Messrs. Haywood & Haywood, for appellees:

The law applies to the persons—the public—for whom transportation services are rendered, and not to the instruments, be they persons or corporations, through or by which the services are performed.

Memphis & L. R. Co. v. Southern Exp. Co. 117 U. S. 1, 29 L. ed. 791.

Railroad companies are not required to furnish express facilities to all alike who demand them.

Pfister v. Central Pac. R. Co. 70 Cal. 169, 27 Am. & Eng. R. R. Cas. 346. See also *Sargent v. Boston & L. R. Co.* 115 Mass. 416; *Camblos*

v. Philadelphia & R. R. Co. 4 Brewst. 563; *Jencks v. Coleman*, 2 Sumn. 224; *New Jersey Steam Nav. Co. v. Merchants Bank*, 47 U. S. 6 How. 844, 12 L. ed. 465; *Barney v. Oyster Bay Co.* 67 N. Y. 301; *The D. R. Martin*, 11 Blatchf. 238.

Express companies are not subject to provisions of the Interstate Commerce Act.

United States v. Moreman, 42 Fed. Rep. 448; *Re Express Companies*, 1 Intera. Com. Rep. 677, 82 Am. & Eng. R. R. Cas. 567.

The cases relied upon to establish that the defendants can be compelled to extend equal facilities to all express companies applying for the same, viz.: *New England Exp. Co. v. Maine Cent. R. Co.* 87 Me. 188, 2 Am. Rep. 81; *Buffalo East Side R. Co. v. Buffalo Street R. Co.* 2 L. R. A. 384, 111 N. Y. 182; *People v. Hawley*, 8 Mich. 380; *Chicago, B. & Q. R. Co. v. Cutts*, 94 U. S. 155, 24 L. ed. 94,—are not applicable to this case.

The “*Granger Cases*,” have been materially modified by subsequent decisions of the United States Supreme Court.

See *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244; *Chicago, M. & St. P. R. Co. v. Minnesota*, 184 U. S. 418, 33 L. ed. 971; *Robbins v. Shelby County Tax. Dist.* 120 U. S. 489, 30 L. ed. 694; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 868; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 701; *Fargo v. Stevens*, 121 U. S. 230, 30 L. ed. 898; *Lecloup v. Mobile*, 127 U. S. 640, 32 L. ed. 811; *McDuffee v. Portland & R. R. Co.* 52 N. H. 480, 18 Am. Rep. 72; *Sandford v. Catawissa, W. & E. R. Co.* 24 Pa. 378, 64 Am. Dec. 667.

The Legislature has no power to pass a law impairing the obligation of a contract made between the defendants and the Southern Express Company before the passage of the Railroad Commission Act.

Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; *Tomlinson v. Jessup*, 83 U. S. 15 Wall. 454, 21 L. ed. 204; *Spring Valley Water-Works v. Schottler*, 110 U. S. 847, 28 L. ed. 178; *New Jersey v. Yard*, 95 U. S. 104, 24 L. ed. 352; *Holyoke Water Power Co. v. Lyman*, 82 U. S. 15 Wall. 500, 21 L. ed. 138; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Chicago, B. & Q. R. Co. v. Cutts*, 94 U. S. 155-161, 24 L. ed. 94, 95; *Dartmouth College Trustees v. Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed. 629; 1 Morawetz, Priv. Corp. §§ 1-8; *Siebert v. United States*, 122 U. S. 284, 30 L. ed. 1161;

two justices, and was contrary not only to the decisions of lower Federal courts in *Wells, Fargo & Co. v. Oregon R. & Nav. Co.* (Or.) 16 Am. & Eng. R. R. Cas. 87, 8 Sawy. 600; *Dinsmore v. Louisville, C. & L. R. Co.* (Ky.) 2 Fed. Rep. 465; *Southern Exp. Co. v. Louisville & N. R. Co.* (Tenn.) 4 Fed. Rep. 481; *Southern Exp. Co. v. Memphis & L. R. Co.* (Ark.) 8 Fed. Rep. 799, which it reversed or overruled, but also to several carefully considered decisions of eminent state courts in *McDuffee v. Portland & R. R. Co.* 62 N. H. 480, 18 Am. Rep. 72; *Sandford v. Catawissa, W. & E. R. Co.* 24 Pa. 378, 64 Am. Dec. 667; *New England Exp. Co. v. Maine Cent. R. Co.* 87 Me. 188, 2 Am. Rep. 81.

Since the question is not one on which the decision of the Supreme Court of the United States is binding on state courts, the question must be regarded as unsettled except in those few jurisdictions in which it has already been decided.

garded as unsettled except in those few jurisdictions in which it has already been decided.

In respect to the necessity of a railroad company's holding itself out as a common carrier of expressmen in order to make it liable for discrimination between them, it is expressly held in *McDuffee v. Portland & R. R. Co.*, *supra*, that it does so hold itself out when it accepts the business of one express company.

For note on the general subject of compulsory service by party whose business it is to serve the public, see further, *Rushville v. Rushville Nat. Gas Co.* (Ind.) 15 L. R. A. 321.

For note on the right of a carrier at common law to discriminate between its patrons generally, see *Louisville, R. & St. L. Consol. R. Co. v. Wilson* (Ind.) 18 L. R. A. 105.

R. A. R.

U. S. Const. art. 1, sec. 10; Ang. & A. Priv. Corp. § 767; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793.

To destroy the ability of a party to perform his contract, is to impair its obligation within the meaning of the Constitution.

Pumpelly v. Green Bay & M. Canal Co. 80 U. S. 13 Wall. 166, 20 L. ed. 557; *St. Tammany W. W. Co. v. New Orleans W. W. Co.* 130 U. S. 64, 30 L. ed. 563; *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357; *Sinking Fund Cases*, 99 U. S. 700, 731, 740, 743, 748, 749, 757, 758, 25 L. ed. 496, 503, 509, 510, 512, 515; *New Orleans Gas Light Co. v. Louisiana L. & H. P. & Mfg. Co.* 115 U. S. 650, 660, 672, 674, 29 L. ed. 516, 520, 524, 525; *Louisville Gas Co. v. Citizens Gas Light Co.* 115 U. S. 688, 29 L. ed. 510; *Morawetz, Priv. Corp.* §§ 473, 474, 478.

The reservation of legislative control over the corporate power of the defendant acts only upon the relations between the state and corporation, and not upon what is done between the corporation and those with whom it deals.

New Orleans Gas Light Co. v. Louisiana L. & H. P. & Mfg. Co. supra; *Railroad Commission Cases*, 116 U. S. 307-329, 29 L. ed. 636-648; *Tomlinson v. Jessup*, 82 U. S. 15 Wall. 459, 21 L. ed. 204; *Sinking Fund Cases*, 99 U. S. 721, 759, 25 L. ed. 501, 515; *Miller v. State*, 83 U. S. 15 Wall. 499, 21 L. ed. 104; *Chicago v. Sheldon*, 76 U. S. 9 Wall. 50-55, 19 L. ed. 594, 597.

Mr. F. H. Busbee also for appellees.

Shepherd, Ch. J., delivered the opinion of the court:

Although we are of the opinion, for the reasons hereinafter stated, that the particular relief asked for in this proceeding is not authorized by the provisions of what is known as the "Railroad Commission Act," still we do not feel at liberty to ignore the important question of jurisdiction suggested in the answers of the defendants and the arguments of counsel. The question is a serious one, and involves in a great measure the efficiency of the legislation designed for the "supervision" of railroad companies and other common carriers in respect to the fixing of reasonable freight and passenger tariffs, the prevention of unjust discriminations and preferences, and the regulation of other matters pertaining to transportation within the state, in which the public is deeply interested. That the Legislature has the authority to provide reasonable rules and regulations for the effectuating of such purposes is too well settled to admit of discussion (*Durham & N. R. Co. v. Richmond & D. R. Co.* 104 N. C. 678; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Dubuque & R. C. R. Co. v. Richmond*, 86 U. S. 19 Wall. 584, 23 L. ed. 178;) and it is equally well settled that, in delegating such authority to a commission, it does not transcend its constitutional powers. *Stone v. Farmers Loan & Trust Co.* 116 U. S. 307, 29 L. ed. 636; 19 Am. & Eng. Encyclop. Law, 686, and the numerous authorities cited in the notes.

"The difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already 18 L. R. A.

passed is apparent and great; and this we understand to be the distinction recognized strikingly by all the courts as the true rule in determining whether or not, in such cases, a legislative power is granted. The former would be unconstitutional, whilst the latter would not." *Georgia R. & Bkg. Co. v. Smith*, 70 Ga. 694, 9 Am. & Eng. R. R. Cas. 385. A careful scrutiny of the Act of Assembly constituting a "railroad commission" (Acts 1891, chap. 320) fails to disclose a purpose to confer upon that body anything in the nature of legislative power. The Act, among other things, denounces excessive charges, unjust discriminations and preferences, as unlawful, and invests the commission with authority to "make such just and reasonable rules and regulations as may be necessary for preventing" the same; the reasonableness and legality of such rules and regulations being reviewable by the courts. This power, as we have just seen, may be delegated to a commission, and any objection on that ground is therefore untenable.

It is insisted, however, that the commission has no jurisdiction to entertain and pass upon complaints made in respect to the violation of the provisions of section 4, and perhaps other sections, of the said Act. That section declares that all unjust discriminations and preferences shall be unlawful, and it is urged that the only remedy provided against its infraction is by indictment, to be prosecuted in a court of competent jurisdiction. It is very plain to us that the contention is without foundation, as in section 5 the authority of the commission to make rules and regulations for the prevention of these very acts is expressly conferred. The subjects embraced in section 4 are perhaps the most important that are confided to the regulation of the commission; and, without reference to the plain language of the Act, it is hardly to be supposed that the Legislature intended to insert therein a merely penal provision, entirely independent of and unconnected with the duties imposed upon that body. Neither is there any force in the argument that the Legislature cannot confer judicial powers upon the commission, as the Constitution (art. 4, § 2) expressly authorizes the establishment of such courts inferior to the supreme court as the Legislature may deem proper; and it is to be observed that the commission has been "created and constituted a court of record," with all the "powers and jurisdiction of a court of general jurisdiction as to all subjects embraced in the Act creating" the same. Acts 1891, chap. 498. Whether a court having no power to enforce its judgments fulfills the definition of a court of record and of general jurisdiction is unnecessary to be considered. It is sufficient to say that the Legislature has the authority to establish courts inferior to the supreme court, and to "allot and distribute" its jurisdiction "as it may deem proper." Const. art. 4, § 12. The question, then, is simply whether the power to hear and determine complaints of this character has been conferred, and this is easily solved by a perusal of section 10 of the said Act, which is as follows: "That if any railroad company

doing business in this state, by its agent or employes, shall be guilty of a violation of the rules and regulations provided and prescribed by said commissioners, and if, after due notice of such violation, given to the principal officer thereof, . . . ample and full recompense for the wrong or injury done thereby to any person or corporation, as may be directed by said commissioners, shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of not less than fifty dollars nor more than five thousand dollars, to be fixed by the judge of the court in which such action shall be tried. An action for the recovery of such penalties shall lie in any county of the state where such violation has occurred or wrong has been perpetrated, and shall be in the name of the state of North Carolina. The commissioners shall institute such action through the attorney-general or solicitor of the judicial district in which the violation has occurred," etc.

It must be noted that the present proceeding is not an action instituted by the commissioners for the enforcement of penalties; nor is it, as suggested, an ordinary civil action for the recovery of damages, as is provided in section 11 of the Act. It is brought for the purpose of seeking "ample and full recompense" for the alleged "wrong and injury" done the complainant. The Act looks beyond the mere infliction of a penalty for the violation of a rule or regulation, and evidently provides for specific redress in the premises. This redress is to be "directed by said commissioners" upon due notice to the party complained of; and it is difficult to understand how the proper measure of relief can be ascertained except by the examination of testimony. The necessary conclusion, therefore, must be that the commission has the authority to hear and determine all matters that are embraced within that part of the said section to which we have referred.

No summons was issued in the present proceeding, as in civil actions, but, upon a complaint being filed, the defendants were notified to "satisfy the complaint or answer the same" within thirty days. After hearing the testimony, the commission declared, in effect, that the rule and regulation made pursuant to the law had been violated, and that "ample and full recompense" should be made by providing the complainant with the facilities mentioned in the order. It is insisted that, as no procedure is provided, the commission has no authority to make an order of this character. It is true that no particular rules of practice are prescribed; but the power to hear and determine, upon notice, is, as we have seen, expressly given, and all necessary means are provided for the conducting of any inquiry which it is the duty of the commission to make. Provision is made for the service of notices the attendance of witnesses, and the punishment of contempts; and the rules of evidence are declared to be the same as in civil actions. It is also provided that there may be an appeal, "as in other cases of appeal," from "all decisions or determinations arising under the operation or enforcement" of the

Act. We cannot hold that, with all of these facilities provided by law, a power expressly granted to hear and determine is to be denied because the particular form of the complaint, or the manner in which the proceeding is to be entitled, or some other immaterial matter of detail, is not particularly prescribed. Besides, such details may well be supplied by the commission under the inherent power of every court of record to make such rules, not inconsistent with the law, as are necessary to the exercise of the powers conferred upon them. 4 Am. & Eng. Encyclop. Law, 450, and the cases cited. It must be admitted, however, that in many respects the act is singularly obscure and confused. It bears the impress of hasty legislation, and seems to be composed of parts of other Acts of a similar character, united with but little regard to order or perspicuity. Its amendment, in many particulars, may well be considered by the lawmakers. Among its defects we find the strange omission of any provision in section 10 as to the effect to be given to the determination of the commissioners in an action brought in the superior court for the enforcement of the penalties prescribed. Whether, in the absence of an appeal, such a determination is conclusive, or whether it simply amounts to a *prima facie* case, are questions left in very great doubt. This, however, cannot affect the right to hear and determine what recompense shall be made to an injured party. The power is expressly conferred, and it is the duty of the commission, in all proper cases, to exercise it. The effect of such a determination, when brought before the courts, is quite another thing. We are therefore of the opinion that the commission has ample authority to entertain and pass upon complaints for a violation of any rule or regulation respecting the matters embraced within section 4 of the said Act.

Having disposed of the question of jurisdiction, we will now inquire whether the present complainant is entitled to the particular relief which it seeks in this proceeding. It must be borne in mind, in considering this case, that there is no complaint that the demands of the public—that is, the demands of persons who desire to ship express freight—are not fully met and supplied. The controversy is solely between the respective corporations, and the real question is not whether the defendant railroad companies are authorized to do an express business for themselves, nor whether they must carry express matter for the public on their passenger trains, in the immediate charge of some person specially appointed for that purpose, nor whether they shall carry express freight for the complainant company as they carry like freight for the general public, but whether it is their duty to furnish the complainant with facilities for doing an express business upon their roads, the same in all respects as those they provide for themselves or afford to any other express company. That this is a proper statement of the question is apparent from the application of the complainant and the findings of the commission. It distinctly

appears that the complainant made no actual tender of any article of freight to be transported by the defendants, but that it demanded "rates and facilities for conducting an express business over their roads in this state," and that each of the defendants "should furnish it with a car or carriage over its respective lines, and rates of transportation, as well within as without the limits of the state, for shipment of goods within the scope of its organization." It is not insisted that the defendants have ever held themselves out as common carriers of express companies, "that is to say, as common carriers of common carriers" (*Express Cases*, 117 U. S. 1, 29 L. ed. 791); and the chief point to be determined is whether, in the absence of such a usage, the law imposes a duty of that character upon them. It is contended that such a duty is imposed by the following provision of section 4 of the Act constituting the commission: "That it shall be lawful for any common carrier, subject to the provisions of this Act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage, in any respect whatsoever." We are of the opinion that the foregoing provision does not change or enlarge the common-law duty which the defendants owe the complainant. That constitutional provisions in almost the same language have been construed as but declaratory of the common law is shown by various authorities. The Constitution of Colorado declares "that all individuals, associations, etc., shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the state." The Constitution of Kansas provides "that no discrimination in charges or facilities in transportation shall be made between transportation companies and individuals, and no railroad company shall make any discrimination or preference in furnishing cars or motive power." The Constitution of Arkansas provides "that all individuals and corporations shall have equal rights to have persons and property transported over railroads, . . . and no undue or unreasonable discrimination shall be made in charges or facilities in transportation." The Constitution of Missouri provides "that no discrimination in charges or facilities in transportation shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback, or otherwise, and no railroad company . . . shall make any preference in furnishing cars or motive power." In speaking of these constitutional provisions, Waite, *Ch. J.*, says: "These provisions impose no greater obligations than the common law would have imposed without them." *Atchison, T.*

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& S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 687, 28 L. ed. 291. This high authority settles the question that our Railroad Commission Act does not extend the common-law duty; and it therefore becomes material to inquire whether, at common law, the defendants owed the complainant the duty sought to be imposed in this proceeding. The Supreme Court of the United States, in the *Express Cases*, *supra*, has answered the question. It declares that "in the absence of some special statute, there is no law which requires railroads to furnish express facilities to all express companies which may demand them." It must be noted that these cases came from the states of Colorado, Kansas, Arkansas, and Missouri; and it is in the light of the constitutional provisions above quoted that this and the following language of the chief justice is used: "The railroad company performs its whole duty to the public at large, and to each individual, when it affords the public all reasonable express accommodations. If this is done, the railroad company owes no duty to the public, as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security. . . . The constitutions and the laws of the states in which the roads are situated place the companies that own and operate them on the footing of common carriers, but there is nothing which, in positive terms, requires a railroad company to carry all the express companies in the way that, under some circumstances, they may be able, without inconvenience, to carry one company. . . . In some of the states, statutes have been passed which, either in express terms or by judicial interpretation, require railroad companies to furnish equal facilities to all express companies, (as in Maine and New Hampshire,) . . . but these are of comparative recent origin, and thus far seem not to have been generally adopted."

In view of the foregoing authorities, we are of the opinion that so much of the order of the commission as determines that "the refusal of the defendants to grant to the plaintiff facilities for conducting an express business was a violation of the terms of said Act" is not warranted by the statute under consideration.

The judgment of the commission, however, also declares that the defendants have violated rule 8 of the "Regulations Concerning Freight Rates." The rule is as follows: "No railroad company shall, by reason of any contract with any express or other company, decline or refuse to act as a common carrier to transport any articles proper for transportation by the train for which it is offered." We are unable to see that, in view of the facts found, there has been any violation of this rule. No duty is imposed by the rule upon any railroad company, but it merely prohibits the refusal to perform a duty by reason of any contract with an express or other company. We have seen that the defendants did not owe any duty to act as a "common carrier

of express companies." Had they owed such a duty, we are very sure that they could not have avoided its performance because of their having made an exclusive contract with the Southern Express Company. We do not think, however, that the rule applies to this case. The defendants have not refused to act as a common carrier, or to transport any article tendered by the complainant. They have refused to afford it facilities for carrying on an express business upon their roads, and this we have seen they had a right to do. In this refusal, they were not guilty of making any discrimination or preference, within the Act of the Legislature. As we have seen, the Supreme Court of the United States has said that they are under no obligation to carry another company; and the mere fact that they are carrying another company does not amount to an unjust or unreasonable preference. It is the duty of the defendants to carry express matter, but they may carry it themselves, or employ competent agencies for that purpose. *Express Cases*, 117 U. S. 8, 29 L. ed. 791, 28 Am. & Eng. R. R. Cas. 545, and the authorities cited in the notes. The Supreme Court of the United States, in deciding the cases just referred to, stated that "railroad companies are by law carriers of both persons and property. Passenger trains have from the beginning been provided for the transportation primarily of passengers and their baggage. This must be done with reasonable promptness, dispatch, and comfort to the passengers. The express business on passenger trains is in a degree subordinate to the passenger business; and it is consequently the duty of a railroad company, in arranging for the express, to see that there is as little interference as possible with the wants of the passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the condition on which it will be occupied. The

space that can be given to the express business on a passenger train is to a certain extent limited. . . . If the general public were complaining that the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented." The same remark is applicable if the agencies adopted by the railroads (in this case the Southern Express Company) are not affording the public sufficient facilities. It is further to be observed that the power to fix rates and tariffs for such agencies is conferred upon the commission by section 13 of the Act. We will also observe that, if the defendants had held themselves out as common carriers of express companies, they would have been guilty in this case of discrimination or the giving of a preference, and therefore subject to the regulation of the commission, had that body declared such discrimination or preference, under the circumstances, to have been "unjust" or "unreasonable."

In view of the facts found by the commission, and of the high authority we have cited, we are of the opinion that the defendants have violated no duty imposed by the law. If other duties are to be imposed, it must be by further legislation, and not by the courts. "To what extent it must come, if it comes at all from Congress, and to what extent it may come from the states, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt. The Legislature may impose a duty, and, when imposed, it will, if necessary, be enforced by the courts; but unless a duty has been created, either by usage or by contract or by statute, the court cannot be called upon to give it effect." *Waite, Ch. J., Express Cases, supra.*

The judgment below is affirmed.

COLORADO SUPREME COURT.

INSTITUTION FOR EDUCATION OF THE MUTE AND BLIND, *Plff. in Err.*,

John M. HENDERSON, State Auditor.

(.....Col6.....)

A statute providing for the payment of bounties by a county treasurer for the destruction of certain wild animals or poisonous weeds, and for planting trees, the amount to be credited in his settlement with the state treasurer, violates a constitutional provision that "no money shall be paid out of the treasury except upon appropriations made by law and on warrant drawn by the proper officer." The fact that the money has not actually reached the treasury does not prevent the application of this provision to money belonging to the state.

(November 21, 1902.)

ERROR to the District Court for Arapahoe County to review a judgment in favor of defendant in a proceeding to compel defendant to draw a warrant upon the state treasurer for the amount of the appropriation in favor of the plaintiff institution. *Reversed.*

Statement by *Hart, Ch. J.*:

Plaintiff in error, the Institute for the Education of the Mute and Blind, as plaintiff below, brought this action for the purpose of compelling the auditor of state to draw his warrant for the amount of an appropriation made by the last General Assembly for the maintenance of the plaintiff institution. The auditor, as a defense to the action, claims that there were no funds in the state treasury where-

NOTE.—As to purposes for which public money may be appropriated, see *Daggett v. Colgan*, 14 L. R. A. 474, and note, 92 Cal. 53; *Waterloo Woolen Mfg. Co. v. Shanahan*, 14 L. R. A. 481, 128 N. Y. 345; 18 L. R. A.

Synod of Dakota v. State (S. Dak.) 14 L. R. A. 416; *Bourn v. Hart*, 15 L. R. A. 431, 93 Cal. 321; *Cutting v. Taylor* (S. Dak.) 15 L. R. A. 601; *Wason v. Wayne County Comrs.* (Ohio) 17 L. R. A. 796.

with to pay the appropriation. Upon final hearing in the court below this defense was established to the satisfaction of the court and the writ of mandamus denied. The case comes here by writ of error. The following stipulation of counsel may fairly be said to embody the material facts established by the evidence introduced upon the trial: "It is hereby stipulated by and between the above-named parties, by their respective counsel, that the record and bill of exceptions in the above-entitled case disclose that if a certain Act of the Legislature entitled 'Bounties,' approved April 18, 1889, commonly known as the 'Bounty Law,' a certain other Act, entitled 'Trees,' approved February 12, 1881, and a certain other Act, entitled 'Loco or Poison Weed,' approved March 14, 1881, are unconstitutional, that the funds remaining in the hands of the treasurer will be sufficient to pay the appropriation of plaintiff in error mentioned in the petition; but if said laws be constitutional, and the funds of the state shall be diverted for the payment of bounties under said law, then there will be no funds out of which to pay said appropriation."

Messrs. Butler & McKinley and **H. Riddell** for plaintiff in error.

Messrs. J. H. Maupin, Atty-Gen., and **H. B. Babb** for defendant in error.

Hayt, Ch. J., delivered the opinion of the court:

In this proceeding the constitutionality of the Bounty Law of 1889, the Loco Weed Law of 1881, and the Act in Relation to Forest Trees of 1881, is contested. The first of these Acts, in the order in which they occur in the stipulation of counsel, is entitled "An Act to Provide for the Destruction of Wolves, Coyotes, Bears and Mountain Lions, and Providing for a Premium therefor." By this Act it is provided that any person who shall kill any of the animals mentioned shall be entitled to a certain fixed premium therefor. This premium varies in amount for the different animals named. Sess. Laws 1889, p. 85. The second Act covered by the stipulation is entitled "An Act to Encourage the Planting of Trees upon the Roadsides and along the Line of Irrigating Canals, and upon Lands under Irrigation." This Act provides that the planting of trees as specified therein shall not increase the value of the lands for the purpose of assessment and taxation. Furthermore, a premium of \$2 for every 100 trees so planted and growing after three years shall be paid each year for seven years after the first three years have elapsed. Sess. Laws 1881, p. 250. The third Act provides that any person who shall dig up any loco or poison weed in accordance with the provisions of the Act "shall receive a premium of 1½ cents per pound for each pound of such weed dug up." Sess. Laws 1881, p. 177. The premiums provided by each of these several Acts are to be paid in the first instance by the county treasurer of the proper county, the amount to be credited to such officer in his settlement for state taxes with the state treasurer.

It must be admitted that the state funds, and not the funds of the county, are drawn upon 18 L. R. A.

for the payment of the bounties provided for by these several Acts. That the Legislature has the power to provide for the payment of bounties is not contested. It is contended, however, that these Acts are in conflict with article 5, § 33, of the state Constitution, which says: "No money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof." Under this provision, when money has been actually paid into the state treasury, a statute providing for its payment other than by appropriation and warrant is void. No argument is needed to demonstrate this. The language employed admits of no other construction. The question presented is therefore narrowed to this: Does this constitutional inhibition apply merely to such money as actually reaches the treasury, or does it apply to funds belonging to the state which have not yet reached the hands of the treasurer?

Counsel, in argument, inveigh against the policy of this legislation. However strongly the practice of paying out money in the manner authorized in these Acts is to be condemned as dangerous and improvident, this is an argument properly addressed to the legislative branch of the government, and not to the courts. The argument here can only be given weight in proportion as it affects the power of the Legislature in the premises.

The provision of the Constitution relied upon to overthrow these Acts varies from that of most of the other states, in that it requires, not only an appropriation, but also a warrant to be drawn, before money can be lawfully paid. Provisions upon the subject are, however, to be found in the national Constitution, and in nearly all of the state Constitutions, which show that the framers of such instruments have with great unanimity considered that a danger existed which should be guarded against. The provision in the national Constitution is as follows: "No money shall be drawn from the treasury but in consequence of appropriations made by law, and a regular statement and account of the receipts and expenditures of all public moneys shall be published from time to time." Art. 1, § 9, par. 6. In speaking of the purposes of this section of the Constitution, a learned commentator says: "The object is apparent upon the slightest examination. It is to secure regularity, punctuality, and fidelity in the disbursements of the public money. As all the taxes raised from the people, as well as the revenues arising from other sources, are to be applied to the discharge of the expenses and debts and other engagements of the government, it is highly proper that Congress should possess the power to decide how and when any money should be applied for these purposes. If it were otherwise, the executive would possess an unbounded power over the public purse of the nation, and might apply all its moneyed resources at his pleasure. The power to control and direct the appropriations constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public peculation. In arbitrary governments the prince levies what money he pleases from his subjects, disposes of it as he thinks proper, and is beyond

responsibility or reproach. It is wise to interpose, in a republic, every restraint by which the public treasures, the common fund of all, should be applied with unshrinking honesty to such objects as legitimately belong to the common defense and the general welfare. Congress is made the guardian of this treasure; and, to make their responsibility complete and perfect, a regular account of the receipts and expenditures is required to be published, that the people may know what money is expended, for what purposes, and by what authority." 2 Story, Const. 5th ed. § 1848. The case of *Ristine v. State*, reported in 20 Ind. 387, will be found an exhaustive and a valuable review of this provision. In the course of the opinion, the court says: "A promise by the government to pay money is not an appropriation. A duty on the part of the Legislature to make an appropriation is not such. A promise to make an appropriation is not an appropriation. The pledge of the faith of the state is not an appropriation of money with which to redeem the pledge. Usage of paying money, in the absence of an appropriation, cannot make an appropriation for future payment. The question is to be settled upon the meaning of the Constitution. Usage may be evidence of the meaning the administrative officers have put upon that instrument, and, as such, entitled to respectful consideration, but it is no binding interpretation; and the late usage was, in fact, probably commenced without much consideration." See also *People v. Spruance*, 8 Colo. 520. The necessity for an appropriation in each instance is dwelt upon in the opinion, and it is shown that an appropriation is not to be inferred from doubtful or ambiguous language. Notwithstanding the previous strict construction given by the courts to the provision with reference to appropriations, with which construction the framers of our Constitution must be presumed to have been familiar, they were not content with the usual provision upon the subject, and consequently inserted an additional clause, not generally found elsewhere. Under it no money can be paid out unless upon a warrant drawn by the proper officer. It is doubtful if these bounty statutes should be held to comply with the clause requiring an appropriation; but it is not necessary for us to determine this question, in view of the provision for payment without a warrant to be found in each of these acts. *People v. Spruance*, *supra*. From the authorities cited, and numerous others which might be added, it is clear that the object of these provisions of the Constitution is to prevent the extravagant and improvident payment of the moneys belonging to the state, and also to furnish a ready check upon the state treasurer. Under it the sanction of two officers must be had before money can be lawfully disbursed.

The attorney-general contends for a construction whereby the provision shall be held to apply only to moneys after the same shall have reached the hands of the state treasurer. This construction is too narrow, and, if adopted, the provision would be unavailing to effectuate the object intended. A cogent element in the construction of the general terms of a Constitution is the consideration of the object to be accomplished and the mischiefs to be

avoided, and, like a statute, the instrument is to receive such a construction as will prevent an evasion of its legitimate operation. Endlich, *Interpretation of Statutes*, §§ 518, 521.

As illustrative of the decisions of the courts in cases where the intent has been allowed to control the general language of statutory and constitutional provisions, we cite *Wheeler v. McCormick*, 8 Blatchf. 267, where a statute was under consideration containing the following: "The original jurisdiction of the circuit court of the southern district of New York shall be confined to causes arising within said district, and shall not be construed to extend to causes arising within the northern district,"—and it was held not to exclude the jurisdiction of the circuit court for the southern district of New York of causes of action arising out of the state. In *State v. King*, 44 Mo. 283, under an Act requiring insurance companies, before commencing business, to have a certain amount secured by mortgage "on unincumbered real estate," it was held that such real estate must be within the state. In *Wayne County v. Detroit*, 17 Mich. 390, under a constitutional provision requiring that the "Legislature shall provide for the establishment of a library in each township, and all the fines collected in the several counties and townships for any breach of the penal laws shall be exclusively applied to the support of such libraries," it was held (*Judge Cooley* delivering the opinion of the court) that the term "counties and townships," as therein used, was meant to include all the municipal subdivisions of the state. In the case of *People v. Ray*, 8 Lans. 398, it was held that the following constitutional provision: "All contracts for work or materials on any canal shall be made with the person who shall offer to do or provide the same at the lowest price, with adequate security for their performance,"—reposed in certain officers a discretion to determine who is the lowest bidder and what is adequate security, and that the constitutional provision must be applied in its spirit, and not according to the letter of the instrument. In *Murray v. Baker*, 16 U. S. 8 Wheat. 541, 4 L. ed. 454, the Supreme Court of the United States decided that the term "beyond seas," in the Statute of Limitations of the state of Georgia, meant without the limits of the state where the statute was enacted. In *Henry v. Tilson*, 17 Vt. 479, in one section the Act under consideration by the court provided a penalty in case any attorney should knowingly receive as fees a greater sum than that allowed by law, and in the following section it was declared that, if any officer or other person should receive any greater fees than provided by law, such person should pay a penalty, etc., and it was held that the latter section should be construed as though the word "knowingly" was also incorporated therein.

Under the construction contended for by the attorney-general, the Legislature may in all cases provide for the disbursement of public moneys before such moneys actually reach the hands of the state treasurer, and thereby entirely defeat the operation of the clause under consideration. This cannot be permitted. The conclusion that payment is only to be made upon a warrant regularly drawn is the only one suggested under which the intent can be

effectuated, and, as it is in harmony with the general spirit of the provision, we feel constrained to adopt it. An additional argument in support of the conclusion reached may be drawn from other sections of the Constitution, as heretofore construed by this court. For instance, in fixing the total amount of appropriations for any fiscal year, the Legislature, except in certain specified instances, is limited to the revenue that may properly be applied in the payment of the same. The amount of such revenue is almost entirely a matter of calculation. *Re Appropriations*, 13 Colo. 816.

To permit the disbursement of an indefinite amount of money, as these bounty Acts contemplate, is to introduce an element of uncertainty into these calculations that will seriously embarrass both the Legislature and the departments in giving effect to section 16, art. 10, of our state Constitution, with relation to the levying of taxes to meet appropriations. In our opinion the several Acts under consideration are plainly in violation of the constitutional pro-

vision invoked. If the Legislature desires to pay bounties, it may do so, for all proper purposes, by making the necessary appropriations therefor, to be paid out upon warrant drawn by the auditor upon the state treasurer. Thus the public funds of the state will be protected, and the safeguards provided by the vigilance of the framers of our fundamental law will be given a construction best calculated to prevent the evil aimed at. If warrants have been issued under statutes otherwise free from constitutional objection, and such warrants have not yet been paid, the Legislature still has it within its power to make the necessary appropriation for the payment of the same. In conclusion we call attention to the fact that in the state of Missouri a statute similar to our Act providing for the payment of bounties for the growing of trees has been declared obnoxious to two other constitutional inhibitions. *Deal v. Mississippi County*, 107 Mo. 464.

The judgment of the District Court is reversed.

FLORIDA SUPREME COURT.

STATE of Florida, *ex rel.* George P. FOWLER,

v.

Jesse J. FINLEY.

(.....Fla.....)

*1. Charges preferred against an attorney for the purpose of disbarring him should be clear, specific, and circumstan-

* Headnotes by TAYLOR, J.

tial, and should be stated with great particularity, that the attorney may know how to defend.

2. In the trial of a proceeding for disbarment of an attorney, the judge, being the arbiter of both the law and the facts, should not delegate the taking of evidence therein to a master, commissioner, or any one else, but should personally hear the evidence of the witnesses for and against the accused, so that in lending or withholding credence to it he may be governed by the same rules and reasons that influence juries when sitting as triers of facts, from

NOTE.—Necessity of bad or fraudulent motive to justify disbarment of an attorney.

The decision in the above case and in *State v. Young*, 80 Fla.—, that a bad or fraudulent motive must be shown in order to require the disbarment of an attorney should be construed with reference to the charges made in those cases, as there are cases in which disbarment has been ordered without particular reference to the motive which inspired the reprehensible conduct complained of. This is particularly true where attorneys have been disbarred for contempt of court.

Thus charging a judicial officer with corruption in an affidavit filed before him and also in open court is ground for disbarment. *Re Murray*, 83 N. Y. S. R. 881.

So in *Re Woolley*, 11 Bush, 95, it is said that an open, notorious, and public insult to the highest tribunal of the state for which an attorney contumaciously refuses in any way to atone may justify the refusal of that tribunal to recognize him in the future as one of its officers. The court further said the attorney might be honest and capable and yet might so conduct himself as continually to interrupt the business of the courts. In that case, however, it appears that the severe penalty of disbarment was not imposed.

In these and in many other cases of disbarment for contempt it would seem to be no defense that the attorney honestly believed himself justified in his conduct.

But where an act is essentially dishonorable it would seem that this in itself was sufficient proof of a bad motive, as in case of taking undue ad-

vantage of a client in a property transaction. *People v. Murphy*, 119 Ill. 159.

Or in offering his services to the adverse party against his former client in a controversy and imparting information acquired in the former employment. *United States v. Costen*, 88 Fed. Rep. 24.

Or in instigating a second contest as to the validity of a homestead claim against a former client and acting as attorney against him where the subject-matter is the same and the contest is largely based on the same facts. *Re O—*, 73 Wis. 602.

So it is said in *Re Stephens*, 77 Cal. 387, that it has always been held ground of disbarment to urge and aid in a prosecution against a person charged with crime and then appear to defend him.

That case decides that such a charge at least calls for an answer and is not demurrable whatever may be the effect of proving the good faith of the attorney.

But such conduct was held to be so far excused as to lessen the penalty to suspension where the attorney was induced to aid the defense by gratitude to the defendant. *Re Stephens*, 84 Cal. 77.

And advertising to procure divorces for other than legal grounds and without publicity is ground for disbarment. *People v. Goodrich*, 79 Ill. 148.

But mere ignorance of the law is no ground for the removal of an attorney, at least where the statute requires no knowledge of law as a requisite of admission. *Bryant's Case*, 24 N. H. 149.

An affidavit morally false, although believed to be literally and technically true, was held not to require disbarment where the court were inclined

an observance of the manner and deportment of the witnesses.

3. Where the acts charged against an attorney in a proceeding for disbarment are proved to have been committed, but the proof fails entirely to disclose any bad or fraudulent motive for the commission thereof, either from the act itself or from other circumstances, disbarment is not authorized.

4. While the interlineation into a decree, after it has received the judicial signature, of immaterial words patently omitted therefrom through clerical oversight, may not, in the absence of proof of a bad motive or fraudulent design in the attorney who perpetrates it, be cause for disbarment, still any manner of tampering with the decree of a court after it receives the sanction of the judge's signature, no matter in how small a particular, and no matter how innocent or immaterial the alteration may be, is highly reprehensible and deserves severe punishment. In recognition of the sanctity of judicial decrees, Chancery Court Rule 87 has been provided, requiring an order of the court for the correction of clerical mistakes therein, arising from any accidental slip or omission; and an attorney who attempts to accomplish correction otherwise should be dealt with summarily and severely.

(June Term, 1892.)

APPPLICATION for a writ of mandamus to compel defendant as Circuit Judge of the Fifth Circuit to restore relator to the right to practice at the bar of the court. *Writ awarded.*

When passing upon the sufficiency of the original return in this case Judge Mabry made the following statement:

This is an original proceeding by mandamus, instituted by the relator, George P. Fowler, asking for a peremptory writ to require the Honorable Jesse J. Finley, judge of the circuit

court for the fifth judicial circuit of the state to vacate and set aside an order made by him as such judge on the 24th day of February, A. D. 1892, disbarring said relator from the office and privileges of an attorney at law, and to allow him to exercise all the duties and privileges as an attorney at law and solicitor in chancery. The alternative writ alleges that "on the 7th day of November, A. D. 1872, the said George P. Fowler was duly admitted as a practicing lawyer, attorney, and counsellor in the circuit court of the state of Florida; that thereafter he was admitted also to practice in the supreme court of the state of Florida and in the United States circuit and district courts for the northern district of Florida; that since his said admission to the said courts he has been in the actual practice of his profession as an attorney and counsellor in all of the said courts, and has always demeaned himself honestly and properly in his practice and proceedings before each and every of the said courts; that he continued so to practice until the 2d day of March, 1892, when an order disbarring him was filed in the office of the clerk of the circuit court of Putnam county, Fla., which order is in the following words and figures, to wit:

"In *Re George P. Fowler*. Rule to show cause,' etc. 'Having examined and considered the evidence filed herein, the court finds the respondent, George P. Fowler, guilty of abstracting the subpoena in chancery in the case of *Andrew I. Wood v. Benjamin Roberts and wife*, then pending in the circuit court of Putnam county. While the court is of the opinion that the omission of the words "of Putnam" might not have vitiated the decree of the court in the case of *Andrew I. Wood v. Hennis Peterman et al.*, then pending in the circuit court of Putnam county, the court finds from the evi-

to attribute the fault to youth, inexperience, and ignorance. *Re Knott*, 71 Cal. 584.

So an attorney who in an argument before a committing magistrate at a time of great public excitement with intent to stir up a riot and disorder, proclaims that to be law which he knows not to be the law with the result of encouraging lawless persons and embarrassing and hindering the officers engaged in preserving the peace, is guilty of professional misconduct justifying his disbarment. *Re Jones's Case*, 13 Pa. Co. Ct. Rep. 229.

But it is otherwise if his misstatements of the law are made in good faith.

The distinction between improper acts done with and those done without bad motive is clearly shown in cases similar to the main case in that they involve a tampering with records or documents. Thus for obliterating a record and antedating a writ to avoid the effect of the Statute of Limitations an attorney cannot be excused on the ground that he acted in ignorance of the moral character of the act. *Ex parte Brown*, 1 How. (Miss.) 808.

In such a case as in some of those following the motive is clearly shown by the act.

So a material alteration of a letter from one judge to another in relation to the disposal of an application for bail is ground for disbarment. *Baker v. Com.* 10 Bush, 592.

And mutilating a receiver's report in a copy of a decree filed in a suit so as to change it from a qualified to an unconditional one, with intent to mislead the chancellor is ground for disbarment. *Re Henderson*, 88 Tenn. 4531.

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And altering a receipt for use in evidence on a trial is cause for disbarment. *Re Serfass*, 116 Pa. 455.

Even if there is a doubt as to an attorney's criminal intent in abstracting from the files in a prothonotary's office a receipt attached to a *verdict facias*, the act will justify his suspension for a limited time. *Re Gates*, 17 W. N. C. 142; *Re Blank*, (Pa.) Jan. 18, 1898.

But a rule against an attorney was dismissed on the ground of his youth and inexperience where the charge against him was that he printed in his paper book the docket entry "bill dismissed" with an addition of the words "in order that the supreme court might decide the case" although it was held that such unauthorized change of the docket entry would justify disbarment if it had been done for the purpose of deceiving the court. *Re Van Horn*, 26 W. N. C. 40.

Cutting leaves from the memorandum book of an insolvent client without any fraudulent purpose and only to protect his interest was held not a ground of disbarment, the book not being a part of his assets. *Re Luca*, 83 Cal. 808.

Other instances might undoubtedly be found which would in some degree illustrate this question, but the decisions above referred to seem to show clearly the distinction between acts done with, and those done without, a bad motive, and that as to the latter the mere illegality of the act will not justify disbarment if the act is not immoral, insulting to the court, or otherwise tends to subvert justice.

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dence that the respondent, the said George P. Fowler, did interline in said decree the words "of Putnam," after the decree was signed by the chancellor, and after the said decree had been partially recorded in the chancery order book of the Putnam county circuit court; and upon the said findings it is considered and adjudged that the said George P. Fowler be, and he is hereby, disbarred, and is hereby forbidden to exercise the functions and privileges of an attorney and counsellor at law and solicitor in chancery, in any of the courts in this state. At chambers, February 24, 1892. J. J. Finley, Judge.

"That said order was based upon charges made against your petitioner by one D. M. Kirby, who made also other charges against your petitioner, which are of no importance, as the court did not sustain them; that, of the two charges sustained by the court, no formal or legal charge was ever made against him, sufficient to put him upon answer, but that nevertheless this petitioner did fully answer, denying the truth of both of the said charges, absolutely and unequivocally; that the charge of abstracting the subpoena in chancery in the case of *Wood v. Roberts* had been brought against him in a criminal proceeding before the Honorable J. E. Baldwin, county judge of Putnam county, Fla., on the 24th day of April, 1890, who heard all the evidence of each of the witnesses who testified in this proceeding, and in addition heard the testimony of B. F. Roberts, who is since dead; and the said county judge thereupon discharged him, and the complaining witnesses asked the dismissal of the complaint against him, which was thereupon had, and he was acquitted of the said charges, and no further proceedings were ever taken or had upon the said charge until the 26th day of March, 1891, when D. M. Kirby's complaint was filed by the Honorable J. J. Finley.

"That the other charge upon which the court in its order bases his disbarrel is the insertion of the words 'of Putnam,' in a final decree of the court in the case of *Wood v. Peterman*.

"That your petitioner in his answer to said rule denied, and still denies, having made such alteration or interlineation in said decree after it was signed by the judge, and says that there was no evidence before the court to sustain the charge.

"Your petitioner humbly submits to the court that if both of said charges sustained by the judge are admitted to be true, he has been acquitted of the charge of abstracting the record, upon a full hearing, and that he ought not to be disbarred upon such a charge until after conviction on a criminal prosecution, and opportunity for defense. As to the charge of the interlineation of the two words 'of Putnam,' in the description of land in a final decree, your petitioner submits that, if such an alteration was made, it was an immaterial insertion of words, which were meant by the judge to be in the decree, which did not affect the decree, and furnish in law no valid or sufficient reason for this disbarrel.

"Your petitioner alleges that the record and evidence and proceedings in disbarring your petitioner from practicing as an attorney and counsellor were wholly and entirely insuffi-

cient to authorize the said judge of the circuit court of the fifth judicial circuit, Hon. J. J. Finley, to authorize his disbarrel; and says that such order is totally null and void, and that he should be restored to his office as an attorney; that he has made application to the said judge to restore him to his right to practice law, and to his office as attorney and counselor at law, which the said judge hath refused, and doth still refuse, to do; by means whereof the said petitioner, George P. Fowler, is prevented from entering upon and exercising the duties of his said office of attorney and counselor at law, and is kept out of the said office and right to practice, to which he is justly and lawfully entitled, and of which he has been deprived illegally, and without due process of law."

To the foregoing writ the respondent made a return which was demurred to and the demurrer sustained with leave to amend. The amendment was made and the case then came before the court upon motion for a peremptory writ.

Further facts appear in the opinion.

Messrs. Miller & Spencer, for relator:

What relator added to the decree is not stated, or that what he did was done with any other than an innocent intent is not averred, and in the absence of such allegations this charge should have gone no further.

Weeks, Attorneys, p. 176; *People v. Allison*, 68 Ill. 151; *State v. Kirke*, 12 Fla. 278.

The second charge is equally as faulty as the first, in that it does not charge that Fowler at the time of the abstraction of the subpoena was an attorney or solicitor in the cause or in any way interested in the cause, or corruptly, or with any bad motive removed the subpoena from the files.

See *State v. Finley* (Fla.) July 18, 1892.

The charges were insufficient to order the relator to show cause, and clearly insufficient to order his disbarrel.

There was no authority in the court to refer this matter to a master in chancery to take the evidence.

State v. Maxwell, 19 Fla. 87.

In a matter of so high and penal a nature the defendant should be confronted with the witnesses against him. Testimony cannot be taken by commission.

Re an Attorney, 88 N. Y. 164; *People v. Restell*, 3 Hill, 289; *Re Kelly*, 59 N. Y. 595.

Full opportunity must be given an attorney to defend in these cases.

Dickinson v. Dustin, 21 Mich. 585.

Suspicion is not sufficient to disbar an attorney and expose him to disgrace and beggary. It must be a clear case (*Weeks, Attorneys*, 175, note; *Hunt v. Adams*, 6 Mass. 519), and must be proved by a preponderance of the evidence.

State v. Young, 80 Fla. —.

The prisoner should have the benefit of any doubt.

Re an Attorney, 1 Hun, 821.

The order of Judge Finley is illegal in that it disbars Fowler from all the courts of the state of Florida.

Bradley v. Fisher, 80 U. S. 18 Wall. 335, 20 L. ed. 646; *State v. Kirke*, 12 Fla. 278.

The defendant must show a clear right in himself to refuse obedience to the writ in view of all its allegations or it is demurrable.

High, Extr. Legal Rem. § 460.

The court will deem any suspicious action of an attorney as a matter of mistake and indulge a presumption of innocence unless willful misconduct or fraud is shown.

People v. Justices of Delaware O. P. 1 Johns. Cas. 181.

Nor will the court exercise its summary jurisdiction over an officer unless in a case of palpable fraud.

Re Lord, 2 Scott, 181, 1 Hodges, 195, 1 Jacob, Fisher's Dig. 640; *Cole v. Grove*, 1 Scott, N. R. 30, 4 Jur. 839.

An application cannot be made at chambers against an attorney unless in a case pending in court.

Ex parte Higgs, 1 Dow, P. C. 495, 1 Jacob, Fisher's Dig. 642; *Anonymous*, 19 L. J. Exch. 219.

The court will not proceed summarily against an attorney for matters which amount to an indictable offense, where it appears that the facts are not exclusively within his own knowledge.

Anonymous, 2 Jur. 467, 1 Jacob, Fisher's Dig. 642; *Robertson v. Mills*, 1 Dow, N. S. 772, 6 Jur. 846.

There must be actual, willful misconduct as attorney.

Re Cutts, 16 L. T. N. S. 715, 1 Jacob, Fisher's Dig. 642.

Where an attorney, without corrupt or improper motive, prepared a special case to take the opinion of the court and suggested facts which had no foundation, he was held guilty of contempt but not disbarred.

Re Elsom, 5 Dowl. & R. 889, 3 Barn. & C. 597.

The court will not grant a rule to show cause why he should not be struck from the roll if the affidavits state an indictable offense.

Anonymous, 5 Barn. & Ad. 1088, 1 Jacob, Fisher's Dig. 644.

Nor for perjury unless enough appears by his own admission to render a jury unnecessary.

Anonymous, 3 Nev. & P. 389.

Nor for not paying over money to a client unless a clear case of willful misappropriation is shown.

Re Sparks, 17 C. B. N. S. 727.

Nor for gambling with a former client.

Ex parte Stratford, 7 Jur. 412, 19 L. J. Q. B. 281, 1 Jacob, Fisher's Dig. 644.

Taylor, J., delivered the opinion of the court:

This cause was instituted in this court at the present term, and at the former hearing (30 Fla. —) the main facts of the case are fully stated. Our conclusion upon the former hearing was that the relator's alternative writ was defective because it failed to show a clear prima facie case of right in the relator in that it contended that the charges preferred against him upon which he was disbarred were insufficient and invalid without setting up or presenting to us the contents or language of the charges referred to; and because it contended further that the evidence before the respondent upon which he based the disbarment did not sustain the charges preferred, but failed to exhibit to us the evidence questioned; and the relator was allowed to amend his petition and alternative writ. The amendment has been made, and the case is now before us for the second time, upon the alternative writ as amended and an amended return thereto by the respondent. The relator now moves for a peremptory writ upon the following grounds: 1. "That the return of the respondent is wholly and entirely insufficient in law, and, in view of the allegations of the alternative writ, shows no clear right in the respondent to refuse obedience thereto." 2. "That the said return does not set up or show upon what evidence, if any, the defendant acted, or show any valid or legal reason, or sufficient legal proceedings, or evidence, to justify the respondent in refusing obedience to said writ." 3. "Because the said return does not set up a denial of the facts stated in the alternative writ, or state or show other facts sufficient to defeat relator's right to restoration." 4. "Because the said return is otherwise informal, and insufficient to defeat relator's rights."

The amended alternative writ alleges the following to be the charges upon which the relator was disbarred:

"The amended alternative writ alleges the following to be the charges upon which the relator was disbarred:

"5th Judicial Circuit of Florida,
In and for Putnam County.
"To the Hon'ble J. J. Finley, Judge in and for said Circuit:

"D. M. Kirby, deputy clerk Circuit Court for said county, complains of George P. Fowler as follows: 1st. That in a certain chancery cause, wherein A. J. Wood was complainant, and Hennis Peterman *et al.* were defendants, he, the said George P. Fowler, acting as solicitor for complainant, interlined and added to the final decree rendered in said cause, after the signature of the chancellor had been affixed.

"2d. That in a certain cause in chancery, wherein A. J. Wood was complainant, and Julia E. Roberts and B. F. Roberts were defendants, the case was carried to final decree and sale, without having had proper and legal service upon the owner of the property, Mrs. Julia E. Roberts; that George P. Fowler assured the judge in open court that service had been had upon Mrs. Roberts; that said subpoena was afterwards abstracted from the clerk's office, and that no one but said George P. Fowler had the record and files in said chancery cause at the time said subpoena was taken, and this complainant believes said George P. Fowler did take or make way with said subpoena, he being the party most interested in its disappearance.

"3d. That in a chancery cause wherein W. W. Rast was complainant, and Minnie A. Estee, W. W. Toller *et al.* were defendants, said George P. Fowler asked this complainant, D. M. Kirby, to make affidavit to the effect that notice of publication had been sent to W. W. Toller, at Glenwood, Virginia, when said Fowler knew it had not been done, and that he had told this complainant that there was no necessity of it, as the said W. W. Toller was in London, England, beyond the seas.

"D. M. Kirby,
"Sworn to and subscribed before }
me this Feb'y 28th, 1891, }
Cook Carleton,
Notary Public State of Fla."

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The alternative writ further alleges that upon the filing of said paper with the respondent, he made an order on the 26th of March, 1891, requiring the relator to show cause before him in open court at Palatka, on the 8th of April, 1891, why he should not be disbarred for the reasons stated in said paper or complaint.

We may as well remark, just here, that we are clearly of the opinion that the form and substance of the charges preferred against the relator were entirely too loose, general, vague, indefinite and uncertain to have warranted this order requiring the relator to respond thereto, or to show cause why he should not be disbarred by reason thereof. All the authorities agree, and the doctrine is reaffirmed in the former decision of this case, that a charge so grave in its nature must be clear, specific, and circumstantial, and must be stated with great particularity, that the attorney may know how to defend. The first of the charges here that this relator was peremptorily called upon to refute, was that in a certain chancery cause, wherein one A. J. Wood was complainant, and Hennis Peterman *et al.* were defendants, the relator interlined and added to the decree rendered therein, after it was signed by the chancellor. It fails to state what it was that was interlined or added to the decree; fails to give the date of the decree, or the court in which the cause was pending, or any date at or about which the alleged interlineation or addition was perpetrated; not even stating whether the paper tampered with belonged to any of the courts of the state of Florida or not, or where the alleged wrongful addition thereto was perpetrated; nor whether the same was done with any bad motive or malicious intent.

The second charge was the abstraction of a subpoena from the clerk's office, in a certain cause, wherein A. J. Wood was complainant and Julia E. Roberts and B. F. Roberts were defendants. This charge does not allege that the relator abstracted the subpoena, but alleges "that said subpoena was afterwards abstracted from the clerk's office, and that no one but said George P. Fowler had the record and files in said chancery cause at the time said subpoena was taken, and this complainant (D. M. Kirby) believes said George P. Fowler did take or make way with said subpoena, he being the party most interested in its disappearance." This charge also fails to allege the court in which the cause to which the subpoena belonged was pending, or any dates, or that there ever was in fact any subpoena therein that could have been abstracted, or in what county or state the supposed abstraction occurred, and does not show how or in what manner the relator was interested in its abstraction or disappearance; nor does it allege any bad motive or intent in the abstraction thereof. We have no hesitancy in saying that these charges so framed were entirely too vague, indefinite, and uncertain, and too wanting in directness, clearness, particularity, and detail to have warranted the respondent in demanding of the relator an exhibition of any cause why disbarment should not follow as a result thereof. The relator, however, failed to move to quash the charges in the form presented, or otherwise to question their legal sufficiency, but saw proper to an-

swer, denying in detail the charges as made; and, to the first charge, as to the interlineation of the decree, specifies in his answer one interlineation, that of the words "of Putnam," in the decree asserting that it was made by him, but before the decree was signed. Upon the coming in of this answer the respondent made an order referring the matter to Calvin Gillis, Esq., as a special master to take such testimony therein as might be offered "on either side, bearing on the truth or falsity of the complaint made, and to report the same to the court at the earliest practicable time." In proceedings for the disbarment of an attorney, we do not think that this was the proper practice. The power to disbar an attorney for any of the causes justifying such a procedure is inherent in the court itself. The judge sits as the arbiter of both the law and facts in the case. He is the trier; and, so far as the facts are concerned, should occupy the same position of personal presence at the examination of witnesses that a jury does at the trial of any one charged with crime, so that he may observe the manner of the witnesses, and may give to their evidence credence or disbelief, as a jury does, accordingly as their manner of testifying may indicate prejudice, malice, or other sinister motive to subserve. By delegating the examination of witnesses in the cause to another, the judge hears the evidence only by proxy, but still retains the position and powers of trier of the facts, and deprives the accused of the right to be confronted with his accusers before the tribunal who pronounces upon the facts. In a case reported in 88 N. Y. 164, for the disbarment of an attorney, it was held that such proceedings are of a public nature and are quasi criminal, and that evidence of an absent witness taken under a commission upon written interrogatories was not admissible, and that the attorney could be convicted only upon evidence good at common law, delivered if he chooses in his presence, by witnesses subject to cross-examination. *Re Kelly*, 59 N. Y. 595. The proper practice in such cases is for the judge to personally hear the evidence of the witnesses for and against the accused, so that in lending or withholding credence to it he may be governed by the same rules and reasons that influence juries when sitting as triers of facts. This manner of trying or getting the evidence in the case was not objected to at the time, however, by the relator, but he seems, from the exhibits made in the amended alternative writ to have gone into the taking of testimony before the special master without complaint or demurrer thereto.

The amended alternative writ sets out the following, in substance, as being the evidence taken before the master, upon which the judgment of disbarment was based: The master, Calvin Gillis, Esq., filed a statement in substance as follows: That he had devoted about a week to the service of taking testimony in the cause, without compensation to himself or the witnesses; that a great deal of immaterial testimony was taken; that the papers and depositions in the cause are in the custody of the clerk of the circuit court for Putnam county. That the parties interested, or some one or more of them, made known to him that there still remained many witnesses to depose

in this matter. That he was willing to serve without compensation to purge the bar if necessary, or to vindicate the bar if unjustly accused; but in the present case he begs to be relieved by your honor, when his labors are more than required elsewhere.

In what appears to be an *ex parte* affidavit made before a notary public, and admitted and filed with the master as evidence, as is stated, by consent of the relator subject to his right to cross examine the affiant, Frank Wright, clerk of the circuit court for Putnam county, testified as follows: That on or about the 18th of April, 1890, George P. Fowler brought to his office a final decree in the case of *Wood v. Peterman* that had been signed by presiding Judge Finley on the 17th of April, at chambers at Ocala, and asked me to record it as soon as convenient. Mr. Kirby, deputy clerk, took the decree and filed it, soon thereafter started to record it; while he was at his desk recording the decree, Mr. Kirby called to me and said, Mr. Fowler has made a mistake in the decree, having described the land as in the "county and state of Florida," and he asked me if I thought that affected the decree. I left my table and went to Mr. Kirby's desk and looked at the decree, and saw that it read as above, and told Kirby to go on with the record, as I thought the rest of the description was sufficient to locate the property. Kirby continued the record, but before completing it was called off by some other business and did not take it up again. Some time afterwards Mr. Fowler came to the office and asked for the papers in the case, and took them away with him. When he returned them Kirby opened the package and looked it over and discovered that the words "of Putnam" had been interlined. I looked at the paper again and found such to be the case, and told Kirby not to continue the record until the judge had seen it and had allowed the interlineation. On the 17th of May I wrote to Judge Finley asking instructions as to completing the record, and saying that I awaited his instructions in the premises. Under date of May 22d, Judge Finley wrote acknowledging receipt of my letter, and of the affidavit accompanying it, but that he could not instruct me until the matter had been brought before him in a shape that would authorize him to act. Thus the matter has stood up to the present time. I have not felt justified in completing the record, and the judge has given me no instructions on the subject. With reference to the loss of the subpoena in the case of *Wood v. Roberts*, I cannot state fully of my own knowledge, as my deputy, Kirby, has charge of law papers in the office, and they seldom come to my notice, but I remember one morning about the middle of April, 1890, about 8 o'clock, when I reached the office I saw Mr. Fowler sitting near the safe containing law papers, looking over some papers. He left soon after, taking some cases with him; about ten o'clock Mr. Haskell came in and asked to see the *Wood v. Roberts* papers, and sat down on the corner of Mr. Kirby's desk to look them over; soon I heard him ask Mr. Kirby where the subpoena was, and he and Mr. Kirby looked through the papers and said they could not find it. After asking if they had looked carefully, I went across the room

and looked for myself, but did not find the subpoena, and have not since seen it, although I have made diligent search for it through the office. On cross-examination by the relator, he answered that he had never, to his recollection, called Mr. Fowler's attention to the interlineation in the decree, after the same was brought to his attention.

D. M. Kirby, the deputy clerk, testified that on or about the 15th of April, 1890, late in the afternoon of that day, one B. E. Dyson, the deputy sheriff of Putnam county, James S. La Roche and himself were looking over papers in chancery suit of A. J. Wood against B. F. and J. E. Roberts, and more particularly the subpoena with the service returned thereon by the sheriff. "I took the subpoena and read the service. The subpoena was placed back among the papers in the safe, and locked in for the night. The next morning Major Fowler entered the office about or shortly after seven or eight o'clock, while La Roche and myself were comparing instruments that had been recorded. Maj. Fowler asked to see the papers in this case; the safe was then opened for the first time that day, and the papers handed to Maj. Fowler, who took them to another table to examine; a few minutes later he handed me the package and I placed it in the safe. I had not opened the package myself since the night before. At about 10 o'clock A. M. of the 16th of April, I think, 1890, E. E. Haskell entered the office as attorney for A. J. Wood, and asked for the same papers; I took them from the safe to my desk, and Mr. Haskell opened the papers in my presence, at the same time conversing with him relative to the service. He examined the papers and the subpoena could not be found; we both examined each individual paper, the safe, the tables, and it could not be found. I had charge of these records and files, and to my knowledge no other parties handled these papers, Maj. Fowler being the only person who opened this package between the evening of the 15th of April, 1890, to ten o'clock A. M. next day. This happened in the court-house, in the city of Palatka, Putnam county, Florida. I have never seen the subpoena since, although having made diligent search for it."

J. S. La Roche, a recorder in the clerk's office of Putnam county, testified to the same facts in substance as to the disappearance of the subpoena as did D. M. Kirby, and testified also that some time in April, 1890, his attention was called by the clerk, Mr. Wright, and his deputy, Mr. Kirby, to the omission of the words "of Putnam" in the decree in the case of *Wood v. Peterman* that Kirby was then recording in the chancery order-book, and that some time afterwards, on looking at the decree again, he saw that the above two omitted words had been interlined after the decree had been signed.

Benjamin E. Dyson, in an *ex parte* affidavit copied into the alternative writ as part of the papers in the case, sworn to before a notary public, and that has nothing about it to indicate that it was ever filed with the master, or used before the judge, testifies that on the morning of the 15th of April, 1890, he entered the clerk's office and asked to see, and was shown by the deputy clerk, the subpoena in

the chancery case of *Wood v. Roberts* and wife, and that after the sheriff's return of service thereon was read by him and the deputy clerk, the latter placed said subpoena among the other papers in the case and put them in the safe, and then closed the safe and followed him out of the office; and, contradicting his first statement above that it was in the morning, he here says that it was about five o'clock P. M., the time of closing the clerk's office.

E. E. Haskell testified in an *ex parte* affidavit made before a notary public, and that has no file marks of the master or judge, that on the morning of April 18, 1890, about ten o'clock, as attorney for A. J. Wood, he called at the clerk's office for the subpoena in the case of said *Wood v. Roberts* and wife, but that after diligent search for same, made by him and the deputy clerk, Kirby, the same could not be found; that he had never seen or handled the papers in the case before that time.

D. M. Kirby, the deputy clerk, upon a second examination, testified to the same facts, substantially, in reference to the interlineation of the words "of Putnam" in the decree, as did the clerk, Mr. Wright.

John E. Marshall, in an *ex parte* affidavit made before a notary public, testified for the relator that he had done a great deal of business with Mr. Fowler, acting as special master in chancery in many cases in which Fowler was solicitor for the complainants, among which was the chancery cause of *A. J. Wood v. Hennis Peterman et al.*; that as such special master he did his writing, and business connected therewith, in Fowler's office, and had spent a great deal of time there, and was well acquainted with his methods of doing business; that he was a very careful, industrious, painstaking, and conscientious man in the discharge of his duty to his clients; that it was always the practice of Fowler to carefully compare all decrees, bills, and other papers prepared by him, before filing the same in the clerk's office; that he had assisted him in many cases and many times in such work, and that he well remembered assisting him in comparing the supplemental decree in the case of *Wood v. Peterman*, the same being signed by the chancellor April 17, 1890; that he was in Palatka on the 7th of April, 1890, and in Fowler's office, and remembered well, and was sure by reference to dates and memoranda in his possession, that he compared the said supplemental decree with Fowler on that day, shortly after he had finished drawing the same; that he called Fowler's attention to the omission of the words "of Putnam" in said decree, and that said Fowler did then and there interline said words in said decree in his presence. Of this fact he was sure and positive, and that he knew that said interlineation was so made by him as stated, and before said decree was signed by the judge or filed in court.

The amended alternative writ avers that the above is all the evidence that was before the respondent in reference to said charges, and that none of said testimony except that of Frank Wright was ever legally or properly before the respondent, the same never having been filed by the master as a part of his report.

The respondent for answer to this amended alternative writ refers the court to his answer 18 L. R. A.

to the original writ herein, and asks that the same may be taken and considered as his return to the writ as amended. Neither in the return to the original writ nor to the amended writ is it denied that the foregoing is all the testimony upon which the respondent acted in disbarring the relator. We must take it as true, then, that what we have given above is, in substance, all the evidence before the respondent bearing upon the two charges upon which the disbarment was predicated. The question, then, to be considered is, Was this evidence sufficient under the law to warrant the court below in visiting upon the relator the severe penalty of disbarment, that is always deeply humiliating to an attorney, and often most disastrous, not only to himself, but to his unfettered family dependent upon his professional efforts for their very existence.

In the judgment or order of disbarment the relator is judged to be guilty of "abstracting the subpoena in chancery in the case of *Andrew J. Wood v. Benjamin F. Roberts* and wife, pending in the circuit court of Putnam County; and also of interlining the words "of Putnam" in the decree in chancery in the case pending in Putnam county circuit court of *Andrew J. Wood v. Hennis Peterman et al.*, after said decree had been signed by the judge. In the case of *State v. Young*, decided at the present term (80 Fla. —,) it is held that "no court should, in the exercise of original jurisdiction, disbar an attorney upon a charge of this character, establishing, if proved, his unfitness morally to be intrusted with the responsibilities of the office, unless the testimony sustains it clearly, both as to the act and the bad motive." Testing the evidence before the respondent by this rule, we fail to find in it anything that even suggests a bad or fraudulent motive or purpose in the relator for the commission of the acts adjudged against him. In the matter of the abstraction of the subpoena in chancery in the case of *Wood v. Roberts* and wife, the evidence does not even suggest any purpose, reason, or motive that the relator could have had for its abstraction or disappearance. What benefit or advantage to himself or any one else could have been reaped out of its disappearance, or what loss or injury could have flown therefrom to any one is not even hinted at in the evidence. He is not shown by the evidence to have been interested in the cause to which the lost paper belonged in any way, either as party thereto, or attorney therein for any of the parties, or otherwise. So far as his motive was concerned for the abstraction of this paper, the evidence is entirely insufficient. If there had been any evidence before us to show that the relator, before the decree was rendered in the case to which this missing subpoena belonged, asserted to the judge, as an inducement to the signing of such decree, that service of subpoena had been made upon Mrs. Roberts, one of the defendants therein, as was charged, or if there had been any proof to show that Mr. Fowler was in any way, either personally or representatively, interested in upholding the decree predicated upon the proper service of such missing subpoena, or as purchaser of the property thereunder, or if there was any proof showing that he had any interest or design whatsoever in the disappearance of said subpoena, we should

have been bound under the proofs before us to sustain the respondent in the order of disbarment. But, so far as the proof goes, we are shown no interested or bad motive or reason for his taking it, or having it to disappear at all. It seems from the evidence that the clerk of the court of Putnam county was in the habit of permitting Mr. Fowler to take out of his office the original papers on file there. In the absence of any proof that he took this subpoena with an interested or bad motive, we think that to this extent the order of disbarment was unwarranted.

As to the second charge, of interlining the words "of Putnam" in the decree in chancery in the case of *Wood v. Peterman et al.*, after it had been signed by the chancellor, although it is denied by the relator that such interlineation was done subsequent to the signing of the decree, still we think that the proof, if not prejudiced, is quite sufficient to establish the fact that it was done subsequently to the signing of the decree. This fact being established, the next question to be considered is, Does the evidence show that it was done with that fraudulent, corrupt, and bad motive that is necessary to have been shown before disbarment could follow. The evidence shows that the interlineation occurred in that part of the decree that undertook to locate or describe the land involved in the decree; and the interlineation caused the sentence in the decree as signed, "county and state of Florida," to read "county of Putnam and state of Florida." It is apparent from the evidence, and from the fact that the decree was in a cause pending in Putnam county, that the land involved therein, to whose description the interlineation referred, did in fact lay in the county "of Putnam;" and it is apparent also from the evidence of the clerk, Frank Wright, that the land was otherwise sufficiently located or described without the words interlined; and from all this it is evident that the omission of the interlined words, "of Putnam," was a *lapsus penae* on the part of the draughtsman who prepared the decree, and that of right it was proper that they should have been put into the decree at the point in which they were interlined, prior to its presentation to the judge for his signature thereto. In the order of disbarment the respondent also expresses the opinion that the omission of the interlined words might not have vitiated the decree. If the decree then, (and it is not before us in the record,) was just as perfect without the interlined words as it would have been had they been originally included therein, then it follows as a necessary sequence that the interlineation was an immaterial one. It added nothing to the effect of the decree, nor detracted anything from it. It did not vary the rights or interests, duties, or obligations of any of the parties to it, or of any one else; nor did it give rise to any opportunity for wrong to any one, or deprive any one of any right under it. This being true, and we think it is, how could the relator have been actuated by any bad, fraudulent, or vicious motive in doing an act that accomplished nothing, and that would have been followed by the same results whether done or left undone. Mr. Fowler, when he made this interlineation in the decree, could not have been

actuated by any bad or fraudulent motive of unfair gain to himself or his client, or harm to any one else, because the act done being wholly immaterial, was powerless to effect any result whatever. In the case of *Hunt v. Adams*, 6 Mass. 519, that was a suit upon a note, the defense to which set up an alteration of the note after it was made and delivered, by the unauthorized interlineation of the word "year" therein, *Chief Justice Parsons*, delivering the opinion of the court, says: "Such addition has no effect in form or substance. In my opinion it would be unworthy of the wisdom of the law to decide, that the incautious interlineation of a word, which the same law would necessarily imply, should defeat the contract. In deed, the assent of the party signing such contract, that the omission of a word by a clerical mistake, which the law will supply, might be cured by inserting such word, ought to be presumed, to protect him from the imputation of intentional fraud." There was no proof that Mr. Fowler made this interlineation under the impression or belief that it added to or detracted from the substance or form of the decree, or was necessary to give it effect. The omission of the words interlined was so manifestly a clerical oversight and mistake, and in the opinion of both the judge and the clerk of the court did not affect the description of the land or the decree either in form or substance, and the words interlined being such as the law would have supplied from the other contents of the decree, under the equitable view taken by *Chief Justice Parsons* in the case quoted above, in considering the motive by which Mr. Fowler was actuated in making this interlineation, we might fairly presume that he did it under the impression that the judge would certainly consent to the correction of so palpable a clerical mistake that when made affected nothing either in form or substance, rather than from any evil design.

We do not wish it to be understood that we are inclined to condone, palliate, countenance, or excuse any manner of tampering with the decree of a court after it obtains the sanction of the judge's signature, even to the crossing of a t or the dotting of an i therein; on the contrary, we think that such a practice is highly reprehensible, and deserves severe punishment, no matter how innocent or immaterial the alteration or change may be. A proper respect for the sanctity of the official judgments and decrees of our courts demands that this shall be so; and in recognition of the sanctity of judicial decrees, our Chancery Court Rule 87 has been provided requiring an order of the court for the correction of clerical mistakes in decrees arising from any accidental slip or omission. But when such an interference with a judicial decree is made unauthorizedly and incautiously, but without any bad motive or fraudulent design, it partakes more of the character of a contempt of the court than of that moral turpitude that stamps the perpetrator as being an unfit person to exercise the office of an attorney. In the absence, therefore, of any evidence showing that the relator was actuated, in making the interlineation charged, by any bad motive or fraudulent design, we do not think that under the circumstances it either merited or war-

ranted the infliction upon him of that severest and most humiliating of all punishments to an attorney—disbarment. Mr. Weeks, in his admirable work on Attorneys, p. 159, in discussing the subject of disbarment, says: "The end to be attained is protection, not punishment. As punishment, removal from office is unreasonably severe, for those cases in which the end is reclamation, not destruction, and for which reprimand, suspension, fine, or imprisonment seems to be the more adequate instrument of correction; for expulsion from the bar blasts all prospects of prosperity to come, and mars the fruit expected from the training of a lifetime."

In the absence of any proof of moral turpitude on the relator's part in making the interlineation charged, we think that the sentence for his entirely unauthorized and highly reprehensible act should have been aimed at correction and reasonable punishment, as there were no elements in it that marked him as a corrupt practitioner against whom the public should be protected by destroying his official life as an attorney.

The peremptory writ is awarded and ordered.

F. C. BLANCHARD *et al.*, *Appts.*,

STATE of Florida, *ex rel.* CALHOUN & DEWITT.

(.....Fla.....)

"Each member of a firm of practicing lawyers must pay the license taxes and fee prescribed for lawyers practicing their

***Headnote by RANNEY, CH. J.**

NOTE.—License tax on lawyers.

A license tax on lawyers is not unconstitutional on the ground that it interferes with the judicial department of the government. *Goldthwaite v. Montgomery*, 50 Ala. 456; *Cousins v. State*, 50 Ala. 118, 20 Am. Rep. 290; *State v. Waples*, 12 La. Ann. 843; *State v. King*, 21 La. Ann. 201; *Young v. Thomas*, 17 Fla. 169; *Stewart v. Potts*, 49 Miss. 749; *State v. Gazley*, 5 Ohio, 14.

Neither does such a tax impair a contract or vested right of an attorney under his license to practice law. *Ould v. Richmond*, 23 Gratt. 464, 14 Am. Rep. 139; *Languille v. State*, 4 Tex. App. 312; *Simmons v. State*, 12 Mo. 208, 49 Am. Dec. 181; *State v. Gazley*, *Young v. Thomas*, *State v. King*, *State v. Waples*, and *Cousins v. State*, *supra*.

In *Lawyers Tax Cases*, 8 Heisk. 565, decided by the Supreme Court of Tennessee in 1875, which case was also reported as *Cardwell v. State*, in 17 S. W. Rep. 109, in advance sheets only and left out of the permanent bound volume, a statute making it unlawful to practice law without payment of a license tax was held unconstitutional; two judges holding that the right to practice law could not be taxed, and two others holding that the practice of law by a duly admitted attorney without payment of the tax could not be made unlawful, while two judges held that the statute was constitutional.

The serious division of opinion among the judges of the court much impairs the effect of the decision as an authority, and it is at any rate in conflict with all other cases on the subject.

The power to tax the exercise of the right to 18 L. R. A.

profession by the Act of June 10, 1891, Rev. Stat. p. 929 *et seq.*, and take out the required license before he can lawfully practice the profession.

(December 8, 1902.)

APPEAL by defendants from a judgment of the Circuit Court for Putnam County in favor of relators in an action brought to compel the issuance of an attorney's license. *Reversed.*

The facts sufficiently appear in the opinion. *Mr. William B. Lamar, Atty. Gen.*, for appellants.

Messrs. R. W. David, W. M. David and Gillis & Gillis for appellee.

Raney, Ch. J., delivered the opinion of the court:

The sole question involved in this case is whether under the General Revenue Act of June 10, 1891, Rev. Stat., pp. 929 *et seq.*, two lawyers associated as partners are entitled to a license as a firm or partnership upon paying the license tax prescribed for one lawyer and the license fee; or must each of them take out a separate license for himself on paying for himself the prescribed tax and fee. The former proposition, in our judgment, is erroneous, and consequently the judgment of the circuit judge awarding a peremptory writ of mandamus must be reversed.

The ninth section of the Act provides that "no person shall engage in or manage the business, profession, or occupation mentioned in this section unless a state license shall have been procured from the tax collector, which license shall be issued to each person on the receipt of the amount hereinafter provided, together with the county judge's fee of twenty-five cents for each license." It then authorizes counties, incorporated cities, and towns to im-

practice law may be delegated to a municipal corporation. *Ould v. Richmond and Goldthwaite v. Montgomery, supra*.

The classification, for taxation, of the lawyers in a city into six classes, according to their reputation and standing, and supposed capacity to make profits, was upheld in *Ould v. Richmond, supra*, and the delegation of this classification to a committee was held valid.

In *Simmons v. State*, and in *Languille v. State, supra*, it is said that a license to practice law is a mere naked grant of a privilege without consideration, and that the state may revoke it or impose such conditions upon its exercise as are deemed proper or demanded by the public interest.

Under Tex. Rev. Stat., arts. 4666, 4668, an attorney may take a license for three months at a time. *Hart v. State*, 21 Tex. App. 318.

Under Ala. Revenue Act of December 31, 1898, it was held that each lawyer composing a firm must pay the price required for a license although the terms of the statute were that "any person, firm, company, or corporation, who desires to engage in or carry on any business or profession hereinafter named" shall pay the sum required. The court held that the statute was to be construed according to the nature of the business, and that the exercise of the profession of law was such a personal right as to require a separate license for each individual.

Even a license for the business of selling intoxicating liquors, if issued to one partner individually, confers no right on the other partners. *Long v. State*, 27 Ala. 32.

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pose further taxes of the same kind on the same subjects, with certain limitations not necessary to be mentioned. After prescribing the amount of the state tax to be paid for pursuing many other avocations, the same section enacts, in its fourteenth subdivision, that "all dentists and lawyers practicing their profession in the state of Florida, shall pay to the tax collector in the counties where their office is located a license tax of ten dollars." It then in another paragraph regulates the issue of the license.

There is in these provisions nothing that affords any basis for the contentions urged in maintenance of the judgment appealed from; nor is any authority cited in their support. The plain declarations of the statute are, that no person shall practice the profession of a lawyer without having paid the license tax prescribed for all lawyers, and obtained the license in the manner provided. As all lawyers are required to pay the state tax of ten dollars, and any authorized county and municipal levies on the same avocation, each and every lawyer must do so, and no lawyer can lawfully practice his profession without having done so. Thus far there is no room for construction; the sole function of the courts is the interpretation of the Act according to the plain meaning of its words; and as to their meaning there is no room for question or doubt. The assertion that a firm or copartnership is in law one person is mistaken; it, on the contrary, is an association of several persons, and their firm name is but a short way of designating the several persons for the purposes of their association. Their separate personality is not lost, and they can neither sue nor be sued at law or in equity solely by such business appellation, nor without using their individual names. It is true that, as argued by counsel for relators, "a firm of lawyers can only take one fee and conduct one side of a case," but it does not follow from this essential principle of professional ethics and sound morals that the several individuals or lawyers composing the firm become either one person or one lawyer; or that they will receive severally a smaller income than they would if they had not associated their industry, talents, and learning for the purpose of gain; still should the result last stated ensue, it is not a consideration or rule that enters into either the construction or interpretation of statutes.

Assuming that each member of a firm of "merchants" or "barkeepers" is, as is suggested by counsel for appellees, not required to pay the full amount of the tax prescribed for merchants and dealers in spirituous, vinous, or malt liquors, it is because in their cases, as in others, the tax is for each place of business, *i. e.*, each store, or barroom, which is not true of lawyers and dentists and others. Again, it is altogether clear from the very terms of the Act in the cases of circuses, theatrical shows, and minstrel troupes, managers of theaters employing traveling troupes, variety shows, banks, banking firms, express companies, electric light, water works, gas light and telephone companies, that each member of, or individual composing, such companies or association, banks or banking firms, is not chargeable with a separate tax, or required to have a separate license, but the tax is upon the association, 18 L. R. A.

company, bank, or firm as such. These distinctions, thus clearly made by the Act, account in part, if not altogether, for the use of the terms "person or persons, firm or association," in the general penal provision, to be found in the tenth section, for punishing the doing without a license any business for which one is required. Such distinctions are the subject of legislative discretion, and the court cannot extend to lawyers the more favorable consideration extended by the law-makers to other avocations, nor hold that such patent discrimination was either unintentional or ineffectual.

The judgment will be reversed, and the cause remanded for proceedings consistent with this opinion.

STATE of Florida, *ex rel.* ATTORNEY-GENERAL,

James E. JOHNSON.

(.....Fla.....)

- *1. The governor has power under section 15 of the executive article of the Constitution, when acting within the authority there conferred, to hear and decide as to the existence of any alleged neglect of duty in office as a ground for suspending an officer. This authority, whether judicial or administrative in its nature, is vested by the Constitution in the governor as a member of the executive department, and does not appertain to, and cannot be exercised by the courts.
2. The governor may, under section 15 of the executive article of the Constitution, suspend an officer for neglect of duty in office, without giving previous notice to the officer of the charge made against him; but it is the governor's duty to notify any officer he may suspend of the cause of such suspension and give him a hearing on such charges and reinstate him if the evidence does not sustain the charges. The officer has a constitutional right to such hearing.
3. So long as the governor's action in suspending an officer is within the limits of his constitutional power the courts cannot interfere to arrest his action. He is the exclusive judge, in so far as the courts are concerned, of the sufficiency of the proof of the charge, not merely because the courts have been given no power of review, but for the further reason that the Senate, a branch of the legislative department, has been granted such power.
4. Under Fla. Rev. Stat. § 154, electors had the right to pay toll taxes on Saturday, September 3d, 1892, to qualify them to vote at the election of October 4 of the same year; but whether or not a tax collector was guilty of neglect of duty in not receiving the taxes on the former day, is a question for the governor's decision, viewed as a ground for the suspension of the collector from office.

*Headnotes by RANNEY, CH. J.

NOTE.—For summary removal of officers, see, in connection with the above case, *Trainer v. Wayne County Auditors*, 15 L. R. A. 95, and *note*, 89 Mich. 162.

5. When an officer has been regularly suspended by the governor under section 15 of the executive article of the Constitution, for any cause recognized by that section, and the successor of the suspended officer has been regularly commissioned, the latter officer is entitled to the official property of the office, and mandamus is the proper remedy to compel the suspended officer to deliver it; and the new appointee is not a necessary party to the proceedings, but the attorney-general is a proper and sufficient relator.

(June Term, 1892.)

MOTION to quash an application for a writ of mandamus to compel respondent to deliver over the property belonging to the office of tax collector for Duval County to one whom the governor had appointed as his successor in office. *Overruled.*

The facts sufficiently appear in the opinion. *Messrs. J. M. Barrs and A. W. Cockrell & Son*, in support of the motion:

The right to exercise an office is as much a species of property within the protection of the law, as any other thing capable of possession; and to wrongfully deprive one of it, or unjustly withhold it, is an injury which the law can redress in as ample a manner as any other wrong.

2 Bl. Com. 36, 263; 4 Bacon, Abr. *Office*, G, 297.

And this right is now within the protection of the 14th Amendment of the United States Constitution.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; *Buntun v. Lyford*, 37 N. H. 512, 75 Am. Dec. 144, and *Freeman's note*; *Belcher v. Chambers*, 53 Cal. 635; *Foster v. Kansas*, 112 U. S. 201, 28 L. ed. 629; *Kennard v. Louisiana*, 92 U. S. 480, 23 L. ed. 478; *Mechem*, Pub. Off. § 454, and *note*.

The power to remove an officer for cause can be exercised only for just cause, and after the officer has had an opportunity for defense.

State v. Love, 39 N. J. L. 14.

The power of removal of officers for cause is a special authority, and must be strictly pursued.

Com. v. Slifer, 25 Pac. 23.

The function by which one is deprived of the emoluments of his office, even for a limited time, is obviously judicial in its character, and this leads to the inquiry whether such a function belongs to the governor of this state.

It certainly did not belong to the British crown.

If the governor has the power therefore it must be derived from the Constitution of the state.

State v. Pritchard, 36 N. J. L. 112.

The ascertainment of the malfeasance, or other cause, must precede the removal, and this ascertainment must proceed upon charges consisting of distinctly stated facts, "so that it can be determined, as matter of law, whether what the removing power treats as wrong is within the legal quality of wrong." The officer must be by the judgment of the courts, or some tribunal possessed of judicial power, convicted of misbehavior in office.

Page v. Hardin, 8 B. Mon. 648.

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That the statute and the Constitution, in giving the governor power to remove, prescribe no methods of examination, can in no way relieve him from the necessity—even if he is to pass personally on the facts—of having specific charges of misconduct communicated to the officer, and established by proof, with a full opportunity to the respondent to examine and cross-examine witnesses, and be heard on the facts and the law.

Dullam v. Willson, 53 Mich. 392, 51 Am. Rep. 128.

The Constitution did not in terms confer upon the governor the power, obviously a judicial power, to examine into public acts of the officers he was empowered by the Constitution to "suspend" for misconduct. Such judicial power did not result, by implication, from the grant of power to absolutely remove for misconduct.

Mechem, Pub. Off. § 454, and *note*; *Com. v. Slifer*, *supra*.

Under our Constitution, if this writ be sustained, the governor is invested with arbitrary power to suspend, discharged of the supervisory control of the Senate, in every case, where the incumbent is elected at the general election, and enters upon his office in January, and holds for two years. All the governor needs to do is to wait until the Legislature meets. He can then "suspend." And the result is, the suspension is extended beyond the duration of the term of the suspended officer unless the governor recalls the Legislature to an extra session. And this is true of every officer the Constitution makes elective (art. 8, § 6; art. 18, § 10), as to that part of the tenure, intervening between the assembling of the last Legislature which sits during his term, and the expiration of his term. The entire elective system is practically annulled.

Dullam v. Willson, *supra*.

An out-going governor has sought to fill in part an office that did not become vacant during the term of his official life (*State v. Meahan*, 45 N. J. L. 189), an office which did not even "fall in" during his incumbency; the term of which does not even begin until the close of his official life.

The commission to Gillen is absolutely void.

Hench v. State, 79 Ind. 297.

The convention that framed the Constitution of 1885, differentiated suspension and removal from office.

As the duration of the displacement of Johnson is extended by its terms beyond the term for which Johnson was elected, it is in substance and in fact a "removal" from office instead of a "suspension" from office, in the sense of the constitutional differentiation, which the governor has attempted to accomplish in this case.

The greater power to remove might include the lesser, to suspend; but the contrary is not true.

Metsker v. Neally, 41 Kan. 122.

A careful examination of the adjudged cases has failed to discover a single authority in which the attorney-general was permitted to institute a suit of this kind; nor any case in which such a proceeding was instituted by another than the party claiming the possession.

People v. Stevens, 5 Hill, 616; *Lambert v.*

People, 76 N. Y. 231; *Re Application of Gardner*, 68 N. Y. 467.

Mandamus issues only to compel the recognition of a clear legal right or the performance of a legal duty; it does not issue so long as the right or the duty is disputed or doubtful.

People v. Lane, 55 N. Y. 219; 2 Jacob & Chaney's Dig. (Mich.) pp. 102, 103, § 14; *Peck v. Kent County Supra*, 47 Mich. 477.

Nor will courts by mandamus compel delivery of books and papers when there is any doubt as to the title to the office, and will send the relator to his quo warranto to try the right.

High, Extr. Legal Rem. § 77; *People v. Kilguff*, 15 Ill. 492; *People v. Head*, 25 Ill. 825.

The Constitution made provision that Johnson might be suspended by the governor, for cause. "This," says the supreme court of Oregon (*Biggs v. McBride*, 5 L. R. A. 115, 17 Or. 640), "clearly implied that he could not be removed at the mere will of the governor, or without a cause."

It must be done upon notice to the delinquent of the particular charges against him, and an opportunity be given him to be heard in his defense.

Dullam v. Willson, *supra*; *State v. Hawkins*, 44 Ohio St. 98; *People v. Canal Appraisers*, 73 N. Y. 445; *People v. New York*, 19 Hun, 441.

Mr. W. B. Lamar, Atty-Gen., contra:

The governor had the right and power to suspend Johnson for the cause he assigned—"neglect of duty in office," and no previous notice is required by the Constitution to be given to Johnson before the act of suspension. Such act of suspension is the exercise of executive discretion, is a political act of a co-ordinate department of the government; and this court will not review the act of the governor. The power thus exercised by the governor is administrative, and not judicial. If notice is required, enough is disclosed by the writ herein to justify the court in granting the relief prayed. Officers are presumed to do their duty, and if notice is required, and was not given, it is matter of defense to respondent therein.

Donahue v. Will County, 100 Ill. 94; *State v. Hawkins*, 44 Ohio St. 98; *State v. McGarry*, 21 Wis. 496; *State v. Prince*, 45 Wis. 610; *Keenan v. Perry*, 24 Tex. 253; *State v. Doherty*, 25 La. Ann. 119; *Taft v. Adams*, 8 Gray, 126; *Ex parte Wiley*, 54 Ala. 226; *Thompson v. Holt*, 52 Ala. 491; *State v. Frazier*, 48 Ga. 187; *Pattison v. Vaughan*, 39 Ark. 211; *State v. Drew*, 17 Fla. 67.

Notice to Johnson was not necessary.

Ex parte Wiley, supra.

Mandamus is the only adequate remedy in this case, because it is the only speedy method of placing the office, books, etc., in the possession of Gillen.

State v. Saxon, 25 Fla. 793; *State v. Crawford*, 14 L. R. A. 253, 28 Fla. 441; *Thompson v. Holt, supra*; *State v. Jaynes*, 19 Neb. 161; *State v. Meeker*, 19 Neb. 444; *State v. Trenton Board of Health*, 49 N. J. L. 849; *State v. Hudson County Chosen Freeholders*, 85 N. J. L. 269; *State v. Sherwood*, 15 Minn. 221; *State v. Clarke*, 52 Mo. 508; *Harwood v. Marshall*, 9 Md. 83; *People v. Head*, 25 Ill. 825; *State v. Dushman*, 39 N. J. L. 679.

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The attorney general is the proper relator herein. Gillen is not a necessary party.

Atty-Gen. v. Lawrence, 111 Mass. 90; *State v. Wilmington Bridge Co.* 3 Harr. (Del.) 312; *Walter v. Belding*, 24 Vt. 658; *State v. Crawford, supra*.

Raney, Ch. J., delivered the opinion of the court:

The governor, the administrative officers of the executive department, justices of the supreme court, and judges of the circuit court are liable under section 29, article 8, "Legislative Department," of the Constitution of 1885, to impeachment for any misdemeanor in office; but by section 15, article 4, "Executive Department," "all officers that shall have been appointed or elected, and that are not liable to impeachment, may be suspended from office by the governor for malfeasance or misfeasance or neglect of duty in office, for the commission of any felony, or for drunkenness or incompetency, and the cause of suspension shall be communicated to the officer, and to the Senate at its next session. And the governor by and with the advice of the Senate may remove any officer not liable to impeachment for any cause above named. Every suspension shall continue until the adjournment of the next session of the Senate, unless the officer suspended shall upon the recommendation of the governor be removed; but the governor may reinstate the officer so suspended upon satisfactory evidence that the charge or charges against him are untrue. If the Senate shall refuse to remove or fail to take action before its adjournment, the officer suspended shall resume the duties of the office. The governor shall have power to fill by appointment any office, the incumbent of which has been suspended. No officer suspended who shall under this section resume the duties of his office shall suffer any loss of salary or other compensation in consequence of such suspension. The suspension or removal herein authorized shall not relieve the officer from indictment for any misdemeanor in office."

Tax collectors are county officers, and are chosen by the duly qualified elector of each county, and their term of office is two years. Const. art. 8, § 16. All county officers continue in office until their successors are duly qualified. Art. 16, § 14. The governor is authorized to fill vacancies. *Executive Communication & Advisory Opinion*, 25 Fla. 427. The present term of respondent expires with the commencement of the next regular term, on the first Tuesday after the first Monday in the coming January, A. D. 1893. Art. 18, §§ 10, 14.

Tax collectors being within the policy of section 15 of article 4, of the Constitution set out above, the construction of such section, to the extent of the questions presented by the record, is necessary. There are two contentions on behalf of respondent which will be disposed of primarily. The first is: That the power of suspension given to the governor cannot be exercised by him until there has been an ascertainment "by the judgment of the courts or some other tribunal possessed of

judicial power," of the existence of one or more of the causes for which suspension is authorized by the designated section. The power to make the inquiry and decide upon the existence of that which is "within the legal quality of wrong" for which suspension may be inflicted, is claimed to be judicial in its nature, and not within the official attributes of the governor. Our judgment is that whether the power be strictly judicial, or, on the contrary, administrative in its character, it exists in the governor. Moreover it is indisputable that if there is an adjudication anywhere, which, under a constitutional provision professing, like ours, to give the power of suspension or removal to a governor or other executive or administrative functionary, holds that such functionary has not the power to inquire into and decide upon the existence of the cause of removal, it has not been presented by counsel; nor has one been found by us in our own researches.

The last observation and the importance of the principle involved necessitate a presentation of the authorities relied upon by counsel for respondent. We will consider them in the order in which they appear in the brief. The decision in *State v. Pritchard*, 86 N. J. L. 101-119 (cited as *Police Commissioners v. Jersey City*, 86 N. J. L. 112, 118,) is, as summarized in the headnotes, (1), that the right to remove a state officer for misbehavior does not appertain to the executive office; that such act is judicial, and belongs to the court of impeachment (2), certain police commissioners of Jersey City, appointed by statute, having been convicted upon indictment of conspiracy to cheat the city, and the governor having declared their offices to be thereby vacated, and having appointed their successors, it was held that the executive action was illegal and void. The opinion clearly shows that no provision of the Constitution, nor of any statute, professed to give the governor the power of removal or suspension, and that the law did not give the conviction the effect of forfeiting the office, but that under the Constitution the jurisdiction to vacate the office was in the court of impeachment, in which the Constitution invested a part of the judicial power of the state, the Senate having the power of trial, and the Assembly the right to impeach. Another case cited is that of *Dullam v. Willson*, 53 Mich. 392, 51 Am. Rep. 128, decided in the year 1884, where the removal was for "official misconduct and habitual neglect of duty." By an amendment made in 1862 to the Michigan Constitution, it was ordained: "The governor shall have power, and it shall be his duty, except at such times as the Legislature may be in session, to examine into the condition and administration of any public office, and the acts of any public officer, elective or appointed, to remove from office for gross neglect of duty or for corrupt conduct in office, or any other misfeasance or malfeasance, either of the following state officers, to wit: the attorney-general, . . . or any other officer of the state, except legislative and judicial, elective or appointed, and to appoint a successor for the remainder of their respective unexpired term of office, and to

report the cause of such removal to the Legislature at its next session." The opinion delivered by Judge Champlin holds unequivocally that the power of removal can be exercised only for the specific causes mentioned in the amendment, and upon specific charges of the particular acts relied on to make out the causes, and upon reasonable notice and opportunity for a hearing, and that the governor has judicial power to examine into and pass upon the charges. He says: "It is only when the causes named exist that the power conferred can be exercised. It follows as a necessary consequence that the fact must be determined before the removal can be made; . . . and the first question is, What is the proper tribunal in which such facts are to be ascertained. In my opinion this provision of the Constitution requires no legislation to make it effective. Read in the light of the history of the times, and the surrounding circumstances when it was adopted, the grant of power is to the governor, coupled with the duty enjoined to examine into the acts of any public officer, and to remove from office for gross neglect of duty or for corrupt conduct in office, any of the officers specified. The amendment for this purpose clothes him with judicial power. It is implied in the grant, and without it the grant would be nugatory and ineffectual to accomplish the purpose for which it was given." Again he says that the amendment, in effect, gives the governor "the right to try the question whether the officer is guilty or not, and to remove him from office." There is in the opinion nothing inconsistent with these views. At the foot of it we find the following: "Sherwood, J. concurred. Cooley, Ch. J.: I concur, both as to the right of the respondent to be heard upon charges, and as to the power of the governor under the Constitution to decide upon the charges." Then follows the opinion of the fourth judge, Campbell, and he alone asserts the view that any court proceeding was necessary; and whereas he concurs with the other judges in a judgment for the respondent on the ground that respondent had had no notice or opportunity for a hearing, still his views affirming the necessity for a proceeding in court are entirely antagonistic to those as to the sole power of the governor to determine the existence of the cause for removal, asserted by the court through a majority of its judges, and for which the adjudication is an authority. Of the other case relied on in this connection, *Page v. Hardin*, 8 B. Mon. 648, it is only necessary to say that, like the one from New Jersey, *supra*, there was no pretense of grant of power of removal or suspension, to the executive; and, considering the differences of organic law, its conclusion that the power of removal was confined to the court of impeachment is, like that in the New Jersey case, not in conflict with the judgment of the majority of the Michigan court in *Dullam v. Willson*. Viewed in the light of the designated difference in the Constitutions of Michigan and those of New Jersey and Kentucky, there is no real contrariety of views or judgment to be found in the opinions of the three courts, excluding, of

course *Judge Campbell's* opinion as to the necessity for action by a court where there is a special grant to the governor of power to remove as in Michigan.

That the grant of such a power as has been conferred upon the governor by the section under consideration invests him with the power to investigate, and to decide as to the existence of any of the causes for which a suspension of an officer may be made, seems to us beyond controversy in the light of common reason; which it is upon the authorities. Had it been the purpose that the suspension should take place only upon the ascertainment by a court, or other distinct tribunal, of the existence of the cause for suspension, it doubtless would have been made the necessary duty of the governor to suspend upon such ascertainment, or such ascertainment would have given the effect of working, *ipso facto*, a suspension. It would not have been left to the discretion of the governor to suspend or not, after the supposed tribunal had made its finding; nor would such finding have been subjected to the review and reversal which must be, and as we understand is conceded to be, reserved to the governor in the power "to reinstate the officer so suspended, upon satisfactory evidence that the charge or charges against him are untrue." Certainly the only status which could be claimed for such court or tribunal would be that of merely an advisory body, and the governor would have an appellate or supervisory, but not an original, jurisdiction to ascertain the truth of the charges. It is moreover, a fact that the Convention of 1885 rejected the following propositions: One, that county offices should be removed for incompetency, willful neglect of duty, malfeasance, misfeasance, drunkenness, gambling and any violation of the criminal laws of the state, upon conviction in the circuit court after indictment by the grand jury of the county, the officer to be suspended from the performance of his duties upon the filing of the indictment, and the governor to appoint a person to perform the duties of the office pending the judicial proceedings, and with further power in the governor, when no grand jury was in session, to suspend the officer charged with such offenses, if he should think a case was made upon the papers presented to him. Another, that all officers not liable to impeachment might be suspended or removed from office by the executive in such manner, and for such causes, as might be prescribed by the Legislature; and another, that the county commissioners should have the power to suspend county officers for habitual drunkenness, neglect of duty, incompetency, and the commission of felony; the board to give notice of the charge and of the time and place of trial, and to declare the office vacant if the charge was sustained on the trial, and the governor, thereupon, to order an election to fill the vacancy; and such trial to be within thirty days from service of the notice. And another, that the suspension by the governor should be upon a recommendation of the grand jury of the county, setting forth the charge against the officer; and still another, that the suspension should

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be after conviction by due course of law. *Vide Journal of Constitutional Convention of 1885*, pp. 119, 120, 134. The conclusion that the intention was to lodge in the chief executive, and in him alone, the exclusive power to investigate and decide, is to our minds irresistible when we consider the express grant of the Constitution to suspend for cause and reinstate, and the rejection of propositions to give the power of trial to other tribunals, including the courts.

The authorities are all to the effect that a grant of the power to remove either for cause or at discretion, carries with it the exclusive power to hear and decide; and whereas the courts are entirely powerless where the power is discretionary, they are equally so where it is for cause, if the grantee of the power acts within its limits, and upon notice, if notice is required; if the removal is for a cause designated by or following within the grant, the grantee or depository of the removing power is the sole judge of the sufficiency of the evidence to justify the removal. That such is the case where the power is discretionary, is settled by this court in *State v. Ledwith*, 14 Fla. 220. In *State v. Doherty*, 25 La. Ann. 119, where the executive power of removing the officer was "for refusing or failing to do his duty as prescribed by this Act," it was said: "The grant of power to the executive to remove an officer for a certain cause implies authority to judge of the existence of the cause. The power vested exclusively in executive discretion cannot be controlled in its exercise by any other branch of the government." In *State v. Hawkins*, 44 Ohio St. 98, the decision was that where charges embodying facts which, in judgment of law, constitute official misconduct, are preferred to the governor, of which notice is given the members charged, and he acting upon the charges so made removes them from office, his action is final and cannot be reviewed or held for naught by the courts on a proceeding in quo warranto whether he erred or not in exercising the power conferred upon him. And in *Keenan v. Perry*, 24 Tex. 253, where the governor was given power of removal for certain enumerated causes, the decision was that no principle is more firmly established than that where a special and exclusive authority is delegated to any tribunal or officer of the government, and no mode of revising his decision by appeal or otherwise is provided by law, his action is final and conclusive of the matter, and the law makes him the sole judge of the existence of the cause of removal. Dixon, *Ch. J.*, speaking for the court in *State v. McGarry*, 21 Wis. 496, a quo warranto proceeding, where a statute gave a board of supervisors power to remove for incompetency, improper conduct, or other cause satisfactory to such board, said: "We are clearly of opinion that the power of the board is absolute and its determination final when acting within the scope of the power. The board may remove for incompetency, improper conduct or other cause satisfactory to the board. By 'other cause' we understand other kindred cause showing that it is improper that the incumbent should be retained in

office. If the board should attempt to remove him for some cause not affecting his competency or fitness to discharge the duties of the office, that would be an excess of power, and not a removal within the statute. It would be equivalent to removing him without assigning any cause, a merely arbitrary removal, which the statute does not authorize. The cause must be one which touches the qualifications of the officer for the office, and shows he is not a fit or proper person to perform the duties; and when such cause is assigned, the power to determine whether it exists or not is vested exclusively in the board, and its decision upon the facts cannot be reviewed in the courts. The only question of judicial cognizance is whether the board has kept within its jurisdiction, or whether the cause assigned is a cause for removal under the statute." See also *State v. Watertown*, 9 Wis. 254; *State v. Prince*, 45 Wis. 610; *State v. Frazier*, 48 Ga. 187; *Patton v. Vaughan*, 89 Ark. 211; *Donahue v. Will County*, 100 Ill. 94; *Ex parte Ramsay*, 18 Q. B. 178.

The contention that the power of suspension cannot be exercised by the governor for the reason that it is judicial, is clearly untenable. It is true that the second article of our organic law divides the powers of government into three departments. Legislative, executive and judicial, and declares that no person properly belonging to one department shall exercise any powers appertaining to either of the others except in cases expressly provided for by this Constitution. The Constitution of Michigan contained a similar provision, (Charters and Constitutions of U. S. 996) and vested the judicial power in designated courts (Id. 1001); and the amendatory provision, set out above, was added, not to the executive or judicial articles or departments, but to the "Impeachments and Removals from Office" article, and the supreme court of that state held, in *Dullam v. Willson*, *supra*, that it was a judicial power, but was to be exercised, as indicated, by the governor. If the framers of our Constitution are, as claimed by counsel, to be charged with notice of this decision, when acting in convention, they must be accorded a knowledge of the conclusions of the court, which both affirmed the validity of a grant like that made to our chief executive, and held that the judicial power to hear and decide was implied in the grant; and the ordinary professional and lay judgment must be that the makers of our Constitution based their action upon the adjudication which sustained their work, rather than on a dissentient view which is entirely fatal to its efficiency. There are authorities which hold and with force, that such power when vested in a functionary of the executive department of the government is not judicial in its nature. *State v. Hawkins* and *Donahue v. Will County*, *supra*. It is, however, entirely unnecessary to ascertain whether the nature of the power is strictly judicial, or quasi judicial, or administrative, or what is its precise classification, since we are altogether satisfied that it is not a power given to the courts by the fourth, or judi-

ciary, article, which provides that the judicial power of our state shall be vested in the courts there designated. If the power is judicial in its character, the fact nevertheless is that it has been given to the governor by the section of the executive article under discussion, and not to the courts, and the governor exercises it as a member of the executive department of the government, and not as a court, or member of the judiciary department; and the courts enumerated in the judiciary article, sections 1 and 34, as the depositaries of the judicial power of the state, cannot exercise it any more than they can the power of trying an officer under impeachment; and for any such court to attempt it would be a no less bald usurpation of the constitutional power of the chief executive, than an attempt to entertain an impeachment trial would be a lawless assumption of the exclusive functions of the Senate, under the 29th section of the legislature article, to try impeachments.

II. The second of the questions claiming primary consideration is that of the necessity for notice to the officer, of the charges, and an opportunity for a hearing, before the suspension. The alternative writ does not allege such notice or hearing (*King v. Gaskin*, 8 T. R. 209), and hence it is insufficient if the notice is necessary.

Under the Constitution of 1868 all executive and judicial officers, except the governor and lieutenant-governor and constables, were appointed by the governor, or by him with the concurrence of the Senate. The governor, lieutenant-governor, members of the cabinet, judges of the supreme and circuit courts, were subject to impeachment, the trial being by the Senate, and removal from office following conviction. Legislative Department, art. 4, § 29. The same section provided that all other officers who should have been appointed by the governor, by and with the advice of the Senate, might be removed from office "upon the recommendation of the governor and consent of the Senate." The 18th section of the fifth, or executive, article made assessors of taxes and collectors of revenue, who were appointed by the governor, with the consent of the Senate, and whose terms were two years, removable upon the recommendation of the governor and consent of the Senate, and ordained that county treasurers, county surveyors, superintendents of common schools and county commissioners, whose terms were each two years, were subject to be removed by the governor "when in his judgment the public welfare will be advanced thereby; *provided*, no officer shall be removed except for willful neglect of duty, or a violation of the criminal laws of the state, or for incompetency." Justices of the peace were appointed for four years, and were removable by the governor "for reasons satisfactory to him." County judges, state attorneys, sheriffs, and clerks of the circuit court were appointed in the same manner, but for four years (Judiciary Article, §§ 9, 10), there being, however, no provision as to their removal other than in section 29 of article 4, *supra*. *State v. Ledwith*, *supra*.

Such, as to the subject in hand, was the condition of the organic law which the Convention of 1885 was called to revise. Revision was the purpose of the convention, and it so understood. Journal, p. 81; *State v. George*, 23 Fla. 585. It is plain that in some cases the old instrument gave the governor and Senate a joint power of removal that was entirely discretionary (*State v. Ledwith*), and in others this power was in the governor alone and for cause, whereas, in the case of justices of the peace it was a matter of his sole and unlimited official discretion. That it is held by authorities of high character that the power to remove an officer for cause can be exercised only after notice and hearing, is unquestionable. *King v. Gaskin*, *supra*; *Reg. v. Canterbury*, 1 El. & El. 545; *Dullam v. Willson*, *supra*; *State v. St. Louis*, 90 Mo. 19; *Fild v. Com.* 82 Pa. 478; *State v. Bryce*, 7 Ohio, 82; *People v. Whitlock*, 92 N. Y. 191; *Biggs v. McBride*, 17 Or. 640, 5 L. R. A. 115; *Mechem*, Pub. Off. § 454. No notice is necessary either where the officer's tenure is at the pleasure of the appointing power, or where he holds for a particular term, and the power of removal is discretionary. *Mechem*, Pub. Off. § 454; *State v. Stevens*, 46 N. J. L. 844; *People v. Whitlock*, *supra*. Of course the authority which lawfully creates an office has full power to make the incumbent removable at the mere will of the appointing power, or for cause. *State v. Ledwith*, *People v. Whitlock*, *State v. Stevens*, *supra*; *Mechem*, Pub. Off. § 454.

There is, however, authority which holds that no notice is necessary even where the power of removal is limited to designated causes. *State v. McGarry*, *supra*. *Mechem* also puts this construction on *Putton v. Vaughan*, 87 Ark. 211, and *State v. Doherty*, 25 La. Ann. 119.

From what is said in the next preceding paragraph it necessarily follows that it was entirely competent for the framers of the organic law to have prescribed whatever conditions as to removal or suspension may have seemed advisable, and the adoption of them by the people in ratifying the Constitution would have made them the law of the land: and no incumbent of the office could be heard to complain of their enforcement. It is, moreover, altogether clear that the governor has not been given any sole power of removal. Whereas he may suspend an officer from the performance of the functions of his office until the Senate shall act at its next session, he has no exclusive power to remove him or deprive him of the future emoluments of his office. All such power existing under the former Constitution has been taken away, and the function of the governor in a recess of the Senate is limited and clearly defined. Where, in the performance of the duty enjoined upon him by the mandate to "take care that the law be faithfully executed" (Const. 1885, art. 4, § 6), he, in the exercise of a fair and just official judgment, finds that there is the misfeasance or malfeasance or neglect of duty in office, or the drunkenness or incompetency which, in the light of the public good, requires the

removal of the officer, or where there has been the commission of a felony, the Constitution contemplates that the suspension shall be made. And though this power of suspension might have been bestowed without any right of hearing in the officer, or with the right of hearing before there could be any exercise of the power, neither course has been pursued. The provision that the governor "may reinstate the officer so suspended upon satisfactory evidence that the charge or charges against him are untrue," was not intended to merely give an arbitrary or willful discretion to the executive to make inquiry or not as might please a caprice or a prejudice, but it was both to impose upon him the duty of hearing evidence upon the charge and to secure to the suspended officer the constitutional right to be heard by the governor upon the charges which the latter has communicated to him upon suspending him. It is as much the duty of the governor on suspending an officer to notify him of the cause of the suspension, or charge upon which he has been suspended as it is to suspend when the facts of a particular case, viewed in the light of the public weal, demand removal; or as it is to refuse to suspend when they do not seem to demand removal or reinstate when under a misapprehension he may have erroneously suspended an officer. By this provision last quoted above the officer's right to a hearing has been postponed till after the suspension. This is one of the conditions upon which he accepts the office, and it is as obligatory upon him as are those as to age, residence, or bond, or any other which the Constitution or any valid statute may prescribe. That a governor may give notice of the charges before suspension, does not defeat the plain policy of the Constitution not to require him to do so, nor does it relieve him from the specific duties imposed by that instrument in this matter. It cannot be denied that there may be cases in which the public interest would suffer grievous detriment by postponing the suspension till after the hearing. The hearing contemplated, though its regulation is left to the chief executive, (at least until the law-making power shall act,) is a full and fair hearing, and often will take much time. It is always to be presumed that he will not hesitate to reinstate at any time, at least in the recess of the Senate, where it may be shown that he has erred in the act of suspension. This is, of course, a consideration which the people have confided to the conscience of the executive under his responsibility to them, yet it is patent that the exercise of the executive power to reinstate implies the status of suspension in the officer.

In reaching this conclusion we have not omitted to give serious consideration to the officer's property rights in his office; the right to its tenure and the enjoyment of its profits and honors against all unlawful invasion. Of course he is a public agent or servant, and has no such title to his office as prevents the power which gave it from terminating it or changing it. He holds subject to the law of the land as to its termination, modification, and as to suspension

or removal therefrom. *State v. Ledwith*, *State v. Hawkins*, *State v. Stevens* and *Donahue v. Will County*, *supra*; *Taft v. Adams*, 3 Gray, 127. So long as the governor acts within the limits of his power the courts are powerless. The Constitution has made the Senate the sole check upon any erroneous action on his part. Any mere error of judgment, whether free from or attended by improper motive, is beyond our cognizance and not merely because, as in most of the adjudicated cases, there has been given no power to any tribunal to correct or arrest the effect of his error, but for the reason that a branch of the legislative department has been given that express power.

Under Rev. Stat., § 154, subsec. 6, electors had the right to pay poll taxes on Saturday, the third day of September, 1892, to qualify them to vote at the election of October 4 of the same year; and whether or not the collector was guilty of neglect of duty in not receiving the taxes as alleged in the alternative writ, was a question for the governor's decision. Rev. Stat., § 343, cannot be made to control it, as a matter of law, because the thirtieth day before the election fell on Sunday. The latter section required the collector to furnish the supervisor of registration, thirty days before the election, a list of all persons who had paid their capitation taxes for two years next preceding the year of the election.

III. It is also argued that the power of suspension cannot apply where, as in the case at bar, the term of the officer suspended will expire before the next session of the Senate, and in support of the point it is urged that the officer cannot in such cases be "restored to the right to resume the duties of the office," unless the governor should convene the Legislature in special session; and, further, that it enables him to practically defeat the elective system. If this position is correct, then the power of suspension does not apply to those officers whose term is only two years, except for the period, never more than about three months, which may antecede a session of the Legislature; nor will it apply to a four-year officer after the second session of the Legislature during any gubernatorial term. This would result from the prescribed commencement of the terms of officers and from the fixed time of the meeting of the biennial sessions of the Legislature. Is it to be supposed for a moment that the intelligence of the constitutional convention was oblivious to the fact that, under the general effect of the organic law they proposed to the people, many suspensions might necessarily occur of officers whose terms would expire before the next ensuing session of the Legislature, or that the people did not so understand when they ratified it? Both the members of the convention and the electors are presumed, and conclusively, to have understood it, and yet we find that the power of suspension has been given without any limitation to periods avoiding the result referred to. The purpose of the grant of power was good government; it was intrusted to the governor because the people believed the public welfare demanded it. They knew

that there could be no resumption of duties where the officer's term would expire, and that in such cases the refusal or omission of the Senate to remove would merely preserve the officer's right to the compensation he would have earned had he not been suspended. Whatever defeat of the elective system it involves, was intended; it, however, in its theory, involves none, as the delinquencies falling within the enumerated causes of suspension must be held to be unanticipated by the people in any particular instance, and wherever they occur and the suspension or removal takes place, the expressed will of the people has been enforced by the suspension and removal. If it be that a governor may err in executing the powers, it must be admitted that the convention and the people were well aware that this might be, yet they intrusted him with the power, and they made it applicable as well when the officer's term would expire before the next Legislature as when it would not. We may remark here that we are aware that a similar argument is used by Judge Campbell in his opinion referred to above; but it must be remembered that he was contending against the power of the governor to remove on his own action, and this argument, like his petition, finds no support; but, on the contrary, condemnation in the conclusion of the majority of the Michigan court.

IV. Another position is, in effect, that the governor has, as shown by the terms of Gillen's commission, extended Gillen's appointment into the term of Johnson's successor, and in doing this he has also attempted to fill a term which does not become vacant until after the expiration of his own official life. Gillen's commission bears date November 26, 1892, and appoints him tax collector in and for Duval county until the adjournment of the next session of the Senate. The terms of Gillen's commission cannot extend his tenure beyond the actual period, whatever it may be, which the law attaches to the appointment; nor can any act of the governor impair the exclusive authority of his successor as to any official function. Any expression further than that the appointment of Gillen is, on the pleadings before us, valid for all the purposes of this case as it now stands, would be mere *obiter* and will not be indulged in. The case of *Hench v. State*, 72 Ind. 297, does not even tend to sustain the theory that Gillen's commission is void if it be he cannot legally hold for the time it specifies, but rather shows that it is valid for so long as the law will entitle him to hold; and such, in our judgment, is the legal effect of the commission. *Advisory Opinion as to Attorney-General*, 14 Fla. 277.

V. The only points remaining to be considered are those as to the propriety of the remedy invoked, and the absence of Gillen as a party. We will dispose of them in the order stated.

In *Thompson v. Holt*, 52 Ala. 491, Thompson, the appellant, had been duly elected judge of probate for six years, and having duly qualified by taking the oath and giving bond, and having received a commission

from the governor, he entered upon the duties of the office. The law required that judges of probate should give an additional bond whenever the grand jury, in term time, or in vacation three members of the commissioners' court, should, by address to the circuit judge, require it, and it made the failure to execute such additional bond a forfeiture or vacation of the office. It also imposed on the circuit judge the duty of certifying the vacancy to the governor, who was required to fill it. Thompson having during his term of office been required in the manner stated to give an additional bond, and the circuit judge having upon investigation refused to approve a bond, in due form, tendered by Thompson, the judge certified the fact of the vacancy to the governor, who appointed Holt to fill the vacancy. Holt having qualified and been commissioned by the governor to the vacancy, demanded the books and other property of the office, but Thompson refused to deliver, whereupon Holt instituted a statutory remedy given to compel delivery in such cases. The opinion of the supreme court of that state, delivered by Brickell, *Ch. J.*, holds that the giving of the additional bond was a condition upon which the continuance in the office depended, and that the statutory proceeding to compel the transfer of books and other property of a public office, though more summary and less formal, was merely cumulative, and would lie wherever mandamus could be obtained at common law. "A mandamus," says this learned judge, "to compel the delivery of property, could not be invoked when in reality the object was to test the title to the office. If the title was the real question in issue, the courts could not interfere by mandamus, but remitted the parties to quo warranto or other appropriate legal remedy. The relator must have exhibited a clear prima facie title, entitling him to the custody of the property of the office, or the courts would not compel its transfer to him. The same rule must prevail with reference to the statutory proceeding. It cannot be perverted into a method of determining the strength of rival claims to a public office. The complainant resorting to it must show a prima facie title to the office free from all reasonable doubt—a title to which the law attaches the possession of the property of the office, and the right to exercise the functions of the office until in a direct judicial proceeding that title has been vacated. A prima facie title to a public office confers a right to exercise its functions, and a right to the possession of the insignia and property thereof. On this prima facie title the court will compel a delivery of the insignia and property, that the functions and duties of the office may be exercised." It was also held that the action of the circuit judge in refusing to approve the additional bond could not be inquired into collaterally or on the special proceeding to deliver the official property, and the order made on the special proceeding for the delivery of the property was affirmed. "Public officers," says the opinion, "are elective, and the returns of the elections are made to the secretary of

state, on whose certificate the commission originally issues. When subsequently to an election a vacancy occurs otherwise than by resignation, some public officer, ministerial or judicial, acting under the sanction of official oath, is charged with the duty of ascertaining and certifying the fact of vacancy to the governor. On this certificate an appointment is made, when it discloses that the office is vacant. The commission of the governor, whether granted on the certificate of election, or a certificate of vacancy, is the highest and best evidence of who is the officer, until on a quo warranto, or a proceeding in the nature of quo warranto, it is annulled by a judicial determination. It is this commission which imparts to the courts judicial notice and which informs the community who are clothed with official authority and bound to official duty. In a proceeding, whether by mandamus or under the statute, to compel the transfer of property attached to a public office, this commission is a clear prima facie title to the office, on which the courts will proceed without indulging any inquiries behind it, when it is founded on a certificate of election or a certificate disclosing vacancy made by proper authority. Inquiries behind it would generate a controversy as to title to the office, which, as we have already said, cannot be entertained either on an application for a mandamus or in the statutory proceeding. The court must rest on the prima facie title, and award the keeping of the property of the office to this title, for the time being, without adjudicating whether the relator has or has not the actual title."

In *State v. Saxon*, 25 Fla. 792, 796, we said that if the relator gave the bond and qualified and received the commission he had his remedy by mandamus against Saxon to compel him to surrender the custody of the books, files, office room and other property of the office without prejudice to the question of the ultimate right to the office. In *State v. Sherwood*, 15 Minn. 221, 2 Am. Rep. 116, the decision was that upon mandamus at the relation of the holder of a certificate of election to the office of clerk of the district court who has given the bond and taken the oath prescribed by law, the relator is entitled to the seal and other property of the office against one holding by virtue of an appointment till his successor is elected and qualified, and the court will not go behind the certificate of election and try the question whether or not the relator was eligible to such office. These conclusions are affirmed in *Oswell v. Lambert*, 10 Minn. 369; *State v. Jaynes*, 19 Neb. 161; *People v. Kilduff*, 15 Ill. 492; *People v. Head*, 25 Ill. 325; High, Extr. Legal Rem. § 73 *et seq.* See also *State v. Hudson County Chosen Freeholders*, 35 N. J. L. 269.

The case at bar is controlled by these authorities, which are clearly distinguishable from cases cited for respondent: *People v. Stevens*, 5 Hill, 616, where on an attempted election of a clerk by a board of aldermen there was a tie vote, the relator receiving nine votes, and the defendant, the then incumbent, the same number, and it was de-

clared that no choice was made; and the relator, who was seeking by mandamus the books and other official property from the defendant, claimed that one of the aldermen, Osborn, who had voted for the defendant, was not a lawful member of the board, and that consequently he, the relator, had been elected; whereas the defendant claimed there was no election, and the consequent right to hold over until another clerk should be elected and qualify. The majority opinion states, in effect, that the facts showed that the relator proposed to try the title to the office, and "in so doing he must necessarily try the title of Osborn to the office of alderman," and that this could not be done collaterally; and that Osborn being at least a *de facto* officer, his vote was not a nullity, but his acts were valid as to the public. *Re Gardner*, 68 N. Y. 467. Gardner had in 1873 been elected an alderman and had entered upon the duties of his office January 1, 1874, and as alderman was *ex officio* supervisor, and in November, 1875, under a law of that year, one Carr was elected alderman, and one Coates, supervisor, and were in possession of the offices. Gardner claiming that the Act of 1875 was unconstitutional, and complaining that the clerk of the board refused to call his name, or recognize him as a member, asked a mandamus to compel him to do so. *People v. Lane*, 55 N. Y. 217, holds that where one has been installed into an office and is in possession discharging his duties under color of law, and where his right to the office depends upon the construction of a statute so ambiguous as to be difficult of interpretation, the title to the office should not be determined in a proceeding by mandamus instituted by another, who had been removed therefrom and claimed the office, to compel payment to him of the salary, the incumbent of the office not being a party to such proceeding. *People v. Goetting*, 133 N. Y. 569, was also a mandamus by one removed from the office of clerk, against the respondent who had removed him, to compel respondent to recognize him as clerk, and the new appointee was occupying and performing the duties of the office. In these cases there was either no clear prima facie title in the relator or the incumbent was not, and properly could not have been, a party.

In the case at bar there is a clear prima facie title free from all reasonable doubt, in Gillen, and there has been not even an irregularity in the exercise of the exclusive execu-

tive power of suspension and appointment, and the power to suspend is unquestionable. When the power has been executed in due form it is the duty of the suspended officer to cease to exercise the duties of his office, and it is likewise his duty to turn over the books to the appointee commissioned by the governor to perform the duties of the office. If it is not done voluntarily, and there is no remedy to compel it, then nothing but confusion in government will follow. It is a mistake to suppose that mandamus is excluded or avoided by the mere fact that there is another remedy. The law is that there must be another specific and adequate remedy. *Ray v. Wilson*, 29 Fla. 342, 14 L. R. A. 778; *Tapping, Mandamus*, 18, 19; *High, Extr. Legal Rem.* §§ 9, 15-17; *Baker v. Johnson*, 41 Me. 15; *People v. Stevens, supra*; *Harwood v. Marshall*, 9 Md. 83. Mandamus is clearly the only adequate remedy for preventing the confusion alluded to, and particularly as the Senate, and not the courts, is the body to pass upon the correctness of the action of the executive, so long as he keeps within the range of the power confided to him.

2. Gillen is not a necessary party to this proceeding. The state is the real plaintiff here, just as it would be if he, instead of the attorney-general, were the relator. The purpose of the action is to enforce the performance of a public duty, the interest in which is common to the whole community. *State v. Jefferson County Comrs.* 17 Fla. 707; *Hamilton v. State*, 3 Ind. 452; *Pike County v. People*, 11 Ill. 203; *Ottawa v. People*, 48 Ill. 233; *People v. Collins*, 19 Wend. 56; *People v. Halsey*, 37 N. Y. 344; *State v. Marshall County Judge*, 7 Iowa, 186, 202; *State v. Crawford*, 28 Fla. 441, 14 L. R. A. 253.

In *Walter v. Belding*, 24 Vt. 658, where the books of record of a town were wrongfully held by a person claiming to be the town clerk, it was held that the writ of mandamus was the proper remedy, and that the same might with propriety be supplicated by the legal town clerk, but if done by the town agent in behalf of the town, it was no such irregularity as to defeat the proceedings. The attorney-general is a proper representative of the people for instituting these proceedings. It is not an action of replevin for personal property of Gillen, nor an ejectment for his real estate.

The motion to quash, or demurrer, is overruled, and it will be ordered accordingly.

WASHINGTON SUPREME COURT.

J. M. ANDERSON *et al.*, *Appts.*,

v.

George W. CRISP, *Resp't.*

(.....Wash.....)

A contract for the sale of a certain number of "merchantable brick," which are

not yet segregated, but which are to be taken from a kiln containing a larger number, some of which are unmerchantable, does not pass the title although the purchase price is paid.

(November 14, 1892.)

A PPEAL by plaintiffs from a judgment of the Superior Court for Chehalis County in

NOTE—On the question when the title passes upon a sale, see notes to *Farmers Phosphate Co. v. 18 L. R. A.*

Gill (Md.) 1 L. R. A. 767; Lord v. Edwards (Mass.) 2 L. R. A. 519; Dunn v. State (Ga.) 3 L. R. A. 190.

favor of defendant in an action brought to recover possession of certain brick. *Affirmed.*

The facts are stated in the opinion.

Messrs. B. F. Jacobs and Schofield & Schofield, for appellants:

A sale is a contract, nothing less, nothing more; and the same cardinal rule governs in the contract of sale that governs in any other contract, to wit, the intention of the parties.

1 Travis, Sales, p. 2; 2 Kent, Com. p. 468; Campbell, Sales, 1, 2; Blackburn, Sales, Text Book ed. § 91; Newmark, Sales, §§ 1-3; Gardner v. Lane, 12 Allen, 39; Atkinson, Sales, 5; 2 Abbott, Law Dict. 442; Cunningham v. Ashbrook, 20 Mo. 558; Schermerhorn v. Taiman, 14 N. Y. 117; Story, Sales, 1.

And a delivery is not a prerequisite to the passing of the title.

2 Bl. Com. Hammond's ed. 448, 449; Bloxam v. Sanders, 4 Barn. & C. 941.

But delivery is usually looked to as an evidence of the intention of the parties.

Newmark, Sales, § 94, and authorities there cited in *note 1*.

And it is the growing practice of the American courts to let each case go upon its own facts, upon the criterion of the intention of the parties.

Newmark, Sales, § 98; 2 Schouler, Pers. Prop. § 250, and authorities there cited.

And the old rule that title does not pass as long as anything remains to be done on the part of the vendor will not prevail where it is the intention of the parties that the title is to vest immediately in the buyer, notwithstanding something remains to be done on the part of the seller, *a fortiori*, where all that remains to be done is to be done by the buyer.

Newmark, Sales, § 94; Foster v. Ropes, 111 Mass. 10; Lingham v. Eggleston, 27 Mich. 324.

Where the intention of the parties is clearly manifest, that intention is to govern.

Newmark, Sales, § 98; 2 Schouler, Pers. Prop. § 250, and authorities there cited; Hyde v. Lathrop, 3 Keyes, 597; Groat v. Gile, 51 N. Y. 431; Marble v. Moore, 102 Mass. 443; Southwestern Freight & C. P. Co. v. Stenard, 44 Mo. 71, 100 Am. Dec. 255; Terry v. Wheeler, 25 N. Y. 525; Bradley v. Wheeler, 44 N. Y. 501; Dixon v. Yates, 5 Barn. & Ad. 340; Turling v. Baxter, 6 Barn. & C. 360; Winslow v. Leonard, 24 Pa. 14, 62 Am. Dec. 854; Olyphant v. Baker, 5 Denio, 379.

The old rule is not applicable in this action, for the reason that the separating and the counting in this case were to be done by the vendee, and all was done by the vendor that was required or contemplated on his part.

2 Schouler, Pers. Prop. § 254; Cunningham v. Ashbrook, 20 Mo. 553; Crofoot v. Bennett, 2 N. Y. 258; Weld v. Cutler, 2 Gray, 197; Brewer v. Salisbury, 9 Barb. 511; Lamprey v. Sargent, 53 N. H. 241; Wagar v. Detroit, L. & N. R. Co. 79 Mich. 648.

The sale will be sustained without separation where the property is part of a general mass of the same kind and value, and the intention of the parties is to make a complete sale.

Jackson v. Anderson, 4 Taunt. 24; Kimberly v. Patchin, 19 N. Y. 830, 75 Am. Dec. 834; Pleasants v. Pendleton, 6 Rand. (Va.) 478, 18 Am. Dec. 726; Waldron v. Chase, 37 Me. 414, 18 L. R. A.

59 Am. Dec. 56; Lamprey v. Sargent, *supra*; Chapman v. Shepard, 39 Conn. 413; Damon v. Osborn, 1 Pick. 476, 11 Am. Dec. 229; Gardner v. Dutch, 9 Mass. 427; Weld v. Cutler, 2 Gray, 195; Hutchinson v. Com. 82 Pa. 472; Morgan v. King, 23 W. Va. 1, 57 Am. Rep. 683; Newhall v. Langdon, 39 Ohio St. 87, 43 Am. Rep. 426; Carpenter v. Graham, 42 Mich. 191; Wagar v. Detroit, L. & N. R. Co. *supra*; Young v. Miles, 20 Wis. 615, 23 Wis. 643; Galloway v. Week, 54 Wis. 604; Hurff v. Hires, 40 N. J. L. 531, 29 Am. Rep. 232; Watts v. Hendry, 13 Fla. 523; Howell v. Pugh, 27 Kan. 702; Horr v. Barker, 11 Cal. 393, 70 Am. Dec. 791; Anderson v. Lecy, 1 Tex. App. (White & W. Civ. Cas. § 927) p. 520; Long v. Spruill, 52 N. C. 96; Morrison v. Woodley, 84 Ill. 192; Davis v. Budd, 60 Iowa, 144; 1 Travis, Sales, pp. 26, 27, *note*; Lupton v. White, 15 Ves. Jr. 432; Charles Sumner's *note*, Ralston, Sales of Undivided Interest in Pers. Prop. pp. 21-58.

Mr. Austin E. Griffiths, for respondent:

Under the facts in this case there was no sufficient delivery of the brick yet in the yard when the levy was made, and by the great weight of authority replevin will not lie, and the judgment appealed from should be affirmed.

Scudder v. Worster, 11 Cush. 573; Austen v. Craven, 4 Taunt. 643; White v. Wilks, 5 Taunt. 176; Shepley v. Davis, 5 Taunt. 618; Rust v. Davis, 5 Taunt. 623; Hutchinson v. Com. 82 Pa. 480; Hutchinson v. Hunter, 7 Pa. 140; Woods v. McGee, 7 Ohio, pt. 2, p. 27; Dunlap v. Berry, 5 Ill. 327, 39 Am. Dec. 413; Waldo v. Belcher, 33 N. C. 609; Courtright v. Leonard, 11 Iowa, 32; Hahn v. Fredericks, 30 Mich. 223, 18 Am. Rep. 119; Ferguson v. Northern Bank, 14 Bush, 555, 29 Am. Rep. 418; Commercial Nat. Bank v. Gillette, 90 Ind. 268, 46 Am. Rep. 223; Reeder v. Machen, 57 Md. 56; Fry v. Mobile Sav. Bank, 75 Ala. 473; Benjamin, Sales, Bennett's ed. 1888, pp. 279-283, 287-298.

Dunbar, J., delivered the opinion of the court:

It is contended by the appellants that the determining question in this case is whether a sale of personal property constituting a part of a large mass of like property passes title to the purchaser until it is separated from the mass, or in some other way designated or distinguished; and appellants' brief on this proposition is elaborate and painstaking, and would greatly aid the court in investigating this question, did we deem its determination necessary in this cause. The question presented by appellants is a new question in this state, and is an exceedingly important one; and in consideration of its importance, and in consideration of the fact that the authorities are so conflicting, we deem it advisable not to decide it until such decision is necessary to the determination of the cause at issue. We say this because, conceding the force of appellants' argument, this cause, we think, must be distinguished from the cases cited which sustain the rule contended for by appellants, that it is not necessary to separate or distinguish a portion of personal property from the mass which includes it, to pass title to the portion sold. All those cases are based on the supposition that all the different portions of the mass are of

equal value and of uniform quality, so that there is nothing left to be done by either party but to weigh, measure, or count, which acts involve no discretion; that the intention of the parties to the contract is the only thing to be considered, and that, when it can be definitely determined from the terms of the contract that the intention of the parties was to pass the title, the title is held to pass. Or, in other words, we presume they mean to say that, while the separation from the common mass is a circumstance going to show the intention of the parties to pass the title, it is not an essential circumstance. *Kimberly v. Patchin*, 19 N. Y. 880, 75 Am. Dec. 834, is the leading case supporting this rule, and has received much criticism, both favorable and adverse, by courts and text-writers. There it was held, upon a sale of a specific quantity of grain, that its separation from a mass indistinguishable in quality or value, in which it is included, is not necessary to pass the title, when the intention to do so is otherwise clearly manifested. In that case it will be noticed that the goods were indistinguishable in quality or value, and it was upon that particular state of facts that the argument of the court was based. "It is," said the court, "a rule asserted in many legal authorities, but which may be quite as fitly called a rule of reason and logic as of law, that in order to an executed sale, so as to transfer a title from one party to the other, the thing sold must be ascertained. This is a self-evident truth, when applied to those subjects of property which are distinguishable by their physical attributes from all other things, and therefore are capable of exact identification." But the court with great force proceeds to argue that other character of property, such as grains, wines, oils, etc., which are not susceptible of definite description, are not subject to this rule, but that the title to such property can be held to pass by contract without separation or manual delivery, if nothing further remains to be done in regard to it. But it must be admitted that if all the property in the mass is not of equal value something more does remain to be done. Thus, in the case at bar, another element is injected into the contract, and there is a question of relative values to be yet determined. The appellants did not buy a portion of an indistinguishable mass, where all the component parts were of equal value; but their contract called for 162,000 merchantable brick; and the evidence was that the brick that were

deemed unmerchantable were thrown aside and not counted in when they came to haul them. So that it is impossible to determine, before the segregation of the brick, not only what particular brick were sold, but what relative portions of the kiln were sold. And while, as we have said before, it may be conceded that the intention of the parties will be carried into effect, if it can be ascertained, yet under this contract it is impossible to ascertain, not only the particular brick sold, but the actual relative number of brick sold, by reason of the unsettled question of what brick were and what were not merchantable, creating an element of uncertainty in the contract which does not exist in those cases where the vendor sells a certain number of bushels of grain or a certain number of gallons of oil or tons of hay, in an undivided mass, where all the different portions are of equal value. We think to hold that the title passed in this case would be carrying the principles of liberal construction beyond the rule laid down in any of the cases cited by appellants. It is true that some of them were brick cases, similar in most respects to the case at bar, but in none of them did it appear that the brick in the kiln were not of uniform and equal value; and all the American cases were decided on the strength of *Kimberly v. Patchin*, *supra*, and the principles upon which that case was based are thus stated by Mr. Ralston, who is an earnest advocate of what he terms "the new rule." "When the constituent parts which make up a mass are indistinguishable from each other by any physical difference in size, shape, texture, or quality, and the quantity and general mass from which it is to be taken are specified, the subject of the contract is sufficiently ascertained, and the title will pass, if the sale is complete in all its other circumstances." Plainly, the case at bar does not fall within those principles.

This being our view of the law covering this particular case, and there being no conflict in the testimony concerning the fact that it was only merchantable brick that were sold, the appellants could not have been injured by the instruction complained of; for they would not have been entitled to a verdict, in any event. Reaching this conclusion renders unnecessary the investigation of the other questions raised.

The judgment is affirmed.

Anders, Ch. J., and Hoyt, Stiles, and Scott, JJ., concur.

TEXAS COURT OF CRIMINAL APPEALS.

Louis EVERS, *Appt.*,

STATE of Texas.

(.....Tex.....)

1. Insulting language which can reduce a homicide to manslaughter being restricted by statute to that for which the killing

takes place immediately it cannot have that effect where the defendant ignored it and started to go away and committed the homicide only after he had been called back.

2. Proof of the reputation of deceased as a dangerous man is not admissible in favor of one being tried for killing him, where at the time of the homicide deceased had done no act indicating a purpose to harm defendant.

NOTE.—The subject of insanity as affecting criminal liability, which is modified by the Texas Statute, is treated, so far as the right and wrong test is 18 L. R. A.

concerned, in a note to *State v. Harrison* (W. Va.) *ante*, 224, with which, see also *Hornish v. People* (Ill.) *ante*, 237.

3. Proof of the declarations of a cab driver which consisted of calling, "There he goes," as an officer went to arrest a person, is inadmissible.
4. The court should define "temporary insanity," where it has charged under the Texas statute that the guilt of a person who has committed a homicide is to be tried without reference to his drunkenness unless that produced temporary insanity.
5. The fact that one who committed a homicide was temporarily insane when he formed and executed the design to kill another may be taken into consideration under Pen. Code, art. 40a, both to determine the degree of the murder and in fixing the penalty.

(December 3, 1902.)

APPEAL by defendant from a judgment of the District Court for Bexar County convicting him of murder in the second degree and fixing his punishment at forty years' confinement in the penitentiary. *Reversed.*

Defendant, and one, Robert Richter, became involved in a difficulty. On the Sunday morning on which the homicide occurred defendant was drinking and, meeting Richter, they renewed the quarrel and proceeded to fight. They were separated and Richter went home whither defendant subsequently followed him. After some altercation, during which deceased was in his dooryard, and defendant in the street in front of the house, deceased jeered at and taunted defendant and defendant offered to settle with deceased, either peaceably or by fighting with fists or with pistols, and at the same time produced two pistols and offered deceased his choice of them. Deceased refused the offer and after some further talk, defendant in the meantime starting to leave and returning, he drew one of the pistols and shot and killed Richter.

Further facts appear in the opinion.

Messrs. Perry J. Lewis and Denman & Franklin for appellant.

Mr. R. H. Harrison, Asst. Atty-Gen., for the State.

Simkins, J., delivered the opinion of the court:

There are numerous bills of exception and assignments of error, but it will be only necessary to consider the following:

1. The defendant complains that the court refused to charge the jury on manslaughter. The ground relied upon was the fact that Richter, while jeering at and abusing defendant, told him "he didn't know who his father was." If any such remark was made by Richter, it cannot avail defendant, for after it was made said defendant turned and went away, and Richter went into the house, and, according to the same witness, (Flora,) called to him to come back, and shook his fist at him. The statute declares that, to reduce homicide to manslaughter, the killing must take place immediately upon the utterance of the insulting words. Penal Code, art. 598. The insulting language seems to have been disregarded. Defendant drew out of his own witness, Flora, the fact that defendant would not have come back, even after the alleged insult, if deceased had not kept calling him. But, while the

taunts and cries of, "Come back and kill me," of the infuriated Richter may have led to that result, it would be none the less murder on the part of defendant.

2. The court did not err in refusing to permit defendant to prove the reputation of deceased as a violent, dangerous man. If such a character could have been proven, the deceased had certainly done no act indicating any purpose whatever to take defendant's life or do him any harm. He stood in his yard, in shirt sleeves and stocking feet, and according to defendant's own witness, had declined to touch defendant's pistol when defendant proposed to have a combat. Willson, Crim. Stat. § 1054.

3. The court erred in admitting the cry of the cab driver, "There he goes!" referring to the defendant, when the officer went out to arrest him. If the cab driver saw the defendant making his escape, he ought to have been placed on the stand to testify to that fact.

4. There is, however, a serious question presented by the record, which will necessitate a reversal of this cause. The court charged the statute on drunkenness, and then instructed the jury that "the law just quoted places a person charged with crime before the law to be tried without reference to his drunkenness, unless said drunkenness goes to the extent of producing temporary insanity. It is therefore your duty, as a preliminary inquiry, to discover the mental status of the defendant at the time of the homicide." Conceding the charge to be correct so far as it goes, it was manifestly insufficient merely to submit to the jury, without further comment than the charge above quoted, a statute about which there was such uncertainty and diversity of opinion, and let the jury draw their own inference as to its purport and meaning. We think the exception, duly reserved by the defendant, was well taken, to the effect that the court erred in failing to define "temporary insanity," and in failing to charge they could consider it in mitigation of the penalty after they had determined the degree of murder.

The statute on drunkenness (Penal Code, art. 40a) has been twice considered and passed upon by this court, and it was held, as we think, correctly: *First*, that mere intoxication from the recent use of ardent spirits should not excuse nor mitigate the degree or penalty of crime; *second*, that intoxication must go to the extent of producing temporary insanity before it can mitigate the penalty in any crime, or be considered in murder cases to determine the degree of murder. *Clor's Case*, 26 Tex. App. 624; and *Evans' Case*, 29 Tex. App. 539, in which the case was heard on habeas corpus on a state of facts different from that here presented. The difficulty, however, seems not to be so much in the terms of the statute as in the reluctance of the trial courts to hold that one grossly intoxicated, or temporarily insane from intoxication, is any more liable for punishment for crime than one insane from any other cause. The history of the statute is well known. Some ten years ago one Porter, a traveling actor, was shot down without provocation in an eastern town in this state. The defendant was tried and acquitted on the ground of temporary insanity, caused by

drunkenness. The Legislature, assembling shortly after, passed this Act: Article 40a: "Neither intoxication, nor temporary insanity of mind produced by the voluntary recent use of ardent spirits, shall constitute any excuse in this state for the commission of crime, nor shall intoxication mitigate either the degree or penalty of crime; but evidence of temporary insanity produced by such use of ardent spirits may be introduced by the defendant in any criminal prosecution in mitigation of the penalty attached to the offense for which he is being tried, and, in cases of murder, for the purpose of determining the degree of murder of which the defendant may be found guilty." By its terms there were two purposes clearly intended: *First*, to eliminate mere intoxication as any defense in any criminal prosecution whatever, regardless of the constituent elements of the crime; *second*, to prevent temporary insanity from being a defense to any crime, but permitting it to be introduced in murder cases to determine the degree, and in all criminal prosecutions to mitigate or lessen the penalty.

The object of the statute was to prevent parties from pleading their own wrong, after voluntarily placing themselves under the influence of drink, and becoming a terror to the community, or a menace to other citizens, whose feelings are often outraged, and their lives endangered or destroyed, by the insolence and recklessness of such intoxicated persons. The underlying principle of the statute is that laid down by common-law writers, to wit, that a sane man, who voluntarily puts himself in such a condition as to have no control over his will or actions, must be held to intend the consequences springing therefrom. Puff. de Jur. Nat. lib. 8, chap. 6, § 4; 2 Co. Litt. 247a; 1 Hale, P. C. 82; 4 Bl. Com. 20.

There is no question that, under the common law, intoxication was not deemed a defense for any criminal act, even though done while a person was insensible to his surroundings, unconscious of his acts, and had no memory or understanding; (*Reniger v. Fogossa*, 1 Plowd. 19; *Beverley's Case*, 4 Coke, 123; *Pirtle v. State*, 9 Humph. 668;) and such was the law in England and America as late as 1835, (*State v. John*, 80 N. C. 883; *State v. Turner*, 1 Wright (Ohio), 81; *Cornwell v. State*, 1 Mart. & Y. 147; *Rea v. Carroll*, 7 Car. & P. 145.) During the past sixty years there has been a persistent, and in the English and many of the American courts a successful, effort to ingraft upon the common-law doctrine the proposition that drunkenness ought to be admitted in evidence, not to excuse, justify, or mitigate the crime, but simply to throw light upon the mental status of the offender, to enable the jury to find out what crime had been committed; or, rather, by proving the absence of the necessary constituents of the crime, (such as malice, premeditation, intent, etc.,) to show that no crime was committed. At first the proposition was only insisted upon and applied in murder cases, or assaults with intent to murder, but the doctrine was soon pushed out to its logical results, and is now applied by some courts to every species of crime which has an intent. It is now generally held that intoxication is admissible as evidence in all the states where murder is divided into degrees, not to

deny the guilt, but to determine the degree. Wharton, Crim. Law, § 51. But this innovation on the common law was vigorously opposed by the early judges. It was, indeed, by its advocates admitted to be dangerous doctrine, and one that ought to be received with caution. Id.; *State v. John*, 80 N. C. 880; *Pirtle Case*, *supra*. Mr. Wharton says: "It has been held with marked uniformity in this country that voluntary drunkenness is no defense to the *factum* of guilt. The only difference has been the extent to which evidence of drunkenness is received to determine the exactness of intent and the extent of deliberation." Wharton, Crim. Law, § 49.

There has been no subject upon which courts have so widely differed, or in which the same courts have so often changed their views, as upon this question. A fair illustration of this is shown in the Tennessee decisions referred to in the *Lyle Case* (Tex. App.) 19 S. W. Rep. 908, which case, in so far as it conflicts with this case, is overruled. In 1827 the law was laid down, in accord with the best authorities, that insanity resulting from long-continued drunkenness is an excuse for crime; but insanity, the immediate result of intoxication, is not. *Cornwell Case*, Mart. & Y. 147; *Bennett Case*, Id. 188. But in 1843 the court in a murder case laid down the doctrine in all its fullness: "That, although drunkenness, in point of law, constitutes no excuse for crime, still when the nature and essence of a crime are made by law to depend on the peculiar state of defendant's mind at the commission of the act, drunkenness is a proper subject of consideration. The question is, What is the mental status at the time of the act, and with reference to the act? This is not holding that drunkenness is an excuse, but it is an inquiry whether the very crime defined by law has been in fact committed. If the mental state required by law to constitute the crime be one of deliberation and premeditation, and drunkenness or other cause excludes the existence of such mental state, then the crime is not excused by the drunkenness or such other cause, but has not in fact been committed." *Swan's Case*, 4 Humph. 186. This reasoning authorized the introduction of drunkenness in any degree in all cases of crime. But in 1849, in the *Pirtle Case*, 9 Humph. 668, the same court expressly asserted the common-law doctrine to be correct, and expressly limited the doctrine announced in *Swan's Case* to murder cases only, and declared that this was only admitted in Tennessee because of the statute of that state dividing murder into two degrees; and also asserting that the drunkenness must be excessive, and that it can only be introduced to reduce the degree of murder, but not to make it manslaughter. But, while the court adhered to common law, it also indulged in reflections that tend to sustain the propositions of the *Swan Case*, and question the correctness of the common law. *State v. Cross*, 27 Mo. 332. In the following year the question came again before the Tennessee courts in the case of *Haile v. State*, 11 Humph. 154, and the courts sustained the views announced in *Pirtle v. State*, but held that the degree of drunkenness which may be considered to shed light on the mental status need not be that excessive intoxication which

renders a party incapable of a criminal intent, but that any state of drunkenness is a proper subject of inquiry. So it appears that in Tennessee drunkenness to any extent is admissible only in murder cases, and for the sole purpose of reducing the crime, if at all, to murder in the second degree, but not to manslaughter, or any lower degree of crime. *Cartwright v. State*, 8 Lea, 377. The statute is right in excluding mere drunkenness as evidence in criminal cases. But the law laid down by the *Pirtle Case* seems to have been the law in Texas prior to the statute, as declared by this court in *Colbath's Case*, 4 Tex. App. 76, and in *McCarty's Case*, Id. 461.

It is certainly difficult for an ordinary mind to understand how drunkenness is admissible to shed light on the mental status of the offender, and yet not mitigate his offense; how it may be a circumstance to be considered by the jury in determining the intent, and yet not be an excuse for crime, if taken into consideration at all. It is claimed there is no inconsistency, because intoxication simply goes to show that no crime has been committed. It would certainly seem that, if no crime had been committed, it is immaterial whether defendant was drunk or sober. If all the facts in the case except the drunkenness show a crime was committed, yet the element of drunkenness changes the nature of the offense, and makes it nothing, then it must certainly excuse the crime. It unquestionably overturns the common-law doctrine; and the naked proposition, divested of its metaphysical distinctions and fine-spun explanations, is boldly asserted, that drunkenness can avoid moral and legal responsibility for crime. Punishment of crime rests upon the theory that the criminal not only has possession of his will, but of the power to control it. It is upon this fact that human responsibility must rest. The drunkard does not lose the power to control his will unless unconscious, but he does lose the desire to do so. So all criminals become such because they lose the desire to control their will; hence the necessity for the strong arm of the law to supply that missing incentive for good behavior which was lost by vicious indulgence. It cannot be denied there is a great difference between a crime deliberately planned and executed by a sober, calculating criminal, and one hastily committed by one whose mind is clouded or infuriated by intoxication; but human laws are based upon considerations of public policy, and look rather to the maintenance of the social order and personal security of the citizen than to fine discriminations in the conduct of wrongdoers. Against the ordinary assassin or wrongdoer there may be some check,—caution may ward off the crime, or innocence may escape its work; but the drunkard is dangerous to the innocent as well as to the most depraved. Wharton, Crim. Law, § 49.

But the statute of the state definitely settles this question, and this court is not at liberty to follow the reasoning under which other courts have drifted far away from the common law. Yet the statute, wisely conceding something to modern thought, permits the intoxicated person, when it is so excessive as to render a person unconscious that the act he is doing is wrong, and will subject him to punishment, to plead

his condition, and if it appears the design to kill was not previously formed, or premeditated, or arising out of a previous difficulty, or from revenge, or executed with cool, deliberate, and passionless action indicating malice, but was the result of a sudden, rash, and unpremeditated design, springing out of inconsiderate or irrational action or excitement, and originating in a mind so inflamed by intoxicants as to be wholly incapable of reflection or self-control, the jury should find the defendant guilty of murder in the second degree, but nothing less; and may also reduce the penalty they would otherwise attach to the crime for his condition. It is to be observed that it is only in murder cases he can plead temporary insanity as a reduction of the degree of crime. In no other character of crime is it admissible to change its nature for want of constituent elements. It was so at common law. As Wharton says, "there was no denial of the fact of guilt." Hence the court erred in not instructing the jury that, if defendant, while temporarily insane, formed the design to slay Richter, and immediately carried his design into execution, they could take into consideration his condition, both in determining the degree of murder, and in fixing the penalty to be assessed by them. The jury, without instruction, having found the offense to be murder in the second degree, may have found a lower penalty had they been so instructed.

The next question is, What does the statute mean by the term "temporary insanity?" Whatever be the form or cause of insanity, it is settled by all authorities that the law will not consider it in a criminal case unless it deprives a person of the capacity and power to distinguish between right and wrong as to the particular act charged as an offense. If a person has knowledge and consciousness that the act he is doing is wrong, and will deserve punishment, whatever be his mental or physical weakness, he is, in the eye of the law, of sound mind and memory, and consequently the subject of punishment. But if a person is incapable of having a knowledge and a consciousness that the act he is doing is wrong and criminal, and will subject him to punishment, he is insane, and not responsible for crime committed by him. Willson, Crim. Stat. § 81, and cases cited; *Nixon's Case*, 32 Kan. 205; 5-Lawson, Defenses to Crime, *Insanity*, 231; Whart. & S. Med. Jur. 45. Though it is a general rule that insanity is an excuse for crime, there is one exception to the rule, and that is, where the crime is committed by a party in a fit of intoxication, though the party is bereft of his reason by drunkenness, and therefore is insane as from any other cause. All authorities recognize drunkenness to be a species of insanity that may be attended, when carried far enough, with loss of reason and self-control while under the direct effects of the intoxicant; but this effect is voluntary, and brought about by the acts of the party, and thereby differs from ordinary insanity, which is the act of Providence, and the sufferer is not responsible.

There are two kinds of insanity produced by alcoholism: *First*. Delirium tremens, caused by the breaking down of the person's system by long-continued or habitual drunkenness.

and brought on by abstinence from drink. This is what is called "settled insanity," to distinguish it from "temporary insanity" or drunkenness, directly resulting from drink. "Settled insanity," from the earliest times, has been held to be a complete defense to crime. Lord Hale says: If by means of drunkenness an habitual or fixed madness be caused, though contracted by the will of the party, it will excuse crime. P. C. pt. 1, chap. 4. In *United States v. Drew*, 5 Mason, 28, decided in 1828, Story, J., says: "Insanity, whose remote cause is habitual drunkenness, is an excuse for crime committed by the party while so insane, but not intoxicated, or under the influence of whiskey. Such insanity has always been deemed a sufficient excuse for any crime done under its influence." *United States v. McGuire*, 1 Curt. C. C. 1; *Macconnehey v. State*, 5 Ohio St. 77; *Carter v. State*, 12 Tex. 500, 62 Am. Dec. 539; *Erwin's Case*, 10 Tex. App. 702. Second. The other kind of insanity, or temporary insanity, is that condition of the mind directly produced by the use of ardent spirits; and where a fit of intoxication is carried to such a degree that the person becomes incapable of knowing the act he is doing is wrong and

criminal, as above stated, he is in that condition referred to by the statute as being "temporarily insane," as stated by this court in the *Kelly Case* (Tex.) 20 S. W. Rep. 357 (decided at this term). There is no difference between the two kinds of insanity, so far as the mental status is concerned, but they differ widely in their causes and results. The first is from drinking as a remote result, the second from drinking as a direct result. The first is an involuntary result, from which all shrink alike; the second is voluntarily sought after. In the first, there is no criminal responsibility; but in the second, responsibility never ceases.

There is evidence only of temporary insanity in the record, and the court erred in not explaining temporary insanity to the jury, and also instructing them that, if they believed that defendant was temporarily insane at the time he formed the intent to kill deceased, and the same was carried into execution while defendant was so insane, they should take such insanity into consideration, both in determining the degree and in reducing the penalty.

For the errors indicated, the cause is reversed and remanded.

ALABAMA SUPREME COURT.

E. A. SANDERS, *Appt.*,

v.

Oscar McMILLIAN.

(.....Ala.....)

1. The test whether an assignment of dower by metes and bounds would or would not be unjust under Code 1886, §§ 1910, 1911, is not to be determined by the interest of the doweress alone, but according to what would be just and right as between her and the present owner of the land.

2. The depreciation in the value of land which is subject to dower after alienation by the husband whether from natural causes or from the mere negligence of the purchaser or alienee in keeping the property in repair is not sufficient cause for assigning compensation to the widow according to the value at the time of the alienation, instead of setting off the dower by metes and bounds.

(November 8, 1892.)

APPEAL by complainant from a decree of the Chancery Court for Greene County

NOTE.—Effect of depreciation in the value of land on a widow's dower right therein.

The doctrine of the above case although it has rarely been brought into direct decision is supported by nearly all the decisions which have been made on the question.

It is said, indeed, in Co. Litt. 32a, in respect to a widow's dower, "if the value be impaired in the time of the heir she shall be endowed according to the value at the time of the assignment and not according to the value as it was at the time of her husband."

But in *Thompson v. Morrow*, 5 Serg. & R. 280, 9 Am. Dec. 368, it is said by Chief Justice Tilghman, and his language is expressly adopted by Judge Story in *Powell v. Monson & B. Mfg. Co.*, 3 Mason, 347: "I have found no adjudged cases in the year books confining the widow to the value at the time of the alienation by her husband where the question did not arise on improvements made after the alienation."

In the main case the court says: "We have not been able to discover any case, nor has any been cited by counsel, in which deterioration in value either from natural causes or from the mere negligence of the purchaser or alienee in keeping the property in repair has been considered sufficient cause for assigning compensation in lieu of dower 18 L. R. A.

instead of setting the same off by metes and bounds, or in which it is held that the widow is entitled to compensation on account of such deterioration." We believe that no search will be able to discover any such case except *Hale v. James*, 6 Johns. Ch. 258, 2 L. ed. 118, 10 Am. Dec. 338.

It is true that Chancellor Kent in *Hale v. James*, *supra*, said: "The rule is fixed and steady and whether the land be improved in value or whether it be impaired in value in the time of the heir the endowment is still to be according to the value at the time of the assignment (Co. Litt. 32a)," and the court held in that case that the time of alienation of premises by the husband was the time at which the value must be taken for the purpose of assigning the widow's dower.

But the general rule in this country is that the value of the lands at the time of the allotment of dower, exclusive of improvements made after alienation by the husband, must control in determining the amount of the widow's dower right. *Fritz v. Tudor*, 1 Bush, 28; *Powell v. Monson & B. Mfg. Co.* 3 Mason, 347; *Westcott v. Campbell*, 11 R. L. 378; *McClanahan v. Porter*, 10 Mo. 746; *Braxton v. Coleman*, 5 Call, 433, 2 Am. Dec. 522; *Dunseith v. Bank of United States*, 6 Ohio, 78.

In *Dunseith v. Bank of United States*, *supra*, the effect of an increase in value was the chief matter of contention, but the court said: "If the lands

awarding complainant dower by metes and bounds out of land which had been alienated by her husband in his lifetime disallowing her claim to an allowance in lieu of dower. *Affirmed.*

The facts are stated in the opinion.

Messrs. Greene & Mobley for appellant.
Messrs. Judge & De Graffenried for appellee.

Thorington, J., delivered the opinion of the court:

Appellant filed her bill in the chancery court for the assignment of dower in lands of which her husband was seised in fee in his lifetime, but which were alienated by him to appellee's vendor without appellant's joining in the conveyance or otherwise relinquishing her dower interest since such conveyance. The bill alleges that an assignment of dower by metes and bounds would be unjust, and claims that appellant is dowerable of the value of the land at the time of the alienation, and that the interest on one third part of such valuation from the death of her husband shall be paid to her annually during her life, and secured by a lien on the land. The reasons alleged to show that an assignment of dower in the lands by metes and bounds would be unjust are that the tract of land at the time of its alienation was worth about \$14,000, and that its value at the time of the death of appellant's husband was \$1,000; that the depreciation in value was caused "largely by the wear and tear of time and the unskillful cultivation of the soil, coupled with the want of fertilizers and the failure to keep the houses in repair; all these coupled with the fact that there is a general decline in values in real estate in that locality;" and it is further alleged "that if said tract of land had been kept up to the standard of a well-regulated farm, and the buildings kept in good repair, then the depreciation in value would not be

so great." The land was aliened by the husband in the year 1861, and the death of the husband occurred in the year 1889. The general rule is that, whenever the property in which the widow is entitled to dower is capable of division, dower must be set off by metes and bounds. 5 Am. & Eng. Encyclop. Law, p. 927; 2 Scribner, Dower, p. 581, § 1, *McClanahan v. Porter*, 10 Mo. 746; *Dunseath v. Bank of United States*, 6 Ohio, 76; Code 1886, §§ 1901, 1910.

The assignment of dower by the common law is of one third part of the lands and tenements of which the widow is dowerable, to be set out by metes and bounds where it is practicable, to be held by her for life. The endowment is required to be of parcel of the lands and tenements themselves. Dower so assigned is said to have been set out "according to common right." When, however, the property did not admit of an assignment of dower in severalty, either from the nature of the husband's interests in it or from the quality of the thing itself, the assignment by metes and bounds was of necessity dispensed with, and an assignment of compensation in lieu of dower was made, or an assignment "against common right," as it is sometimes designated; and this assignment was so made as to yield the widow one third of the rents and profits received from the entire estate. It was further the rule of the common law that if the land was held by the heir or devisee the widow was entitled to have the value of the land estimated at the time dower was assigned, thus giving her the benefit of improvements made by the heir or devisee, and also that she should bear a proportion of the loss which may have been incurred by an unavoidable diminution in the value of the lands during the time which intervenes between the death of her husband and the assignment of her dower. If such deterioration was caused by the willful waste of the heir, she was entitled to an action for

diminish in value subsequent to the alienation the widow is, it is conceded, subjected to the loss."

In *Fritz v. Tudor*, *supra*, it is said: "Both principle and authority prescribe the value of the use at the time of the allotment considering the land in the same condition it was in when alienated without amelioration or deterioration resulting from the acts of the purchaser." And it was said that this common-law rule was not essentially changed by Ky. Rev. Stat., chap. 47, § 10, providing that the wife be endowed according to the value of the estate when received by the heir, devisee, or purchaser so as not to include in the estimated value any permanent improvements he has made on the lands, but that the value at the time of the allotment without augmentation by improvements must control.

The fact that the depreciation in value is due to the acts or omissions of the alienee does not make him responsible therefor to the widow or change the rule that her dower must be assessed according to the depreciated value. *McClanahan v. Porter*, 10 Mo. 746.

A purchaser at sheriff's sale during the husband's life stands in the same attitude with the husband's alienee in this respect. *Ibid.*

The rule was applied in *Braxton v. Coleman*, 5 Call, 433, 2 Am. Dec. 592, in which a widow was held entitled to dower in the land only excluding the

value of a mill erected thereon by a purchaser from the husband after a mill which was on the premises when purchased had been carried away by a freshet.

So in *Westcott v. Campbell*, 11 R. L. 578, where a mill fully insured was burned down after alienation of the real estate and was rebuilt the grantor's widow was held entitled to dower in the property only according to its value at the time of the assignment of dower, less the amount of increase in the value by reason of the new mill. The court based its decision on the doctrine, that if the mill had not been rebuilt, the widow could have had dower only according to the depreciated value of the property. Nothing was said in the opinion about the effect of the insurance.

But where a building was burned after the death of the owner, his widow was held entitled under her dower right to a share of the insurance thereon which had been collected by the administrator. *Campbell v. Murphy*, 55 N. C. 387.

Where heirs take upon themselves to sell land and receive the purchase money without consulting or providing for the widow's dower they will not be heard to show that the property was worth less than they sold it for at the time or that it has depreciated since the sale. *Clift v. Clift*, 37 Tenn. 27.

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damages against him, but it did not affect or alter the manner of assignment. Tiedeman, Real Prop. § 185. With regard to the assignment of dower in alienated estates the rule in England, as declared in *Doe v. Guinnell*, 1 Q. B. 682, is that the widow shall be endowed according to the value of the estate at the death of the husband, regardless of any improvement or deterioration resulting from the acts of the purchaser. But in this country the rule in such cases, according to the weight of authority, is more favorable to the purchaser, and excludes the widow from taking advantage of his improvements upon the estate; but it allows her generally, though not in all the states, to have the benefit of any rise in value resulting from other causes, the policy of the rule being to avoid discouraging purchasers from making improvements. *Westcott v. Campbell*, 11 R. I. 378; 2 Scribner, Dower, pp. 612-617; Tiedeman, Real Prop. § 185. And that is the rule adopted in this state, both by judicial decisions and by statute. *Barney v. Frouner*, 9 Ala. 901; *Beavers v. Smith*, 11 Ala. 20; *Springle v. Shields*, 17 Ala. 295; *Francis v. Garrard*, 18 Ala. 794; *Ware v. Owens*, 42 Ala. 212, 94 Am. Dec. 642; *Wood v. Morgan*, 56 Ala. 897; Code 1886, § 1910.

In this state, before the present statute, when a dilapidated mill upon the land was torn down by a purchaser from the husband, and a new and expensive structure erected in its stead, it was held that the widow of the grantor was not entitled to any share of the improvements, and that her dower should be estimated with reference to the nature of the premises at the time of the alienation; that the destruction of the old mill afforded a proper case for compensation to the widow by a court of equity, instead of an assignment by metes and bounds. *Beavers v. Smith*, *supra*.

We have not been able to discover any case, nor has any been cited by counsel, in which deterioration in value, either from natural causes or from the mere negligence of the purchaser or alienee in keeping the property in repair, has been considered sufficient cause for assigning compensation in lieu of dower, instead of setting the same off by metes and bounds, or in which it is held that the widow is entitled to compensation on account of such deterioration. On the contrary, the doctrine of permissive waste seems never to have been introduced into the common-law jurisprudence of this country to that extent. It is said by *Chancellor Kent* that, "whether the land be improved in value or be impaired by acts of the party subsequently, the endowment, in every event of that kind, is to be according to the value at the time of the assignment, if the land descended to the heir." 4 Com. (Lacy's ed.) *65. And again: "The widow takes the risk of the deterioration of the estate arising from public misfortunes or the acts of the party." *Id.* *66. The foregoing quotations are contained in an elaborate and learned opinion of the supreme court of Missouri in the case of *McClanahan v. Porter*, 10 Mo. 746, in which the conclusion is reached that the widow

takes her dower according to the value of the land at the time of the assignment, and that, although she gains nothing by the improvements of the heir or alienee, she suffers loss by his waste or neglect, depreciating the value of the property. And in 2 Scribner on Dower, p. 685, it is said: "In the United States the doctrine laid down by Perkins, that the widow has no remedy for waste committed by the alienee during the lifetime of the husband, seems to be generally acquiesced in. But for waste committed after the husband's death, she has her remedy." 5 Am. & Eng. Encyclop. Law, p. 981.

In this state, when the dower is incapable of being set off by metes and bounds, or when it would be unjust, from improvements made by an alienee or from any other cause, to assign the dower by that mode, the chancery court alone has jurisdiction to make an assignment of compensation in lieu of dower; and in such case the rule is fixed by statute that the widow is dowable of the value of the land at the time of alienation, the interest on one third part thereof from the death of the husband to be paid her annually during her life, and secured, if necessary, by a lien on the land, unless the parties agree to a compensation in gross, to which the court must give effect. Code 1886, §§ 1910, 1911. The test, however, whether an assignment by metes and bounds would or not be unjust, within the meaning of the statute, is not whether the interests of the dowress alone would be promoted or prejudiced by that mode of assignment. The rule prescribed by the statute, "to be equal and just, must be mutual." The mutual rights of the demandant and of the alienee must be considered, and the conclusion must be influenced, not by what would be the interest of the one or the other, but by what would be just and right, as between the two.

We do not think the facts alleged in the bill of complaint in this case make out a case within the contemplation of the statute, and entitling the demandant to an assignment of compensation in lieu of dower, instead of by metes and bounds. It is shown by the averments of the bill that the depreciation in the value of the land since the alienation is due largely to natural causes, and to a much less extent to the mere failure of the alienee to keep the property in repair from 1861, the time of the alienation, to 1891, the time of the demands for dower, and not from any willful waste on his part. By the common law, as we have shown, while the widow shared in improvements made by the heir or devisee, neither the improvements made by an alienee of the husband, nor depreciation in value caused by his acts or from natural causes, affected the rule for the assignment of dower, though willful waste by either the heir, devisee, or alienee, after the husband's death, would afford the basis for a claim for damages to be allowed, not, it has been declared, as of any fixed period, but as of the value of the property at the different periods at which the widow is deprived of her dower,—in the case of the heir, from the death of the husband; in the case of an alienee, from the time of the demand for dower

until the assignment. *McClanahan v. Porter*, 10 Mo. 746; *Steels v. Brown*, 70 Ala. 235. We discover nothing in our statute designed to change this general rule. On the contrary, this court, in *Wood v. Morgan*, 56 Ala. 397, speaking of a statute in substance the same as this, said: "So that the section of the Code we are considering is rather a legislative recognition of an existing rule than the enactment of a new one." Our statute, therefore, being in harmony with the common law instead of making a change therein, it follows that mere depreciation of value whether from natural causes or the act or omission of the alienee, presents no good reason for making an assignment of dower against the common right, instead of according to the common right, or by metes and bounds.

Furthermore, recurring to the question whether it would be unjust, within the meaning of the statute, to the demandant, to set off her dower by metes and bounds, we will add that the law would not have cast upon her husband, had he lived until this time, any duty or obligation towards her, as respects her inchoate right of dower, to keep the premises in good repair, or to cultivate the lands "according to the standard of a well-regulated farm;" and, if no such duty rested

on the husband, we can conceive of no principle of law that would impose that obligation upon the alienee of the husband, any more than upon the latter himself. To assign dower as the bill in this case seeks to have it done, would require a valuation of the land, which would make the widow's third some four or five times greater than the present value of the entire tract. Thus the alienee would be compelled to pay annual interest for the life of the dowress on a sum four or five times greater than the present value of the whole tract of land, and more than thirteen times greater than her one third of the present value of the land. This would be the grossest injustice to the alienee. An assignment of dower by metes and bounds, so far as anything in the bill shows to the contrary, would operate justly to both parties. There is no question of willful waste committed after the death of the husband presented by the bill, and consequently it is unnecessary to consider what the rights of the demandant would be in that case, or what the remedy for their enforcement.

We discover no error in the decree of the chancery court on the motions and demurrers filed by appellee, and it is accordingly affirmed.

ILLINOIS SUPREME COURT.

William M. DORSEY, *Appt.*,

Eliza WOLFF, Admx., of Marcus A. Wolff.

(.....Ill.....)

1. **The negotiability of a note is not destroyed by a stipulation for 10 per cent attorneys' fee** to be recovered as part of the note or in a separate suit, if the note is not paid when due and suit is brought thereon.
2. **The indorsement of a negotiable note passes with it to the assignee the right to enforce a stipulation** in the note for an attorneys' fee to be recovered either as part of the note or by separate action.
3. **A separate suit for an attorneys' fee** may be authorized by express stipulation in a promissory note.
4. **It is not usury to include in a promissory note a stipulation for 10 per cent as an attorneys' fee** if the note is not paid when due and suit is brought thereon.

(November 2, 1892.)

A PPEAL by defendant from a judgment of the Appellate Court, Third District, affirming a judgment of the Circuit Court for Macoupin County in favor of plaintiff in an action brought to recover attorneys' fees provided for in a certain promissory note. *Affirmed.*

The facts are stated in the opinion.

Messrs. Palmer & Shutt for appellant.
Mr. A. N. Yancey for appellee.

Magruder, J., delivered the opinion of the court:

This is an action of assumpsit begun in the circuit court of Macoupin county on May 16, 1889, by Marcus A. Wolff against the appellant, Dorsey, to recover, as attorneys' fees, the sum of 10 per cent upon the amount found to be due upon the promissory notes hereinafter mentioned, in a suit theretofore brought upon said notes. The defendant demurred to the declaration. The demurrer was overruled. The defendant excepted to the order overruling the demurrer, and elected to stand by his demurrer. Thereupon plaintiff's damages were assessed at \$1,619, and judgment was rendered in his favor for that amount. The judgment has been affirmed by the appellate court, from which latter court the case is brought here by appeal.

The declaration sets up three notes, executed by the defendant, William M. Dorsey, dated December 31, 1885, payable to the order of George W. Belt, at the banking house of Belt Bros. & Co., in Bunker Hill, Ill.,—the first for \$13,586.84, on or before two years after date; the second for \$543.47, on or before eighteen months after date; and the third for \$543.47, on or before two years after date,—each of which notes, after the maker

NOTE.—As to stipulations for attorneys' fees, see *Farmers Nat. Bank v. Sutton Mfg. Co.* 17 L. R. A. 595, 52 Fed. Rep. 191; *Levens v. Briggs*, 14 L. R. A. 183, 21 Or. 333; *Exchange Bank v. Tuttle* (N. M.) 7 18 L. R. A.

L. R. A. 445, and note; *Wright v. Traver*, 3 L. R. A. 50, and note, 78 Mich. 493; *Bowie v. Hall*, 1 L. R. A. 546, and note, 69 Md. 423.

promises for value received to pay the amount therein named to the order of said Belt, contains the following words: "With eight per cent interest per annum after maturity, and, if not paid when due and suit is brought thereon, then we promise to pay ten per cent on the amount due hereon in addition as an attorneys' fee, and to be recovered as part of this note, or by separate suit." By the terms of each note, also, the makers and indorsees waive presentment for payment, protest, and notice, etc. The declaration then avers that Dorsey delivered said notes to Belt, and Belt indorsed the same to plaintiff, etc.; that said notes were not paid when due; that suit was brought thereon; that the said 10 per cent was not paid before or after said suit was brought, and was not recovered in said suit so brought upon said notes as a part thereof etc. One of the counts, in addition to the foregoing averments, alleges that, after the maturity of the notes, they were placed in the hands of an attorney for suit; that suit was brought thereon, and, the 10 per cent attorneys' fee not having been recovered therein, the plaintiff, before the bringing of the present suit, paid his attorney for his services in said former suit the said sum of \$1,619.20.

The main question presented by the assignments of error is whether or not the notes described in the declaration are negotiable instruments. It is claimed by the appellant that the notes are made non-negotiable by the insertion therein of the written promise of the maker that, if they were not paid when due and suit was brought thereon, he would pay 10 per cent on the amount due thereon in addition, as an attorneys' fee, and to be recovered as a part of the notes, or by separate suit; that the indorsements by the payee did not confer the right upon the indorsee to bring suit in his own name upon the notes; that, even if such indorsements should be held to have conferred upon the assignee the right to bring suit upon the notes in his own name, it did not confer upon such assignee the right to bring a separate suit upon the stipulations or promises as to the attorneys' fees.

Various definitions have been given of a "promissory note." In general terms, it may be defined to be a written promise by one person to pay to another person therein named or order a fixed sum of money, at all events, and at a time specified therein, or at a time which must certainly arrive. *Love v. Bliss*, 24 Ill. 168; *Chicago R. Equip. Co. v. Merchant's Nat. Bank of Chicago*, 186 U. S. 268, 34 L. ed. 349; *Story, Prom. Notes*, p. 2; 3 Kent, Com. 74; 2 Am. & Eng. Encyclop. Law, p. 314. A note is none the less negotiable because it is made payable on or before a named date. *Chicago R. Equip. Co. v. Merchant's Nat. Bank of Chicago*, *supra*; *Cisme v. Chidester*, 85 Ill. 523; *Ernst v. Steckman*, 74 Pa. 18, 15 Am. Rep. 542. An instrument for a specified sum of money, and also for the payment of something else, the value of which is not ascertained, but depends upon extrinsic evidence, is not a note. *Love v. Bliss*, *supra*. A note which provides for the payment, after the maturity thereof,

of a certain rate of interest per annum, not exceeding the legal rate, is not made conditional by such provision. *Houghton v. Francis*, 29 Ill. 244; *Reeves v. Stipp*, 91 Ill. 609; *Laird v. Warren*, 92 Ill. 204.

Applying these definitions to the notes mentioned in the declaration in this case, we find that each note is "a note for a sum certain, payable at a fixed date." *Dietrich v. Baylis*, 28 La. Ann. 787. The notes are not payable on a contingency, because the maker has the option of paying on or before a certain date; nor are they conditional instruments because they contain the words, "with eight per cent interest per annum after maturity." The portion of each note which precedes the stipulation or promise as to the attorneys' fee is in itself a complete promissory note. For example, the part of the first note that goes before the provision for the fee is as follows: "\$13,586.84. Bunker Hill, Ills., Dec. 31st, 1885. On or before two years after date, for value received, we or either of us promise to pay to the order of George W. Belt, thirteen thousand five hundred eighty-six and 84-100 dollars, payable at the banking house of Belt Bros. & Co. in Bunker Hill, Illinois, with eight per cent interest per annum after maturity," etc. "Here the sum, time of payment, and payee are certain, and these are the essential characteristics of a promissory note." *Houghton v. Francis*, *supra*. The promise to pay the attorneys' fee is a promise to do something after the note matures. It does not affect the character of the note before or up to the time of its maturity, either as to certainty in the amount to be paid, or fixedness in the date of payment, or definiteness in the description of the person to whom the payment is to be made. The stipulation or promise as to the attorneys' fee cannot, therefore, affect the negotiability of the note, because the negotiability of a promissory note is, for all practical purposes, at an end when it matures. Parties taking it after its maturity cannot claim to be innocent holders without notice of defenses which may be set up by the maker against its collection. If the stipulation for an attorneys' fee is of such a character as to make the amount to be paid at maturity uncertain or indefinite, the note cannot be regarded as negotiable so as to authorize a suit upon it by the indorsee; but, where the stipulation does not have such an effect, its insertion in the note does not destroy the negotiability of the note.

When the amount to be paid at maturity is certain and fixed, the maker knows what he is to pay, and the holder knows what he is to receive, from the face of the note itself. Commercial paper is expected to be paid promptly when it is due. A stipulation for an attorneys' fee, which is only to be recovered if the note is not paid when due and suit is brought upon it, can have no force except upon the maker's default. If he keeps his contract by paying his note at its maturity, he will not be obliged to pay the additional amount; and no element of uncertainty enters into the contract. By the stipulation, the maker offers to the holder an assurance of his own confidence in his ability to pay

without suit, and thereby adds to the value of the paper, as promising less expense in its collection. It has been said that "the additional agreement relates rather to the remedy upon the note, if a legal remedy be pursued, than to the sum which the maker is bound to pay; and that it is not different in its character from a *cognovit*, which, when attached to promissory notes, does not destroy their negotiability." *Dan. Neg. Inst.* 4th ed. §§ 62, 62a. We do not think that the negotiability of the notes in this case was destroyed by the stipulations therein as to attorneys' fees.

The view here expressed is sustained by the authorities. In *Nickerson v. Sheldon*, 83 Ill. 372, 85 Am. Dec. 280, the note contained this provision: "And we further agree, if the above note is not paid without suit, to pay ten dollars, in addition to the above, for attorneys' fees." In that case the plaintiff did not declare for the \$10, and hence the recovery was only for the principal and interest due on the note, but we held the note to be negotiable under the statute, and said: "The amount due by this note is absolutely certain, and it possesses all the requisites of a negotiable instrument under the statute." *Stewart v. Smith*, 28 Ill. 397. There is no uncertainty as to the precise sum of money to be paid on the maturity of the note." *Bane v. Gridley*, 67 Ill. 888; *Gobble v. Linder*, 76 Ill. 157; *Barton v. Farmers & M. Nat. Bank*, 123 Ill. 852. In *Stoneman v. Byle*, 85 Ind. 103, 9 Am. Rep. 637, the note contained a stipulation for the payment of attorneys' fees should suit be instituted thereon, and it was said: "We see no reason, on principle or authority, or on grounds of public policy, for holding that such a stipulation destroys the commercial character of paper otherwise having that character."

So here the defendant had the right to pay the face of the note when due, and avoid the attorneys' fees. As long as the note retained the peculiar characteristics of commercial paper, viz., up to the time of its maturity and dishonor, the amount to be paid on the one hand, and recovered on the other, was fixed and definite." *Smock v. Ripley*, 62 Ind. 81. In *Gaar v. Louisville Bkg. Co.*, 11 Bush, 180, there was indorsed upon the back of an accepted bill of exchange an agreement by the drawers, indorsers, and acceptors thereof "to pay a reasonable attorney's fee to any holder thereof if the same shall thereafter be sued upon, and also pay interest at the rate of ten per cent per annum after maturity until paid;" and it was claimed that the written agreement so indorsed upon the bill destroyed its negotiability on the ground that the amount of the attorneys' fee was not ascertained, and hence that the bill was for an uncertain amount; but the court held otherwise, and said: "The amount to be paid at maturity was fixed and certain, and it was only in the event that the bill was not paid when due that any uncertainty arose. The reason for the rule that the amount to be paid must be fixed and certain is that the paper is to become a substitute for money, and this it cannot be, unless it can be ascertained from it exactly how

much money it represents. As long, therefore, as it remains a substitute for money, the amount which it entitles the holder to demand must be fixed and certain; but when it is past due it ceases to have that peculiar quality denominated 'negotiability,' or to perform the office of money; and hence anything which only renders its amount uncertain after it has ceased to be a substitute for money, but which in no wise affected it until after it had performed its office, cannot prevent it becoming negotiable paper." In *Seaton v. Scovill*, 18 Kan. 483, 26 Am. Rep. 779, a note for the payment of a certain sum, "with interest at twelve per cent per annum after due until paid, also costs of collecting including reasonable attorneys' fees if suit be instituted on this note," was held to be negotiable; and *Mr. Justice Brewer*, delivering the opinion of the court, quoted with approval the above extract from the Kentucky case, and said: "The amount due at the maturity of the paper is certain; and the only uncertainty is in the amount which shall be collectible in case the maker defaults, at the maturity of the paper, in his promise to pay, and the holder is driven to the necessity of instituting a suit for collection, and then only as to the expenses of such collection." In *Sperry v. Horr*, 83 Iowa, 184, each of the notes sued upon was for a certain sum, and contained the following words: "With ten per cent interest until paid; if not paid when due, and suit is brought thereon, I hereby agree to pay collection and attorneys' fees therefor," and the court held them to be negotiable, saying the attorneys' fees are not part of the sums due on the notes, but are an amount for which the maker may become liable when a legal remedy is enforced against him. *Shugart v. Puttee*, 37 Iowa, 422; *Fort Dodge First Nat. Bank v. Breece*, 39 Iowa, 640; *Hovenstein v. Barnes*, 5 Dill. 483; *Schlesinger v. Arline*, 81 Fed. Rep. 648; *Wilson Sewing Mach. Co. v. Moreno*, 6 Sawy. 35, 7 Fed. Rep. 806.

Inasmuch as the note is negotiable, and passes by indorsement to the assignee, the agreement as the attorneys' fee also passes to such assignee as a part of the note. The stipulation or promise to pay the attorneys' fee is not made with the payee alone. The note is payable to the payee or order. The promise is as much to the holder as to the original payee. The fee is to be paid if the note is not paid when due, whether it is then owned by the payee or by any other holder. Moreover, the attorneys' fee is an incident to the main debt and passes with it. *Bank of British North America v. Ellis*, 2 Fed. Rep. 44; 2 Dan. Neg. Inst. § 62a; *Adams v. Ad-dington*, 16 Fed. Rep. 89. The promise to pay it, thereby lessening the cost of collection in case of suit, gives the note currency as well as security, and is regarded as a provision for the indorsee or holder as well as for the payee. *Bank of British North America v. Ellis*, 6 Sawy. 96, 2 Fed. Rep. 44. Daniel, in his work on Negotiable Instruments, (vol 2, § 62a,) says: "When the added stipulation is deemed valid, and the bill or note negotiable, such stipulation becomes a part of the acceptor's or indorser's

contract, and need not be sued for by the attorney, but it is recoverable by the holder of the instrument." See cases cited in *note* 3.

A further question arises as to the mode of enforcing the collection of the fee. It is said that it cannot be recovered in a separate suit if it is not embraced in the recovery on the note. Such seems to be the doctrine in Indiana. *Smiley v. Meir*, 47 Ind. 559. In a case in Iowa, also where the note sued on contained a stipulation "to pay, in addition to the amount thereof, fifteen dollars attorneys' fees if the note is collected by suit," it was held not to be the intention of the parties that the fee should become due only after the note was collected by suit, but to be their intention that the fee should be recoverable with the amount of the note. *Shugart v. Patten*, 87 Iowa, 422. In this state it has been held that the fee is not due when the suit is brought on the note, and therefore cannot be included in the assessment of damages. *Nickerson v. Babcock*, 29 Ill. 497; *Easter v. Boyd*, 79 Ill. 325. In the two cases, however, in which this court so held, there was no express agreement in the note that the fee might be recovered in a separate suit. *Nickerson v. Babcock*, and *Easter v. Boyd* *supra*. In the case at bar, the promise is "to pay ten per cent on the amount due hereon in addition as an attorneys' fee, and to be recovered as a part of this note or by separate suit." Whether or not a stipulation to pay the fee to be recovered as a part of the note, in case suit is brought on it for its nonpayment when due, is so far a mere incident to the main debt that a separate suit cannot be brought for the fee after the termination of the suit on the note, is a question which is not presented by this record. We see no reason why the maker of the note may

not stipulate that a separate suit may be brought for the fee, and why such stipulation cannot be enforced by the payee or the holder. If the written promise to pay the fee passes to the holder by the indorsement, the written agreement as to the mode of recovery also passes. The fact that the engagement to pay a fee is incidental and auxiliary to the main engagement to pay the debt does not prevent the maker of the note from agreeing to submit to a separate suit for the recovery of the fee. We are therefore of the opinion that the present suit is properly brought.

It is further claimed that the agreement to pay the 10 per cent as a fee is usurious. The authorities above referred to hold to the contrary. *Stoneman v. Pyle* and *Wilson Sewing Mach. Co. v. Moreno*, *supra*. See also 2 Parsons, Notes & Bills, pp. 418, 414; *Clawson v. Munson*, 55 Ill. 394; *Barton v. Farmers & M. Nat. Bank*, 122 Ill. 352. There is here no violation of the Usury Law, because the agreement "provides for new or additional compensation or interest for the use of the money because of the failure to pay at maturity. It is not in the nature of a contract for additional interest, but a provision merely against loss or damage to the payee (or holder) specifically pointed out." *Barton v. Farmers & M. Nat. Bank*, *supra*. There is nothing to show that 10 per cent on the amount due is an unreasonable fee. The defendant stood by his demurrer to the declaration, which described the notes, and the provision therein for a fee of 10 per cent. The declaration must therefore be regarded as alleging, in substance, that a reasonable attorney's fee was 10 per cent on the amount due on the notes. *Smiley v. Meir*, *supra*.

The judgment of the Appellate Court is affirmed.

INDIANA SUPREME COURT.

Mary VAN WALTERS *et al.*, App'ts
v.
BOARD OF CHILDREN'S GUARDIANS
OF MARION COUNTY.

(.....Ind.....)

1. The supreme right of the state to the guardianship of children controls the natural right of parents when the welfare of society or of the children themselves conflicts with such parental rights.
2. A judgment cannot be set aside on a petition which merely alleges facts in contradiction of the judgment.
3. A petitioner who has no cause of action has no right to compel answers to interrogatories.

(November 15, 1892.)

APPEAL by petitioners from a judgment of the Circuit Court for Marion County in

NOTE—For state guardianship of children, see, in connection with the above case, *note* to *Whalen v. Olmstead* (Conn.) 15 L. R. A. 593.

19 L. R. A.

favor of defendants in a proceeding brought to set aside a decree committing plaintiff's children to the custody of defendant. *Affirmed.*

The facts are stated in the opinion.

Messrs. Jacob B. Julian and *J. F. Julian* for appellants.

Mr. C. L. Hare for appellee.

Elliott, J., delivered the opinion of the court:

The petitioners in the court below, Georgia Wilkins and John D. Wilkins are here the appellants. The material allegations of their complaint are these: That the appellant, Georgia Wilkins, is the mother of Mary Van Walters, William F. VanWalters and Clara VanWalters; that she married her co-appellant on the 17th day of August, 1891; that the eldest of the three children was born on the 31st day of August, 1879, and the youngest on the 12th day of February, 1887; that on the 11th day of July, 1891, the children by a decree of court were committed to the custody of the appellee; that neither of the children was "at any time

abandoned, neglected or cruelly treated, nor were they of vicious habits nor were their surroundings of such a character as to lead to their demoralization;" that the petitioner, Georgia Wilkins, was so distracted in mind, so crazed with grief over her children being taken from her, that she was at the time incapable of comprehending or doing anything; "that the petitioners are able and willing to take care of the children and to make reasonable provision for their physical comfort and welfare, and that they are able and willing to see that the children "go to school and receive a good education." The petition prays that the decree be set aside or that it be so modified as to give them custody of the children for a time specified to enable them to convince the court that they are competent to take care of the children.

It has been for many centuries theoretically true that the state, through its appropriate organs, is the guardian of the children within its borders. The Constitution of a state is always presumed to be framed by organized society governed by settled principles. *State v. Noble*, 118 Ind. 350-361, 4 L. R. A. 101; *Johnston v. State*, 128 Ind. 16-18, 12 L. R. A. 235, and authorities cited.

It is therefore proper to assume that our Constitution and our laws enacted under its sanction and confirm the great principle of the sovereign's guardianship of the children within the dominions of the sovereign. But while it is true that this great principle is thus sanctioned and confirmed, it is still true that the equally great principle that natural right vests in parents the custody and control of their children is confirmed and enforced. This high and strong natural right yields only when the welfare of society or of the children themselves comes into conflict with it; but where there is such conflict the supreme right of guardianship asserts itself for the protection of society and the promotion of the welfare of the wards of the commonwealth. It is unnecessary to define the boundaries or prescribe the limits of the power of the state to take children from the custody of parents who will lead them into evil paths or surround them with vicious influences, and place them in the custody of those who will train and educate them for good lives and make them useful members of society, for our statute is far within the limits of the great power of inherent state guardianship. The statute which provides that children may be taken from the custody of parents whose course of life or whose evil conduct unfits them to rear children so that they will become good and useful citizens was enacted pursuant to the great constitutional provision of which we have spoken, and is not to be broken down by the declaration of a doctrine that will make the duty of those who are selected to take charge of the children so vexatious and difficult that good men and women will be deterred from accepting the office which, at best, is an unpleasant one. The statute violates no constitutional principle, inasmuch as it guards the interests and rights of parents by requiring that their children shall not be taken from them without a hearing, upon due notice, in the courts of the state. As a check to an abuse of power and the exercise of arbitrary authority by the courts of original

jurisdiction, it provides for the right of appeal to the highest court of the state. Here, then, we have a case where the proceedings are founded upon a statute enacted for the purpose of promoting the highest interests of society and in which ample provision is made for a hearing before a court of justice upon due process of law. There is neither denial nor abridgement of constitutional rights, and hence no reason why a proceeding conducted in accordance with the provisions of the statute should be excepted from the operation of the general rules of law. What those rules award to the appellants they are entitled to demand, but they are entitled to nothing more.

The fundamental rule is that public officers are presumed to do their duty. This rule intensifies in force when applied to judges, for they hear with deliberation, act with impartiality, and decide upon the law and the evidence. In the law they are learned, and the evidence upon which they act they derive, under wise rules, from trustworthy sources. If this were a direct attack in the strongest form it would be our plain duty to presume that the trial court acted upon sufficient evidence, proceeded regularly and gave a just judgment. See authorities cited, *Elliott's Appellate Procedure*, §§ 709, 710, 712.

Under the attack here made we are imperatively required to conclusively presume that there was evidence fully supporting the judgment of the court of original jurisdiction.

Another relevant rule, and an old one, is expressed in the maxim, "A man shall not be twice vexed for one and the same cause." We should violate this rule without justification or excuse if we sustain the assault of the appellants upon the judgment from which this appeal is prosecuted. That judgment has all the attributes of a valid judgment, for there was a hearing in a court of justice, and the hearing was upon due notice. The only allegations that assail the judgment are those which contradict it, and contradiction cannot be suffered since judgments import absolute verity. If we should hold that a defeated suitor may deny what a solemn judgment affirms, we should necessarily adjudge that issues may be tried again and again despite a judgment rendered in due course of law by a court possessing plenary jurisdiction. That we cannot do, inasmuch as to do it would be to defy authority and disregard principle.

The vague and indefinite allegation concerning the mental condition of the petitioner, Georgia Wilkins, is not sufficient to overthrow a solemn judgment. One who seeks to impeach a judgment upon the ground of mental incapacity must directly state material facts, for mere rhetoric cannot supply their place. Here there are general statements showing, if they show anything at all of a substantial nature, mere temporary mental trouble, and that is not enough to overbear a judgment pronounced after a lawful hearing. For anything that appears, the mental condition may have lasted but a brief time and not even approached insanity.

Where a petitioner has no cause of action he has no right to compel answers to interrogatories.

Judgment affirmed.

ALABAMA SUPREME COURT.

ALABAMA GREAT SOUTHERN R.
CO., *Appl.*,
v.

William D. CARROLL.

(.....Ala.....)

1. It will be presumed that the common law of another state is the same as that where the court is sitting in the absence of evidence to the contrary.
2. The law of a state in which a railroad brakeman is injured by negligence of a co-employee determines his right to recover, although such law is contrary to that of another state in which the negligence transpired and which is also the domicile of the parties and the place of the contract of employment.

(November 22, 1892.)

APPEAL by defendant from a judgment of the City Court of Birmingham in favor of plaintiff in an action brought to recover damages for personal injuries received by plaintiff while in the employ of defendant through an alleged defect in certain machinery. *Reversed.*

The facts are stated in the opinion.

Messrs. J. W. Fewell and A. G. Smith, for appellant:

Plaintiff contracted to work for the railroad in the state of Mississippi as well as in the state of Alabama; so that while he was at work in the state of Alabama the laws of that state would fix and determine his rights and remedies, so far as any negligence of the employer, or his fellow servants, was concerned, and when he was at work in the state of Mississippi his rights and remedies in regard to the same would be determined by the laws of Mississippi.

Where the cause of action arises in other states, if plaintiff sees proper to sue in the courts of Alabama, those courts must apply the law of the state in which the cause of action arose.

Chicago, St. L. & N. O. R. Co. v. Doyle, 60 Miss. 977; *Atchison, T. & S. F. R. Co. v. Moore*, 29 Kan. 632, 11 Am. & Eng. R. R. Cas. 243; *LeForest v. Tolman*, 117 Mass. 109, 19 Am. Rep. 400; *McMaster v. Illinois Cent. R. Co.* 65 Miss. 264; *Davis v. New York & N. E. R. Co.* 143 Mass. 301, 58 Am. Rep. 138; *Lime-killer v. Hannibal & St. J. R. Co.* 33 Kan. 88, 52 Am. Rep. 523; *Debevoise v. New York, L. E. & W. R. Co.* 98 N. Y. 377, 50 Am. Rep. 683; *Hyde v. Wabash, St. L. & P. R. Co.* 61 Iowa, 441, 47 Am. Rep. 820; *Willis v. Missouri Pac. R. Co.* 61 Tex. 432, 43 Am. Rep. 301; *Buckles v. Ellers*, 72 Ind. 220, 37 Am. Rep. 156; *Woodard v. Michigan, S. & N. I. R. Co.* 10 Ohio St. 121; *East Tennessee, V. & G. R. Co. v. Lewis*, 39 Tenn. 235; *Whitford v. Panama R. Co.* 23 N. Y. 465.

The law of the state where the cause of action arose, where the injury was inflicted, must be the law that governs the case.

2 Thomp. Neg. p. 1282; *Kuhl v. Memphis & O. R. Co.* (Ala.) Feb. 25, 1892, 5 Am. & Eng. Encyclop. Law, p. 127; 8 Am. & Eng. Encyclop. Law, p. 522, and *note*.

If that be so, then it became the duty of the court to construe that law and to instruct the jury on it.

Inge v. Murphy, 10 Ala. 885.

The laws of Mississippi are practically the same that the law of Alabama was prior to the passage of the Act which is now embodied in the Code as § 2590, and as was determined by our court.

Smoot v. Mobile & M. R. Co. 67 Ala. 13; *Bull v. Mobile & M. R. Co.* 67 Ala. 206; *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672; *Louisville & N. R. Co. v. Allen*, 78 Ala. 494.

Under the law of Mississippi, as under the common law, a servant cannot recover of the master for an injury caused by the negligence of a fellow servant.

McMaster v. Illinois Cent. R. Co. 65 Miss. 264.

Those who are co-working in the same common enterprise, under the same master and are compensated by him, are fellow servants. Differences in wages and work do not affect the question if the general business is the same.

New Orleans, J. & G. N. R. Co. v. Hughes, 49 Miss. 258; *McMaster v. Illinois Cent. R. Co.* *supra*; *Lagrone v. Mobile & O. R. Co.* 67 Miss. 592; *Louisville, N. O. & T. R. Co. v. Petty*, 67 Miss. 255; *Chicago, St. L. & N. O. R. Co. v. Doyle*, *supra*; *Howd v. Mississippi C. R. Co.* 50 Miss. 178; *Vicksburg & M. R. Co. v. Wilkins*, 47 Miss. 404; *Smith v. Potter*, 46 Mich. 258, 41 Am. Rep. 161, 2 Am. & Eng. R. R. Cas. 140; *Mackin v. Boston & A. R. Co.* 135 Mass. 201, 15 Am. & Eng. R. R. Cas. 196.

Messrs. Brooks & Brooks, for appellee:

Wherever, by either the common or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties.

Dennick v. New Jersey Cent. R. Co. 103 U. S. 18, 26 L. ed. 441.

Under the Alabama decisions this action was properly brought in that state.

Central R. & Bkg. Co. v. Carr, 76 Ala. 391, 52 Am. Rep. 389; *Alabama G. S. R. Co. v. Thomas*, 89 Ala. 294.

The validity, meaning, and effect of contracts must be ascertained and determined by the law of the place where made, unless made with reference to the law of some other place. The *lex loci contractus*, unless otherwise agreed, must govern in interpreting the contract, and ascertaining the rights and obligations of the parties. Such laws enter into and form a part of the contract, and in suing to recover damages for a breach of contract, or a breach of duty arising from it, whether such breach occurred in the place where the contract was

NOTE.—The rule as to a right of action for injuries sustained in another state is applied in the above case to an unusual state of facts which offer a good test of the rule.

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For right of action for death accruing under statute of another state, see *Nelson v. Chesapeake & O. R. Co.* 15 L. R. A. 533, and *note*, 38 Va. 971.

made or elsewhere, the objection that the law has no extraterritorial force is idle.

Hanrick v. Andrews, 9 Port. (Ala.) 9; 8 Am. & Eng. Encyclop. Law, 545, 546; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 647, 29 L. ed. 758; *McDougald v. Rutherford*, 80 Ala. 258; *Walker v. Forbes*, 81 Ala. 9; *Broughton v. Bradley*, 86 Ala. 689; *Cubbedge v. Napier*, 62 Ala. 518.

A contract valid in the state where it is made is valid and binding everywhere, and will be enforced in another state unless clearly contrary to good morals or repugnant to the policy or positive institutions of the latter state.

8 Am. & Eng. Encyclop. Law, 552, 553, and notes.

Even when the contract is made in one state, to be partly performed in that state and partly performed in other states, the rule is that the construction of the contract is to be governed by the law of the place where it is made.

Morgan v. New Orleans, M. & T. R. Co. 2 Woods, C. C. 249; *Williams v. Carr*, 80 N. C. 204.

The Employers' Act was intended to define and regulate the contract rights and obligations of persons between whom the relation of employer and employe exists. It provides that, in the cases and under the circumstances therein mentioned, the master shall be liable to the servant for personal injuries by him sustained, and that the servant may recover compensation for such injuries by suit at law. There can be no recovery by the injured party under this statute unless a contract exists. If there be no contract, express or implied, there can be no recovery.

Georgia Pac. R. Co. v. Propst, 88 Ala. 518, 85 Ala. 208.

As soon as the contract is made the rights and obligations of the parties under the Employers' Act become vested and fixed.

The law is neither more nor less than the contract of the parties and must be upheld as their contract.

Moore v. Davidson, 18 Ala. 209.

While the contract requires Carroll to perform services as brakeman on the entire road from Birmingham to Meridian, and the road lies partly in Alabama and partly in Mississippi, yet it is a continuous line of road, and the contract is entire and indivisible, and must be governed by the laws of the place wherein it was made.

McDaniel v. Chicago & N. W. R. Co. 24 Iowa, 412; 1 Rorer, Railroads, 234, 235; *Dyke v. Erie R. Co.* 45 N. Y. 113, 6 Am. Rep. 43; *Curtis v. Leavitt*, 15 N. Y. 227; *Everett v. Vandrives*, 19 N. Y. 436.

The separation of the train and the personal injury occurred on that part of the road which is in Mississippi, but in fact the breach was committed in Alabama.

The injuries to the plaintiff was the result or sequence rather than a constituent element of the breach of duty.

Green v. State, 68 Ala. 539.

The statute relative to the supplying of safe machinery, etc., and maintenance in safe condition is nothing but an affirmation of the common law.

Wilson v. Louisville & N. R. Co. 85 Ala. 272; 18 L. R. A.

Eureka Co. v. Bass, 81 Ala. 214, 60 Am. Rep. 152; *Louisville & N. R. Co. v. Allen*, 78 Ala. 501; *Georgia Pac. R. Co. v. Davis*, 92 Ala. 813. See also *Louisville & N. R. Co. v. Orr*, 91 Ala. 548; *Toledo, P. & W. R. Co. v. Conroy*, 68 Ill. 560; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 647, 29 L. ed. 758, and cases cited; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; 7 Am. & Eng. Encyclop. Law, p. 824, and note 2, p. 825, note 1, p. 830, and note 1; *Van Dusen v. Letellier*, 78 Mich. 492.

Foreign laws must be averred and proved as facts.

8 Am. & Eng. Encyclop. Law, 539, note 2; Ala. Code, § 2675; *McDougald v. Rutherford*, 80 Ala. 258.

The law of a foreign state, whether declared by judicial decisions or otherwise, must be pleaded and proved.

Cincinnati, H. & D. R. Co. v. McMullen, 117 Ind. 439; *St. Louis & S. F. R. Co. v. Weaver*, 85 Kan. 412, 57 Am. Rep. 176; *Cubbedge v. Napier*, 62 Ala. 518.

McClellan, J., delivered the opinion of the court:

The plaintiff, W. D. Carroll, is, and was at the time of entering into the service of the defendant, the Alabama Great Southern Railroad Company, and at the time of being injured in that service, a citizen of Alabama. The defendant is an Alabama corporation, operating a railroad extending from Chattanooga, in the state of Tennessee, through Alabama to Meridian, in the state of Mississippi. At the time of the casualty complained of plaintiff was in the service of the defendant in the capacity of brakeman on freight trains running from Birmingham, Ala., to Meridian, Miss., under a contract which was made in the state of Alabama. The injury was caused by the breaking of a link between two cars in a freight train which was proceeding from Birmingham to Meridian. The point at which the link broke and the injury was suffered was in the state of Mississippi. The evidence tended to show that the link which broke was a defective link, and that it was in a defective condition when the train left Birmingham. It was shown that this link had come to the defendant road at Chattanooga, Tenn., with a car which belonged to, and came to that point over, a road which was foreign to the Alabama Great Southern road; that at Chattanooga this foreign car was coupled into a train of the defendant by means of this link, the destination of the car next in rear of it being Birmingham, and the destination of the second car in the rear of it, which belonged to defendant, being Meridian, to which point the foreign car was also bound. At Birmingham the car between this foreign car and the Alabama Great Southern car, which were billed to Meridian, was cut out, and these two cars were coupled together by means of the link which had come to the defendant with the foreign car. The evidence went also to show that the defect in this link consisted in or resulted from its having been bent while cold; that this tended to weaken the iron, and in this instance had cracked the link somewhat on the outer curve of the bend,

and that the link broke at the point of this crack. It was shown to be the duty of certain employes of defendant stationed along its line to inspect the links attached to cars to be put in trains, or forming the couplings between cars in trains at Chattanooga, Birmingham, and some points between Birmingham and the place where this link broke, and also that it was the duty of the conductor of freight trains, and the other train men, to maintain such inspection as occasion afforded throughout the runs or trips of such trains; and the evidence affords ground for inference that there was a negligent omission on the part of such employes to perform this duty, or, if performed, the failure to discover the defect in, and to remove, this link was the result of negligence.

The foregoing statement of facts, either proved or finding lodgment in the tendencies of the evidence, together with the evidence of the law of Mississippi as to the master's liability for injuries sustained by an employe in his service, will suffice for the consideration and determination of the question which is of chief importance in this case, namely, whether the defendant is liable at all, on the facts presented by this record, for an injury sustained by the plaintiff in the state of Mississippi. The affirmative of this inquiry is sought to be rested and maintained upon two distinct propositions. In the first place, it is insisted that the negligence which one aspect of the evidence tends to establish is that of the defendant in respect of a duty which the law imposes upon the master, and which, whether performed, or undertaken to be performed, in the particular instance by the hand of the master, or by the hand of one to whom he had delegated its performance, is yet to be taken as being performed, or attempted to be performed, by the master himself, in such sort that the employer is responsible for its misperformance or nonperformance, whereby injury results to one of his employes, under the doctrine of the common law, and wholly irrespective of statutory provisions. These doctrines are presumed, and also shown, by the evidence in this case, to obtain in the state of Mississippi; and the defendant being an Alabama corporation, it cannot be questioned that an action may be maintained in this state to recover damages for an injury sustained in Mississippi by one of its servants, if the facts present a good cause of action under the law of that state. It is manifest, beyond adverse inference, on the evidence, conceding the link, the breaking of which caused the accident, to have been in a defective condition when it came to defendant's road at Chattanooga, attached to, and intended to be used in, the further transportation of the foreign car, that it was so used from that point to the place of the accident, that this defective condition of the link was patent to such observation as should have been bestowed upon it, and that the defect in it was the proximate cause of the injury to the plaintiff,—it is, we say, clear upon every aspect of the testimony, conceding all this to be true, that the use of that link in coupling the foreign car to the defendant's

train, and also in its use throughout the voyage from Chattanooga into Mississippi, was due to the negligence of employes of the defendant, who were charged by it with the duty of inspecting the link before and at the time of incorporating the foreign car into this train, and at the several points in Alabama where inspectors were stationed, as shown by the evidence, and also of the train men charged with the duty of inspection as the train was *en route*. There is no pretense that the defendant had not been sufficiently careful in the selection of these inspectors, or that they were incompetent. It is not pretended that they were insufficient in number, or stationed at points too widely separated along the line. There is no such idea advanced as that the defendant was negligent in the purchasing of links of adequate strength, and supplying them to these inspectors and to trains generally, or that there was any necessity for the continued use of this link upon a discovery of its defective condition; but, to the contrary, it is affirmatively shown that the defendant purchased and supplied its trains and employes with all necessary links of good quality and perfect condition to be used in its trains, to supply the places of links which became defective from use, and to substitute for defective links coming to this road with foreign cars. The only negligence, in other words and in short, which finds support, by direction or inference, in any tendency of the evidence, is that of persons whose duty it was to inspect the links of the train, and remove such as were defective, and replace them with others which were not defective. This was the negligence, not of the master, the defendant, but of fellow servants of the plaintiff, for which at common law the defendant is not liable. Thus it is said in McKinney on Fellow Servants, § 197: "It is a very common thing for train hands to receive injury through the negligence of persons employed by the company to inspect their cars to discover defects and repair them. The weight of authority, perhaps, is to the effect that the negligence of such employes in the performance of such duties cannot be attributed to the company, and it is consequently not liable for it,"—citing, among other cases, *Smith v. Potter*, 46 Mich. 258, 46 Am. Rep. 456; *Mackin v. Boston & A. R. Co.* 135 Mass. 201; *Columbus & X. R. Co. v. Webb*, 12 Ohio St. 475; *St. Louis, I. M. & S. R. Co. v. Rice*, 51 Ark. 467; *Kidwell v. Houston & G. N. R. Co.* 8 Woods, C. C. 813; and our own case of *Smoot v. Mobile & M. R. Co.*, 67 Ala. 18; and these and other cases are cited to the same proposition in 7 Am. & Eng. Encyclop. Law, p. 864, *note*. There are cases which hold to the contrary, but the law is, and has long been settled in this state, as we have stated it; the case of *Smoot v. Mobile & M. R. Co.*, *supra*, being directly in point. *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672, 720 *et seq.*; *Mobile & M. R. Co. v. Smith*, 59 Ala. 245; *Louisville & N. R. Co. v. Allen*, 78 Ala. 494.

This being the common law applicable to the premises as understood and declared in Alabama, it will be presumed in our courts,

as thus declared, to be the common law of Mississippi, unless the evidence shows a different rule to have been announced by the supreme court of that state as being the common law thereof. The evidence adduced here fails to show any such thing, but, to the contrary, it is made to appear, from the testimony of Judge Arnold, and by the decisions of the Supreme Court of Mississippi, which were introduced on the trial below, that that court is in full accord with this one in this respect. Indeed, if anything, those decisions go further than this court has ever gone in applying the doctrine of fellow servants to the exemption of railway companies from liability to one servant for injuries resulting from the negligence of another, holding, in one case, that a hostler, whose only duty it was to supply an engine with sufficient sand before turning it over to the engineer to go on the road, is a fellow servant of the engineer, for whose negligent failure to supply the sand the company would not be liable, (*Louisville, N. O. & T. R. Co. v. Petty*, 67 Miss. 255;) in another, that a section foreman and a laborer working under him were fellow servants in such sort that their common master would not be liable for the negligence of the former in attempting to repair a fish bar, which he ought to have discarded, and applied for a new one, (*Lagrons v. Mobile & O. R. Co.* 67 Miss. 592;) and in yet another case, that a section foreman and train men are fellow servants in respect of the negligence of the former, unknown to the company, in failing to keep the track in repair, and that an engineer on a passing train, who was injured in consequence, could not recover against the common employer, (*New Orleans, J. & G. N. R. Co. v. Hughes*, 49 Miss. 258;) and the doctrine of this case is said by Mr. McKinney to be "substantially the rule recognized by the English common-law decisions," (*McKinney, Fellow Servants*, p. 82, § 29.) See also *McMaster v. Illinois Cent. R. Co.* 65 Miss. 264.

Proceeding, therefore, on the presumptions we are authorized to indulge, and also on the evidence adduced in this case as to the law of Mississippi in this connection, and upon the testimony most favorable to the plaintiff as to the cause of his injuries, we feel entirely safe in declaring that plaintiff has shown no cause of action under the common law as it is understood and applied both here and in the state of Mississippi.

It is, however, further contended that the plaintiff, if his evidence be believed, has made out a case for the recovery sought under the Employers' Liability Act of Alabama, it being clearly shown that there is no such or similar law of force in the state of Mississippi. Considering this position in the abstract,—that is, dissociated from the facts of this particular case which are supposed to exert an important influence upon it,—there cannot be two opinions as to its being unsound and untenable. So looked at, we do not understand appellee's counsel even to deny either the proposition or its application to this case,—that there can be no recovery in one state for injuries to the person sustained in another, unless the infliction of

the injuries is actionable under the law of the state in which they were received. Certainly this is the well-established rule of law, subject, in some jurisdictions, to the qualification that the infliction of the injuries would also support an action in the state where the suit is brought had they been received within that state. 3 Am. & Eng. Encyclop. Law, pp. 127, 128; *Hyde v. Wabash, St. L. & P. R. Co.* 61 Iowa, 441, 47 Am. Rep. 830; *East Tennessee, V. & G. R. Co. v. Lewis*, 89 Tenn. 235; *Buckles v. Ellers*, 72 Ind. 220, 87 Am. Rep. 156; *Willis v. Missouri Pac. R. Co.* 61 Tex. 432, 48 Am. Rep. 801; *Woodard v. Michigan S. & N. I. R. Co.* 10 Ohio St. 121; *Whitford v. Panama R. Co.* 23 N. Y. 465; *Debevoise v. New York, L. E. & W. R. Co.* 98 N. Y. 877, 50 Am. Dec. 688; *Nashville, O. & St. L. R. Co. v. Foster*, 11 Am. & Eng. R. R. Cas. 180; 2 Rorer, Railroads, p. 1149; *Kahl v. Memphis & C. R. Co.* (Ala.) 10 So. Rep. 661; *Chicago, St. L. & N. O. R. Co. v. Doyle*, 60 Miss. 977; *Davis v. New York & N. E. R. Co.* 143 Mass. 301, 58 Am. Dec. 188; *Le Forest v. Tolman*, 117 Mass. 109, 19 Am. Rep. 400; *Limekiller v. Hannibal & St. J. R. Co.* 83 Kan. 83; *The Scotland*, 105 U. S. 24, 26 L. ed. 1001; *The Santa Cruz*, 1 C. Rob. 50; *Atchison, & S. F. R. Co. v. Moore*, 29 Kan. 632, 11 Am. & Eng. R. R. Cas. 243.

But it is claimed that the fact, of this case take it out of the general rule which the authorities cited above abundantly support, and authorize the courts of Alabama to subject the defendant to the payment of damages under section 2590 of the Code, although the injuries counted on were sustained in Mississippi under circumstances which involved no liability on the defendant by the laws of that state. This insistence is, in the first instance, based on that aspect of the evidence which goes to show that the negligence which produced the casualty transpired in Alabama and the theory that, wherever the consequences of that negligence manifested itself, a recovery can be had in Alabama. We are referred to no authority in support of this proposition, and exhaustive investigation on our part has failed to disclose any. There are at least two well-considered cases against it, one of which involved an effort to recover for personal injuries, sustained in Alabama under circumstances which afforded no cause of action in Alabama, in the courts of Tennessee, where the casual negligence occurred, and where, also, had the negligence manifested itself in the result complained of there, the plaintiff would have been entitled to recover. The accident happened on a train going from Nashville to Chattanooga, in Tennessee, on a railway which runs for a comparatively short distance through Alabama. The negligence relied on consisted in the failure of employes of the defendant, charged in that behalf, to discover and remedy a defective brake before the train left Nashville, as well as during its passage through Tennessee. While the train was running through Alabama, a brakeman was killed in consequence of the defect in this brake. All this is precisely on all fours with our case in those of its aspects most

favorable to the plaintiff; that plaintiff, the court conceded, would have had a good cause of action under the law of Tennessee, the place of the negligence, if his intestate had been injured within its limits. So here, the plaintiff, on one aspect of the evidence, would have had a good cause of action in Alabama, the place of the negligence, had he been injured in Alabama. But it was found in that case that the laws of Alabama gave no cause of action for the negligent failure to inspect the appliances used in operating a train, but held the brakemen and the inspectors to be fellow servants in respect thereto, just as here the laws of Mississippi afford no redress for the consequences of such negligence, though our statutes have since the Tennessee decision provided therefore; and it was held on the authority of *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672, that there could have been no recovery in Alabama, and that of consequence no cause of action existed in Tennessee; the court saying: "There is no question but the laws of Alabama . . . controlled the rights of the parties in this case, and whether there was error in this part of the charge [referring to an instruction as to defendant's liability on the negligence shown] as given, or the refusal of the specific instructions asked for, [substantially that the negligence of a car inspector from which a brakeman suffers injury is no ground for action against their common employer,] depends wholly upon the laws of that state." *Nashville, C. & St. L. R. Co. v. Foster*, 10 Lea, 358. In the other case the precise point here under consideration was brought before the Supreme Court of Mississippi, in an action instituted in that state sounding in damages for fatal injuries inflicted upon plaintiff's intestate in the state of Tennessee. It was insisted that, inasmuch as the death of the deceased resulted from the negligent failure of a train dispatcher in Mississippi to give requisite orders to the train men at a certain point in Tennessee, the rights of the parties were determinable by the laws of Mississippi, the place of the disastrous negligent omission. But the court held to the contrary, saying: "The right of the appellee is determinable by the law of Tennessee, in which state the killing of her husband occurred. The view that no recovery could be had here, except for a result traceable to an omission of duty in Mississippi, is unfounded. Physical force, proceeding from this state, and inflicting injury in another state, might give rise to an action in either state, and *vice versa*; but the omission of duty in Mississippi cannot transfer a consequence of it, manifested physically in another state, to Mississippi. The cases of injuries commenced in one jurisdiction and completed in another illustrate our view on this subject. The true view is that the legal entity called the "corporation" is omnipresent on its railroad, and the presence or absence of negligence with respect to an occurrence at any point of the line is not to be resolved by the place at which any officer or employé was stationed for duty. The question is as to duty operating effectually at the place where its alleged failure caused

harm to result. The locality of the collision was in Tennessee. It was there, if anywhere, that the company was remiss in duty, for there is where its proper caution should have been used." *Chicago, St. L. & N. O. R. Co. v. Doyle*, 60 Miss. 977, 984. If this doctrine was properly applied to the facts of that case, where the act to be performed, the failure to perform which caused the injury, could only be performed at a point in Mississippi, and by an employé who was stationed and remained at that place, it would seem to address itself with more force to the case at bar, where it appears the corporation was in fact present with the train and with the defective link every inch of the journey from Birmingham to the point of the accident, in the person of the conductor and other train men who were charged with the duty all along the line of discovering and removing the unsafe appliance.

The position of the Mississippi court appears to us to be eminently sound in principle and upon logic. It is admitted, or at least cannot be denied, that negligence of duty unproductive of damnifying results will not authorize or support a recovery. Up to the time this train passed out of Alabama no injury had resulted. For all that occurred in Alabama, therefore, no cause of action whatever arose. The fact which created the right to sue,—the injury,—without which confessedly no action would lie anywhere, transpired in the state of Mississippi. It was in that state, therefore, necessarily that the cause of action, if any, arose; and whether a cause of action arose and existed at all, or not, must in all reason be determined by the law which obtained at the time and place when and where the fact which is relied on to justify a recovery transpired. Section 2590 of the Code of Alabama had no efficacy beyond the lines of Alabama. It cannot be allowed to operate upon facts occurring in another state, so as to evolve out of them rights and liabilities which do not exist under the law of that state, which is of course paramount in the premises. Where the facts occur in Alabama, and a liability becomes fixed in Alabama, it may be enforced in another state having like enactments, or whose policy is not opposed to the spirit of such enactments; but this is quite a different matter. This is but enforcing the statute upon facts to which it is applicable, all of which occurred within the territory for the government of which it was enacted. Section 2590 of the Code, in other words, is to be interpreted in the light of universally recognized principles of private, international, or interstate law, as if its operation had been expressly limited to this state, and as if its first line read as follows: "When a personal injury is received in Alabama by a servant or employé," etc. The negligent infliction of an injury here, under statutory circumstances creates a right of action here, which, being transitory, may be enforced in any other state or country the comity of which admits of it; but for an injury inflicted elsewhere than in Alabama our statute gives no right of recovery, and the aggrieved party must look to

the local law to ascertain what his rights are. Under that law this plaintiff had no cause of action, as we have seen, and hence he has no rights which our courts can enforce, unless it be upon a consideration to be presently adverted to. We have not been inattentive to the suggestions of counsel in this connection, which are based upon that rule of the statutory and common criminal law under which a murderer is punishable where the fatal blow is delivered, regardless of the place where death ensues. *Green v. State*, 66 Ala. 40. This principle is patently without application here. There would be some analogy if the plaintiff had been stricken in Alabama, and suffered in Mississippi, which is not the fact. There is, however, an analogy which is afforded by the criminal law, but which points away from the conclusion appellee's counsel desire us to reach. This is found in that well-established doctrine of criminal law that where the unlawful act is committed in one jurisdiction or state, and takes effect—produces the result which it is the purpose of the law to prevent, or, it having ensued, punish for—in another jurisdiction or state, the crime is deemed to have been committed and is punished in that jurisdiction or state in which the result is manifested, and not where the act was committed. 1 Bishop, Crim. Law, § 110 *et seq.*; 1 Bishop, Crim. Proc. § 58 *et seq.*

Another consideration,—that referred to above,—it is insisted, entitles this plaintiff to recover here under the Employers' Liability Act for an injury inflicted beyond the territorial operation of that Act. This is claimed upon the fact that at the time plaintiff was injured he was in the discharge of duties which rested on him by the terms of a contract between him and the defendant, which had been entered into in Alabama, and hence was an Alabama contract, in connection with the fact that plaintiff was and is a citizen of this state, and the defendant is an Alabama corporation. These latter facts—of citizenship and domicile, respectively, of plaintiff and defendant—are of no importance in this connection, it seems to us, further than this: they may tend to show that the contract was made here, which is not controverted, and, if the plaintiff has a cause of action at all, he, by reason of them, may prosecute it in our courts. They have no bearing on the primary question of the existence of a cause of action, and, as that is the question before us, we need not further advert to the fact of plaintiff's citizenship or defendant's domicile.

The contract was that plaintiff should serve the defendant in the capacity of a brakeman on its freight trains between Birmingham, Ala., and Meridian, Miss., and should receive as compensation a stipulated sum for each trip from Birmingham to Meridian and return. The theory is that the Employers' Liability Act became a part of this contract, that the duties and liabilities which it prescribes became contractual duties and liabilities, or duties and liabilities springing out of the contract, and that these duties attended upon the execution whenever its performance was required, in Mississippi as well as in

Alabama, and that the liability prescribed for a failure to perform any of such duties attached upon such failure and consequent injury wherever it occurred, and was enforceable here, because imposed by an Alabama contract, notwithstanding the remission of duty and the resulting injury occurred in Mississippi, under whose laws no liability was incurred by such remission. The argument is that a contract for service is a condition precedent to the application of the statute, and that, "as soon as the contract is made, the rights and obligations of the parties under the Employers' Act "became vested and fixed," so that "no subsequent repeal of the law could deprive the injured party of his rights, nor discharge the master from his liabilities," etc. If this argument is sound, and it is sound if the duties and liabilities prescribed by the Act can be said to be contractual duties and obligations at all, it would lead to conclusions, the possibility of which has not hitherto been suggested by any court or law writer, and which, to say the least, would be astounding to the profession. For instance, if the Act of 1885 becomes a part of every contract of service entered into since its passage, just "as if such law were in so many words expressly included in the contract as a part thereof," as counsel insist it did, so as to make the liability of the master to pay damages for injuries to a fellow servant of his negligent employé a contractual obligation, no reason can be conceived why the law existing in this regard prior to the passage of that Act did not become in like manner a part of every contract of service then entered into, so that every such contract would be deemed to contain stipulations for the non-liability of the master for injuries flowing from the negligence of a fellow servant, and confining the injured servant's right to damages to a claim against his negligent fellow servant; the former, in other words, agreeing to look alone to the latter. There were many thousands of such contracts existing in this country and England at the time when statutes similar to section 2590 of our Code were enacted. There were, indeed, many thousands of such contracts existing in Alabama when that section became the law of this state. Each of these contracts, if the position of plaintiff as to our statute being embodied into the terms of his contract, so that its duties were contractual duties and its liabilities contractual obligations to pay money, can be maintained, involved the assurances of organic provisions, state and Federal, of the continued nonliability of the master for the negligence of his servants, notwithstanding the passage of such statutes. Yet these statutes were passed, and they have been applied to servants under pre-existing contracts as fully as to servants under subsequent contracts, and there has never been a suggestion even, in any part of the common-law world, that they were not rightly so applied. If plaintiff's contention is well taken, many a judgment has gone on the rolls in this state and throughout the country, and been satisfied, which palpably overrode vested rights, without the least suspicion on

the part of court or counsel that one of the most familiar ordinances of the fundamental law was being violated. Nay, more; another result, not heretofore at all contemplated, would ensue. Contracts for service partly in Alabama might be now entered into in adjoining states, where the common-law rule still obtains, as in Mississippi, for instance, were the servant has no right to recover for the negligence of his fellow; and the assumption of this risk, under the law, becoming, according to the argument of counsel, a contractual obligation to bear it, such contracts would be good in Alabama; and, as to servants entering into them, our statute would have no operation, even upon negligence and resulting injury, within its terms, occurring wholly in Alabama. And, on the other hand, if this defendant is under a contractual obligation to pay the plaintiff the damages sustained by him because of the injury inflicted in Mississippi, the contract could be of course enforced in Mississippi, and damages there awarded by its courts, notwithstanding the law of that state provides that there can be no recovery, under any circumstances whatever, by one servant for the negligence of his fellow employé. We do not suppose that such a proposition ever has been or ever will be made in the courts of Mississippi. Yet that it should be made and sustained is the natural and necessary sequence of the position advanced in this case.

These considerations demonstrate the infirmity of plaintiff's position in this connection, and serve to show the necessity and propriety of the conclusion we propose to announce on this part of the case. That conclusion is that the duties and liabilities incident to the relation between the plaintiff and the defendant, which are involved in this case, are not imposed by, and do not rest in or spring from, the contract between the parties. The only office of the contract, under section 2590 of the Code, is the establishment of a relation between them,—that of master and servant; and it is upon that relation, that incident or consequence of the contract, and not upon the rights of the parties under the contract, that our statute operates. The law is not concerned with the contractual stipulations, except in so far as to determine from them that the relation upon which it is to operate exists. Finding this relation, the statute imposes certain duties and liabilities on the parties to it, wholly regardless of the stipulations of the contract as to the rights of the parties under it, and, it may be, in the teeth of such stipulations. It is the purpose of the statute, and must be the limit of its operation, to govern persons standing in the relation of master and servants to each other, in respect of their conduct in certain particulars within the state of Alabama. Mississippi has the same right to establish governmental rules for such persons within her borders as Alabama, and she has established rules which are different from those of our law; and the conduct of such persons towards each other is, when its legality is brought in question, to be adjudged by the rules of the one or the

other state, as it falls territorially within the one or the other. The doctrine is like that which prevails in respect of other relations, as that of man and wife. Marriage is a contract. The entering into this contract raises up certain duties and imposes certain liabilities in all civilized countries. What these duties and liabilities are at the place of the contract are determinable by the law of that place; but, when the parties go into other jurisdictions, the relation created by the contract under the law of the place of its execution will be recognized, but the personal duties, obligations, and liabilities incident to the relation are such as exist under the law of the jurisdiction in which an act is done or omitted, as to the legality, effect, or consequence of which the question arises. It might as well be said, where there is a marriage in Alabama, and the parties remove to Mississippi, and the wife there makes a contract which is void in Mississippi, but valid under our statute, and subsequently they return to Alabama, that our courts will enforce that contract; or if such husband, while in Mississippi, does an act which is innocuous and lawful in that state, but which, if done here, would entail liability upon him, and the parties afterwards return here, that the liability imposed by our laws could be enforced here, because the parties entered into the contract here,—as that a master is liable here for conduct towards his servant which was proper, or at least involved no liability, where it took place, simply because the contract which created the relation was entered into in this state. This whole argument is at fault. The only true doctrine is that each sovereignty, state or nation, has the exclusive power to finally determine and declare what act or omissions in the conduct of one to another—whether they be strangers, or sustain relations to each other which the law recognizes, as parent and child, husband and wife, master and servants, and the like—shall impose a liability in damages for the consequent injury, and the courts of no other sovereignty can impute a damaging quality to an act or omission which afforded no cause of action where it transpired. These propositions find illustration and support in the case of *Whitford v. Panama R. Co.*, 23 N. Y. 465, where the relation involved was that of carrier and passenger,—a relation which had been created by a contract made in New York between a corporation and a citizen thereof for carriage, commencing in that state, and ending in San Francisco, *via* Panama, and over the Panama Railroad. The passenger was killed, through the fault of the corporation's servants, while being transported along this railroad. The law of New York gave to the personal representative of a person whose death was caused by the wrongful act or omission of another a right of action therefor in all cases where the deceased, had the injury fallen short of death, could have recovered. It did not appear that the laws of New Granada, where the injury was inflicted, authorized any recovery on the facts alleged and proved. It was urged, as here, that the domicile of the

parties, and the fact that they contracted in New York, took the case out of general rules as to territorial limitations upon the operation of statutes; but the plaintiff was nonsuited, it being held, in effect, that the laws of New Granada were controlling as to the duties and liabilities incident to the relation which existed between them, while the contract of carriage was being performed in that country, and that the carrier, so far as care and diligence were concerned, owed the passenger no duties there, except such as were imposed upon the relation by the local law, and that no liability for negligence and its results, not prescribed by that law, rested on the company. And the court, *inter alia*, said: "Suppose the government of New Granada to have enacted that the proprietors of a railroad company should not be responsible for the negligence of its servants, provided there was no want of due care in selecting them, it could not be pretended that its will could be set at naught by prosecuting the corporation in the courts of another state, where the law was different. . . . The true theory is that no suit whatever respecting this injury could be sustained in the courts of this state, except pursuant to the law of international comity. By that law, foreign contracts and foreign transactions, out of which liabilities have arisen, may be prosecuted in our tribunals by the implied assent of the government of this state; but in all such cases we administer the foreign law as from the proofs we find it to be, or as without proofs we presume it to be." So in the case of *Gray v. Jackson*, 51 N. H. 9, 12 Am. Rep. 1, there was a contract of affreightment, by the terms of which

goods were to be carried out of one state into and through other states. They were lost in a state other than that in which the contract was made and the carriage commenced. By the law of the place of the contract, the carrier was liable for the loss, under the circumstances shown in evidence, had it occurred in that state. By the law of the state where the loss occurred, however, the carrier was not liable. In an action for the loss, prosecuted in the state of the contract, the law, not of that state, but of the place of the loss, which operated as to the particular transaction on the relation of shipper and carrier, and prescribed the duties and liabilities incident to that relation in that state, regardless of the place where the contract creating the relation was entered into, was applied, and made to determine the rights of the parties to be other than they were under the law of the place of the contract, which was also, as here, the place of the forum.

The foregoing views will suffice to indicate the grounds of our opinion that the rights of this plaintiff are determinable solely by the law of the state of Mississippi, and of our conclusion that upon no aspect or tendency of the evidence as to the circumstances under which the injury was sustained, and as to the laws of Mississippi obtaining in the premises, was the plaintiff entitled to recover. The general affirmative charge requested for defendant should therefore have been given. The other very numerous assignments of error need not be considered. For the error in refusing to instruct the jury to find for the defendant, if they believed the evidence, *the judgment is reversed*, and the cause will be remanded.

SOUTH CAROLINA SUPREME COURT.

Mary McCANDLESS, *Rept.*,

v.

RICHMOND & DANVILLE R. CO., *Appt.*

(.....S. C.....)

1. The police power of a state has no application respecting the liability of a railroad company for fires communicated by its engines or originating on its right of way as this power applies only to matters pertaining to the public health, the public morals, and the public safety.
2. A contract made by a railroad charter is not impaired by a statute making the company liable for fires caused by its engines or the act of its servants on its right of way where although the original charter was not subject to amendment or repeal the company accepted an amendment, the effect of which under general laws then in force was to make the charter subject to amendment, alteration, or repeal.
3. The privileges or immunities of citizens are not abridged by a statute creating

a liability on railroad corporations for fires on its right of way or set by its engines.

4. The property of a railroad company is not taken without due process of law by a statute making the company liable for fires set by its locomotives or originating on its right of way by an act of its agents or servants but giving the company an insurable interest in the property exposed to such dangers.
5. The equal protection of the law is not denied to railroad corporations by statutes making them liable for fires set by their engines or upon their right of way by the act of their agents or servants and giving them an insurable interest in the property exposed to such loss.
6. Making a railroad company liable for fires set by its engines or on its right of way is not a regulation of commerce among the states.
7. No restraints, disqualifications, or burdens are placed upon or discriminations made against railroad corporations, within the prohibition of S. C. Const., art. 1, § 12, by a statute applicable only to the

NOTE.—As to the equal protection of the laws under the Constitution of the United States, see 18 L. R. A.

note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. 579.

operators of railroads making them liable for all fires set out by their engines or on their rights of way if it applies equally and uniformly to them.

(McIver, Ch. J., *dissent*.)

(December 17, 1892.)

A PPEAL by defendant from a judgment of the Common Pleas Circuit Court for Chester County in favor of plaintiff in an action brought to recover damages for property lost by fire alleged to have been communicated thereto by defendant's locomotive. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. J. S. Cothran and B. L. Abney* for appellant.

Messrs. Henry & Gage, for respondent:

This statute is but the re-enactment of the common law.

1 Addison, Torts, p. 853.

The police power of the states under the Constitution of the United States and state extends to the protection of all property within the state. The maxim, *sic utere*, etc., applies here.

Desty, Fed. Const. p. 72; *Davis v. Central R. & Bkg. Co.* 17 Ga. 323; *Cooley*, Const. Lim. p. 715.

Statutes making railroad companies liable for beasts killed are constitutional although they previously existed.

Cooley, Const. Lim. p. 722, *note*, citing some thirty cases.

Also statutes making railroad companies liable for injuries by fire communicated by their locomotives, sustained as to companies previously existing.

Ibid. and *note*, citing *Lyman v. Boston & W. R. Corp.* 4 Cush. 288; *Rodemacher v. Milwaukee & St. P. R. Co.* 41 Iowa, 297, 20 Am. Rep. 592; *Gorman v. Pacific R. Co.* 26 Mo. 441, 73 Am. Dec. 220.

The railroad company has, under the statute, an insurable interest in property along its route.

Thompson v. Richmond & D. R. Co. 24 S. C. 372.

Where this is the case it was held to extend to all property subject to insurance and to include growing trees.

Chapman v. Atlantic & St. L. R. Co. 37 Me. 92.

Property rights, however absolute, are subject to such limitations as not to be injurious.

Cooley, Const. Lim. 714.

Pope, J., delivered the opinion of the court:

This action was commenced in the court of common pleas for the county of Chester, in this state, and came on for trial at the March term, 1891, of said court, before his honor, Judge Kershaw, and a jury. At the trial the plaintiff and defendant submitted to the court the following agreement in writing: "The defendant consents to a verdict herein in the sum of one hundred dollars in favor of the plaintiff: provided, that the court should determine that section 1511 of the General Statutes is constitutional, it being admitted that the fire which destroyed plaintiff's property was communicated from defendant's locomotive. That, if the court holds that said section of the General Statutes is unconstitutional, then the verdict shall be 18 L. R. A.

p>for defendant." Section 1511 of the General Statutes of this state is as follows: "Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, or originating within the limits of the right of way of said road in consequence of the act of any of its authorized agents or employes, except in any case where property shall have been placed on the right [of way] of such corporation unlawfully, or without its consent; and it shall have an insurable interest in the property upon its route for which it may so be held responsible, and may procure insurance thereon in its own behalf." The presiding judge then charged as follows: "The parties in this case, admitting the origin of the fire to be sparks from defendant's locomotive, and the amount of damages sustained by reason thereof to be \$100, and that the same was communicated from the locomotive of the defendant without negligence, and the supreme court of this state having held, in the case of *Thompson v. Richmond & D. R. Co.*, 24 S. C. 366, that in such case, under section 1511 of the General Statutes, the defendant would be liable irrespective of any negligence, have agreed that a verdict shall be rendered in favor of the plaintiff for one hundred dollars, unless I shall hold that said section 1511 is unconstitutional, so far as it undertakes to make railroad corporations responsible in damages for property injured by fire communicated by its locomotive engines, without any negligence upon its part, and while in the prudent, careful, and proper operation of its road and franchises. I now charge you, gentlemen of the jury, that said section of the General Statutes is constitutional in every respect, and is not contrary in any manner to the Constitution of the state or of the United States, and is a proper exercise of the police power of the state by the Legislature. Under the stipulation entered into by the parties hereto, I must therefore direct that you find a verdict in favor of the plaintiff in the sum of one hundred dollars." The jury rendered a verdict in favor of plaintiff for \$100, and, judgment having been duly entered thereon, the defendant now appeals to this court on the following grounds: "The defendant, the Richmond & Danville Railroad Company, excepts to the charge and ruling of the presiding judge in the above-stated case that section 1511 of the General Statutes of the state of South Carolina is constitutional wherein it undertakes to make railroad corporations responsible in damages for property injured by fire communicated by their locomotive engines, absolutely and irrespective of any question of negligence, whereas he should have held that said section was unconstitutional so far as it undertook to make railroad corporations responsible for damages irrespective of the question whether its conduct was proper, or whether it was neglectful of duty. (1) Because said section contravenes the Constitution of the United States, in that (a) it deprives railroad corporations of their property without due process of law, in violation

of the 14th Amendment; (b) it denies to railroad corporations within its jurisdiction the equal protection of the law, in violation of the 14th Amendment; (c) it impairs the obligation of the charter contract of the defendant in violation of section 10, art. 1; (d) it interferes with the power of Congress to regulate commerce among the several states, in violation of section 8, art. 1. (2) Because said section contravenes the Constitution of the state of South Carolina, in that (a) it subjects railroad corporations to restraints and disqualifications other than are laid upon other corporations and citizens of the state, in violation of section 13, art. 1; (b) it discriminates between railroad corporations and other corporations and citizens of the state, by imposing upon them conditions and obligations, and subjects them to burdens, different from those imposed upon other corporations and citizens, in violation of the same section and article; (c) it imposes a new obligation upon railroad corporations for the benefit of another class of citizens, when they are guilty of no neglect of duty, in violation of the same section and article; (d) it dispossesses railroad corporations of their property under a rule of law to which other corporations and citizens are not subjected, in violation of the same section and article; (e) it deprives railroad corporations of their property under a rule of law to which other corporations and citizens are not subjected, in violation of the same section and article; (f) it takes the private property of railroad corporations, and applies the same to a private use, without the consent of said corporation, or a just compensation being made therefor, in violation of section 23, art. 1."

1. We observe that the learned circuit judge has announced in his charge to the jury that section 1511 of the General Statutes of this state was constitutional because it was the exercise by the state of what is known in law as the "police power" of the state. We hesitate in venturing to dissent from this view as expressed by one for whose judgment we have so much respect, and in whose accuracy we have always with so much pleasure confided, yet candor, in the light of our own official responsibilities, requires that we should do so in this instance, no matter how distasteful it may be to us personally. We are aware that many eminent lawyers and judges have adopted the views of the circuit judge. But a careful consideration of the latest official declarations of this law by the Supreme Court of the United States has led us to modify our conceptions of what is involved in what is called the "police power" of a state in this Union of states. The fundamental idea in ascribing such potency to this principle of the law is based upon the immutable principles of self-defense,—a doctrine ever dear to the freeman in his individual status, and very precious to the affections of a people united in society, in an organized government; that, inasmuch as all rights of the state, not delegated expressly or by necessary implication to the general government, were reserved to the states in their individual sovereignty, and that, as all provisions in the laws of the

United States were made upon the theory that this reserved right in the sovereign states was preserved intact, when any such laws of the United States contravened this principle, such principle would be preserved. To make our meaning clear, take this illustration: The Constitution of the United States requires that no state shall pass any law impairing the obligation of a contract. Where a contract had been made by the state of Louisiana, whereby she invested a corporation, formed under her laws, with the exclusive privilege of having slaughter houses in the city of New Orleans, within that state, and yet a subsequent Legislature of that state made another contract with another corporation that directly impinged upon the first contract, and the question was finally carried to the Supreme Court of the United States, that august tribunal decided that the second contract was valid, although it was in violation of the obligation of the first contract, and justified such Legislature upon the principle of law known as the "police power," which required the protection of the public health of the citizens of that state. As we before remarked, in view of this and some previous decisions of that court, many lawyers and judges conceived that all questions relating to the exercise of the sovereign powers of a state by that state fell within this principle of the law. A moment's reflection will satisfy any one that such a broad doctrine would have in its wake untold evils. Three cases finally reached the supreme court, involving this principle. They are all to be found in 115 U. S. and are *Louisville Gas Co. v. Citizens Gas-Light Co.* 115 U. S. 683, 29 L. ed. 510; *New Orleans Gas-Light Co. v. Louisiana Light & Heat Producing & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; and *New Orleans Water-Works Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525. Mr. Justice Harlan delivered most carefully considered decisions in the three cases, wherein he reviewed every decision of that court relating to the police power of the states, and announced the conclusion that there was a harmony in all of them, one with the other, and that such law only comprised questions pertaining to the public health, the public morals, and the public safety, and that the police power was confined within the limits of these three questions. It must be admitted on all hands that the official declarations by a majority of this supreme court are final, conclusive, and authoritative declarations of the true construction to be placed upon the Constitution and laws of the United States. Such being the result, we therefore cannot agree with the learned circuit judge here in sustaining the constitutionality of this Act of our Legislature on the ground that it is an exercise of the police power of the state.

But it by no means follows that, being unable to agree to the reason assigned by the circuit judge in support of his charge to the jury wherein he sustained this provision of the law as constitutional, we must reverse his judgment, for, if there are any sound grounds in law for its support, we must do so. The assertion by him of the police

power in the state was only a reason for his conclusion.

It remains for us to consider the constitutionality of this part of the Act of our Legislature in other aspects. Does that section operate to defeat any of the provisions of the Constitution of the United States or of this state in any of the particulars complained of? We propose to discuss these matters not exactly in the line suggested by the grounds of appeal, but our discussion will ultimate in a consideration of the merits of each one.

1. It may be as well to remark in the outset that the appellant here in its separate individuality is not a corporation created under the laws of this commonwealth. It is a creature of the laws of Virginia; but it has leased the Charlotte, Columbia & Augusta Railroad, and this railroad is a creature of the state of South Carolina. 11 Stat. at L. pp. 415, 536; 14 Stat. at L. p. 232. Any corporate rights exercised by the appellant in its management of the franchises of the Charlotte, Columbia & Augusta Railroad Company as its lessee are referable solely to the charter rights of its lessor. No clearer definition of a corporation exists than that announced by Chief Justice Marshall in the case of *Dartmouth College Trustees v. Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed. 639: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence." One of the rights conceded in this country to corporations is that of being regarded as a person in the eyes of the law. *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 35 L. ed. 1061; and authorities therein cited in support of such proposition. The effect of the adjudicated cases on the subject of the charters conferred upon corporations operating railroads is that railroad corporations are private corporations affected by a use in the public. They are formed for the benefit and convenience of the public, hence by law invested with special privileges. As public purposes are by them subverted, they are invested, to an extent limited to their needs, with the state's right of eminent domain. Their business, being affected with a public use, to that extent is subject to legislative action. *Charlotte, C. & A. R. Co. v. Gibbs, supra*; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 877. As the charter of a corporation sets into existence the properties which it passes, it may not be amiss at this point to examine the charter which the laws of this state have conferred upon and which has been accepted by the Charlotte, Columbia & Augusta Railroad Company. So far as the grant of the usual rights possessed by a railroad company, the charter in this instance is complete. We mean by this statement that from the initial points of Augusta, Ga., by way of Columbia, in this state, to the city of Charlotte, in North Carolina, this corporation has had conferred upon it the usual properties possessed by railroads, but it may be proper to state that in the Act of the Legislature of this 18 L. R. A.

state providing for its creation any remuneration secured by its terms to the owners of the lands through which the right of way was to be obtained, only looked for compensation by such railroad to such landowners for the value of the property so taken by the railroad, such value being liable to be reduced by the consideration of the increased value lent to such lands by the railroad being built. In no case was there any provision for the injury that might accrue to such property by reason of fire being used by its locomotives. This railroad company was made up by the consolidation of the Charlotte & South Carolina Railroad Company with that of the Columbia & Augusta Railroad. The first had been chartered in 1846-1848; the second, some time during the year 1858. The consolidation occurred in 1869, under an Act of the Legislature of this state. The state of South Carolina in 1841 made the following enactment: "(41) Be it further enacted that it shall become part of the charter of every corporation which shall at the present or any succeeding session of the General Assembly receive a grant of a charter, or any renewal, amendment, or modification thereof, (unless the Act granting such charter, renewal, amendment, or modification shall in express terms except it,) that every charter of incorporation granted, renewed, or modified as aforesaid shall at all times remain subject to amendment, alteration, or repeal by the legislative authority." 11 Stat. at L. p. 183. The Act of 1846, providing a charter for the Charlotte & South Carolina Railroad Company, contained a clause especially excepting this corporation from such forty-first section of the Act of 1841. The Act passed in 1848 made no reference to such section. The Act providing for the consolidation as aforesaid was silent as to this forty-first section of the Act of 1841. The effect of this section 41 of the Act of 1841 has been construed by the court of last resort on constitutional questions,—the United States Supreme Court at least twice. *Tomlinson v. Jessup*, 82 U. S. 15 Wall. 454, 21 L. ed. 204; *Hoge v. Richmond & D. R. Co.* 99 U. S. 348, 25 L. ed. 808,—in which last-cited suit Mr. Justice Field as the organ of the court, said: "By the Law of 1841 every charter of a corporation in South Carolina subsequently granted, amended or modified was subject to repeal, amendment or modification by the Legislature, unless specially excepted from such legislative control in the Act granting the charter, amendment, or modification. Such is evidently the meaning of the forty-first section of that law, though the intention is inaptly expressed. This construction is somewhat different from that placed upon it in *Tomlinson v. Jessup, supra*, and gives the Legislature more extended control, but it is the construction to which a more careful examination of the language has led us. By it the Legislature said that subsequent charters should be subject to repeal or amendment, unless they were in express terms excepted from its control in the Acts granting them; and that existing charters, if subsequently amended or modified, should stand

in the same position. Its provisions constituted the condition upon which every charter was afterwards granted, amended or modified. They formed as much a part of the new or amended charter as if they had been originally embraced in it." Also *Tomlinson v. Jessup*, *supra*, in which the construction in *Hoge v. Richmond & D. R. Co. supra*, as to the effect of section 41, was virtually given in these words: "The power reserved to the state by the Law of 1841 authorized any change in the contract as it originally existed, or as subsequently modified, or its entire revocation."

It is admitted that a charter granted by a state to a corporation makes a contract between the state and the corporation, and that a question as to impairment of that contract arises whenever a state by subsequent legislation seeks to alter the same against the will of the corporation; and that, when such action of the state is questioned in law, the answer will have to be made justifying such legislative interference with its contract by the state. It is contended here that the Legislature of this state has no right, by the enactment of section 1511, to interfere with her contract with the Charlotte, Columbia & Augusta Railroad Company. But does it not seem that this state makes perfect answer to the appellant here when it shows that the party who accepted the contract contained in the Act of incorporation did so with a positive stipulation on the part of the state that, if the railroad company ever accepted any alteration or modification of its original charter by an Act of the Legislature of this state, thereafter it would be competent for the Legislature to alter, modify, or repeal such contract at the pleasure of the state? Such is the inevitable effect, unless there should be placed upon the Act in question some restraining hand by the 14th Amendment of the Federal Constitution. It is well-settled law that the laws which subsist at the time and place of the making of a contract and when it is to be performed enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. *White v. Hart*, 80 U. S. 13 Wall. 653, 20 L. ed. 688; *Von Hoffman v. Quincy*, 71 U. S. 4 Wall. 552, 18 L. ed. 409; *Edwards v. Kearzey*, 96 U. S. 601, 24 L. ed. 797. So, when the state of South Carolina made a contract by the grant to this railroad company, all of her laws in existence at that time pertaining thereto became a part of such contract. At the date of this contract, under the law as it then existed, in case injury resulted to the property of another by fire communicated from the locomotive in use by the appellant, no damages could be recovered therefor unless negligence—want of due care—by the railroad company was shown. *Thompson v. Richmond & D. R. Co. supra*; *Rodemacher v. Milwaukee & St. P. R. Co. supra*; *Lyman v. Boston & W. R. Corp.* 4 Cush. 288. After all, what is the controlling motive in this legislation? It certainly is not animosity against railroads. Look at the facts underlying the exercise of this principle of law: The Constitution and laws of every well-regulated community secure the enjoyment by every one of life, liberty, and property. A man owns property through which, or near by the place where, a railroad is constructed. The property of the man is destroyed by the fire communicated to the same by the railroad company. One man has lost his prop-

erty of others. It adds, however, a provision allowing the railroad company to insure the property on its route against such loss resulting from fire communicated by its engines, or occurring on its right of way. Let it be remembered that such a privilege to the railroads could not be secured when losses occurred from negligence.

The inquiry must now be made, as previously suggested, does this section contravene the 14th Amendment to the Federal Constitution? In the case of *Minor v. Happersett*, 88 U. S. 21 Wall. 171, 22 L. ed. 629, when the effect of the 14th Amendment was under consideration, Chief Justice Waite, in announcing that court's decision, stated: "The Amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had." The language of the first section of this Amendment, in part, is as follows: ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Where can it be pretended that in this section 1511 the state of South Carolina has attempted to abridge the privileges or immunities of citizens of the United States? Is there not provided in the section an absolute equality of all railroad companies? Was not the Charlotte, Columbia & Augusta Railroad Company one on its own creatures, deriving its life from her laws? Care should be taken to restrict the view of this appeal to the fact that it is really this railroad, and no other, that makes this question. We are not required to answer questions fanciful in their nature. Our duty is to confine ourselves and our judgment to the parties actually before this court. We repeat it, this appellant has no other rights in this connection than those possessed by its lessor; and we fail to see how this section under discussion has abridged the privileges or immunities of such lessor through his lessee. The right to alter the contract existed before 1869. It existed in 1862, when this section was enacted. The right to control in determining the propriety of its alteration by the assent of the lessor was in the state. All that has been done has been to exercise that admitted right. The same course has been adopted by other states, and the courts of last resort in those states have upheld such legislation. *Rodemacher v. Milwaukee & St. P. R. Co. supra*; *Lyman v. Boston & W. R. Corp.* 4 Cush. 288. After all, what is the controlling motive in this legislation? It certainly is not animosity against railroads. Look at the facts underlying the exercise of this principle of law: The Constitution and laws of every well-regulated community secure the enjoyment by every one of life, liberty, and property. A man owns property through which, or near by the place where, a railroad is constructed. The property of the man is destroyed by the fire communicated to the same by the railroad company. One man has lost his prop-

erty through no carelessness of his own, and the railroad has destroyed that property through agencies necessary to the conduct of its business. The property of the citizen destroyed was not in the way of the proper conduct of the railway's business, but the fire set to it by the railroad company was while such property was off of its roadbed. Now, under all those circumstances, who shall suffer? In *Danner v. South Carolina R. Co.*, 4 Rich. L. 329, 55 Am. Dec. 678, which was a case for negligence, and of course differs in that particular from the case at bar, the court ruled the law in this state to be that, upon the proof by the plaintiff of the killing of his cattle by the railroad company, it was then incumbent on the railroad company to rebut by its proof the charge of negligence. This section goes only a step further by holding the railroad company responsible for injuries to the rights of others, resulting from agencies set in motion by it, and which had escaped from the railroad's control, so as to work an injury to the property of another, while such property was on its owner's premises. The charge that this section takes the property of another without due process of law cannot be successfully maintained. Here there is no reference to the taking of the property of another. There is no compulsion used to this railroad to allow the fire of its engine to escape and burn up the property of another, but rather it incites care to prevent that result by providing a penalty for a failure to do so. Granted that the result is the payment of damages for the injuries aimed to be suppressed by this legislation, still it is only the result. No legislative provision vests the money of the railroad in the owner of property destroyed by the railroad. Nor do we see how it denies to this railroad the equal protection of the law. Nor, from what has been already said herein, is there any ground to imply an impairment of the obligation of the contract. These matters are somewhat involved in the decision of the United States court in the case of *Charlotte, C. & A. R. Co. v. Gibbs*, *supra*, and were all decided adversely to the railroad. As to the last, where it is suggested that this section interferes with the power of Congress to regulate commerce among the states in violation of section 8 of article 1, we are utterly unable to perceive the slightest soundness in that position. The argument of appellant is silent at this point. We apprehend that it must be a vast circuit that must be traversed to make this suggestion of error available to the correction of this judgment of the circuit court.

2. (a) A rule of law ought to apply generally; that is true; that is, there ought to be no excepted classes. What is the crime of murder in one man ought, under the law, to be the same crime in another man, under the same circumstances. When a tax is levied upon the profession of law, one gentleman at the bar should be required to pay it, just as do all the other members of the profession. One pilot should be allowed to collect the same fees as another pilot for similar services. One railroad should be

subjected to a fine, or other penalty, for failing to blow its whistle at a crossing, just as all other railroads should be required to do. One railroad should be required to pay, on its gross earnings, a tax to pay the expenses of the railroad commissioners of this state, just as all the balance of the railroads in this state are required to do. Equality is equity. But when the law reaches out its strong arms, and punishes the murderer, he should not complain that his other fellow citizens, who have not committed murder, are not also hung. The lawyer who pays a tax on his profession should not complain that a tanner does not pay a like tax. A commission merchant should not feel chagrined because a pilot collects fees for bringing a vessel into port and he cannot. A railroad should not complain when it has to pay the expenses of the railroad commission, whose office it is to superintend its business, because a cotton factory, with whom the railroad commission has no business, is not required to pay its part of such expenses. And so with the balance. It is upon those common carriers who have been confided valuable franchises by the state on condition of a use of them by the public, and who operate railroads over a right of way contiguous to the property of others with a flying locomotive whose sparks sometimes spread ruin to others. It is to the railroads, who alone do this, that the law speaks, whether such railroads are operated and owned by one man, a partnership of men, or a chartered company. It speaks to every one alike. It is no respecter of persons. This exception is overruled.

(b) What is said in disposing of the objection indicated as "(a)" will apply with equal force to the objection now presented.

(c) The laws of this state reserved the right to change the contract. The Legislature, in its wisdom, has acted. In our judgment, its action is not liable to be considered an error as alleged.

(d) The short reference in (c) applies here as well.

(e) and (f). We are at a loss to perceive how this action of the state can be said to deprive or take the private property of railroads and give it to another without the railroads' consent, and contrary to law,—especially to the Constitution of this state. A little reflection, we are sure, will remove this difficulty. Where railroads are made to pay damages to persons whose persons or property they have injured, it cannot be said that such damages, though very unwillingly paid, are taken from them contrary to law. It is the law when enforced that requires the damages paid. The provision of the statute creating the offense, for the commission of which the damages are adjudged to be paid, can in no sense be made to apply to the case suggested in these exceptions. The grounds of appeal must all be dismissed.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

McGowan, J.:

I am not inclined to declare an Act of the

Legislature unconstitutional unless it is clearly so. I concur in the result.

McIver, C. J., dissenting:

It being admitted that the fire which destroyed plaintiff's property some time in July, 1890, had its origin in sparks escaping from defendant's locomotive, and that the damages sustained amounted to \$100, the only question in the court below, and the only question raised by this appeal, is whether section 1511 of the General Statutes comes in conflict with the provisions of the Constitution of this state or that of the United States. The section in question reads as follows: "Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, or originating within the limits of the right of way of said road in consequence of the act of any of its authorized agents or employes, except in any case where property shall have been placed on the right of way of such corporation unlawfully, or without its consent; and shall have an insurable interest in the property upon its route for which it may be so held responsible, and may procure insurance thereon in its own behalf." This section has been construed by this court in the case of *Thompson v. Richmond & D. R. Co.*, 24 S. C. 366, as designed to eliminate the element of negligence, whenever a railroad company is sued for damages occasioned by fire communicated by its locomotives, or originating upon the right of way in consequence of the act of any of the authorized agents or employes of such company. So that the practical inquiry here is whether the Legislature has the power to pass an Act making a railroad company liable for damages done to the property of another, without fault on its part, and while in the lawful use of its own property. This question, not having been raised or considered in *Thompson's Case*, *supra*, is now presented for the first time, and must now be determined. The general rule, as I understand it, is that where one person, in the lawful use of his own property, happens to do some injury to the property of another, without fault on his part, he is not liable for the damages resulting from such injury. To make him so liable, it is necessary to show, not only the injury done, but also that it was due to some fault, either willful or negligent, on the part of the person sought to be charged. This rule has been applied to cases in which the damages sustained resulted from fire communicated by sparks from locomotive engines running on railways. *Cooley, Torts*, 589-592, where that eminent author says, "The gist of the action is negligence." See also *McCready v. South Carolina R. Co.*, 2 Strobb. L. 356, where Wardlaw, J., lays down the same doctrine. In addition to this, it will be found that the Legislature has incorporated this principle in its legislation upon the subject of the destruction of property by fire, for by section 2497 of the General Statutes, as amended by the Act of 1886, (19 Stat. at L. p. 621, which was the law in force at the time

of the destruction of the property of plaintiff by fire,) it is expressly declared that whoever shall maliciously or negligently set fire to any combustible matter, so as thereby the woods, etc., of another be set on fire, shall be liable to indictment, and shall, moreover, be liable to an action for damages; and, in the subsequent amendment by the Act of 1891, (20 Stat. at L. p. 1125,) the same element of negligence is retained. It seems, therefore, that the Legislature, by the provisions of section 1511 of the General Statutes, has undertaken to apply a much more stringent rule to railroad corporations than would be applied to all other persons under like circumstances. Now, as it is properly conceded that corporations, in inquiries like the present, must be regarded as persons, it seems to me that the section in question is a violation of section 12, art. 1, of the Constitution of this state, as well as of the 14th Amendment to the Constitution of the United States. In other words, it is class legislation, which it was one of the objects of those constitutional provisions to prevent. It subjects a railroad corporation to "other restraints or disqualifications" in regard to its personal rights than such as are laid upon others under like circumstances, and it denies to railroad corporations "the equal protection of the laws;" and it tends to deprive a railroad corporation of its property without due process of law, and merely by legislative declaration, for, as we have seen, where fire is communicated to the lands of another by sparks escaping from a locomotive engine of a railroad corporation while passing over its track lawfully, as it has a right to do under the provisions of its charter, this legislation undertakes to make such corporation liable for any damage that may ensue, whether there is any negligence on the part of the corporation or not; while, if the same damage is done by any other person to the property of another, he cannot be made liable without proof of some fault or negligence upon the part of the person causing the damage. It is true that class legislation may sometimes be vindicated as an exercise of the police power, but I agree with Mr. Justice Pope that the legislation here under consideration cannot be vindicated as an exercise of the police power; and I need not undertake to add anything to what he has said in his opinion upon this subject. It must be remembered that the question here is not as to the power of the Legislature to enact laws for the proper regulation of railroad corporations in the exercise of the franchises granted to them, which would be readily conceded. The chapter of the General Statutes in which the section under consideration is found affords numerous instances of the exercise of such a power, which never have been, and never can be, successfully questioned. But the question here is as to the power of the Legislature to enact a law by which the liability of a railroad corporation for an injury done to the property of another without fault on its part, while in the lawful use of its own property, shall be measured by a different rule, and determined by a different principle, from that which

would be applied to every other person who, while in the lawful use of his own property, should, without fault on his part, injure the property of another, whereby, in the latter case, it would be absolutely necessary to show negligence in order to fix liability, while in the former it would not be necessary to show any negligence whatever. Nor is this a question whether the Legislature may not enact a law altering the rules of evidence, by declaring that, where the property of a person is injured by fire caused by sparks escaping from a locomotive engine, proof of the injury from such a cause shall constitute prima facie evidence of negligence, and throw the burden of proof upon the railroad corporation using such locomotive of showing that there was no negligence; but, as I have said, the question practically is whether one principle of law can be applied to railroad

corporations and another to all other persons, under like circumstances. We have no case in this state directly in point, and it must be conceded that the authorities elsewhere are conflicting. It seems to me, however, that the cases which hold legislation of the character of this now under consideration as unconstitutional, are better founded in reason than those which hold the contrary. See *Zeigler v. South & North Alabama R. Co.* 58 Ala. 594; *San Mateo County v. Southern Pac. R. Co.* 18 Fed. Rep. 723; *New Orleans & N. E. R. Co. v. Bourgeois*, 66 Miss. 3; *Oregon R. & Nav. R. Co. v. Smalley*, 1 Wash. 206; *Chicago, M. & St. P. R. Co. v. Minnesota*, 184 U. S. 418, 88 L. ed. 970. It seems to me, therefore, that section 1511 of the General Statutes is clearly unconstitutional, and should be so declared.

ILLINOIS SUPREME COURT.

Andrew MILLIKIN, Appt.,
v.
EDGAR COUNTY.

(.....Ill.....)

A contract for the employment of a keeper of a county poor-house for three years is not within the power of a board of supervisors, each of whom is elected for one year only, although the statute gives them power to appoint such keeper without any express limitation as to the time.

(November 2, 1892.)

APPPEAL by plaintiff from a judgment of the Appellate Court, Third District, affirming a judgment of the Circuit Court for Edgar County in favor of defendant in an action brought to recover the amount of compensation which plaintiff alleged that he had earned as keeper of the county poor-house. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. H. S. Tanner, Joseph E. Dyas and George A. VanDyke*, for appellant;

The contract between appellant and the county is authorized by paragraph 4, § 28, chap. 107, p. 1788, *Starr & Curtis' Annotated Statutes of Illinois*. The power of the county board to appoint a keeper of the poor-house being conceded, leaves nothing in dispute but the length of time for which the keeper may be appointed.

A contract made in good faith by the county board employing a keeper of the poor farm for a reasonable time, even though such time exceeds the term of office of the members of the board of supervisors, is valid and binding on the county.

Stevenson v. School Directors, 87 Ill. 255.

Messrs. James A. Eads and Henry Van Sellar, for appellee:

Counties possess no powers, except such as are expressly, or by necessary implication, conferred upon them by the legislative department of government.

Scates v. King, 110 Ill. 466; *Dill. Mun. Corp.* pp. 82, 83, § 10, and *note*, p. 102, § 55.

A county may make authorized contracts, but they have no power to make contracts which shall cede away, control, or embarrass their governmental powers, or which shall disable them from performing their public duties.

Dill. Mun. Corp. p. 110, § 61.

The support and care of the poor is a matter of public concern and is a governmental or public duty imposed by law on counties.

Dill. Mun. Corp. p. 82, § 10.

The law imposes on the county the duty of caring for the poor, by levying annually the necessary taxes and by the employment of the necessary agents and servants. This duty they cannot delegate to others, nor can they make any contract that will hinder or embarrass them in the performance of that duty.

East St. Louis v. East St. Louis Gaslight & Coke Co. 19 Ill. App. 46; *Stevenson v. School Directors*, 87 Ill. 255; *Davis v. School Directors*, 93 Ill. 294.

Craig, J., delivered the opinion of the court:

This was an action of assumpsit brought by Andrew Millikin against the county of Edgar to recover damages for the breach of an alleged contract entered into by and between the parties. It is averred in the declaration that on the 11th day of April, 1889, the board of supervisors of the county appointed the plaintiff steward or keeper of Edgar county poor-house for the term of three years from the 1st day of May, 1889, and agreed to pay him as compensation \$1,700 per annum, payable in quarterly installments on the 1st days of March, June, September, and December; that, the

NOTE.—The subject of the power of public officers to make contracts binding on their successors 18 L. R. A.

or for a term of years is fully treated in a note to *Shelden v. Fox* (Kan.) 18 L. R. A. 287.

plaintiff gave bond with security for the performance of his duties, which was approved by the board; that he entered upon the discharge of his duties under the appointment, and continued in the discharge thereof, faithfully performing all duties imposed upon him, until the 6th day of March, 1890, when the board of supervisors discharged the plaintiff, and ordered him to vacate the poor farm, and then and there dispossessed him, and refused longer to permit plaintiff to perform the duties of said appointment, by means whereof he was injured, and has sustained damages, etc. The defendant interposed a general demurrer to the declaration, which the court sustained, and, the plaintiff electing to abide by his declaration, judgment was entered against him for costs, which was affirmed in the appellate court.

The only question presented by the appeal is whether the board of supervisors had the power to enter into the contract with the plaintiff described in the declaration for the term of three years. Counties are political divisions of the state created for governmental purposes. They possess such powers as have been conferred by the Constitution and legislative department of the state. Their powers are of a public nature conferred merely for public purposes, and they should be exercised in such a manner as will best promote the interest and advance the welfare of the people. In chapter 84, Rev. Stat., will be found many of the principal powers conferred upon counties. Section 23 provides that each county shall be a body politic and corporate, and may sue and be sued; section 23 provides that the powers shall be exercised by a county board; and section 24 confers authority to purchase and hold real and personal property necessary for the use of the county, to make contracts, and do all other acts in relation to the property and concerns of the county, necessary to the exercise of its corporate powers; section 26 makes it the duty of the county board to erect and keep in repair alms-houses, jails, and other necessary county buildings; while section 25 confers power on the board to cause to be annually levied and collected taxes for county purposes. Section 14, chapter 107, provides that every county (except those in which the poor are supplied by the towns) shall receive and support the poor resident in the county. Section 28 also provides that the county board shall have power to acquire a suitable tract of land upon which to erect and maintain a county poor-house; to appoint a keeper of the poor-house, and all necessary agents for the management and control of the poor-house and farm, and prescribe their compensation and duties. The power and duty of the county board to make proper provision for the care, custody, and support of the poor of the county is so plainly conferred and so clearly enjoined by the provisions of the statute cited that neither can, with any show of plausibility, be

18 L. R. A.

questioned or denied. But while the power of the county board to employ a suitable person to keep and manage the poor-house may be conceded, can that power be exercised, as was attempted to be done, by entering into a contract like the one described in plaintiff's declaration, running for a period of three years? Reliance is placed on the last part of section 28 of chapter 107 of the Statutes, set out above, as authority for the making of the contract by the board. That clause of the statute does not in terms impose a limit as to the time for which the keeper of the poor-house may be appointed by the board, but, in placing a construction upon it, it must be construed in view of and in connection with other provisions of the statute relating to the powers of the board. At the time the contract was attempted to be made the members of the board of supervisors were elected annually; each member held his office for the term of one year, and no longer. The board was clothed with authority to levy taxes to raise funds to support paupers, but this power was required to be exercised annually. In view of these provisions of the statute it would be an unreasonable construction of the statute relied upon to hold that the Legislature intended to clothe the board with authority to enter into a contract with the keeper of a poor-house to run for the term of three years. If the board had the power to enter into a binding contract of this character for three years, no reason is perceived why it might not make a contract for five or even ten years, and, if this could be done, the hands of succeeding boards would be tied,—their powers taken from them. If this important power—the supervision of a poor farm and the care of the unfortunate—may be so far delegated as was attempted in this case, the county might be deprived in a great measure of one of the most important affairs intrusted to its care and supervision. The statute should not receive a construction which might lead to such disastrous results, unless the language employed would admit of no other reasonable interpretation. While the identical question presented by this record has not heretofore been before this court, similar questions arose in *Stevenson v. School Directors*, 87 Ill. 255, and *Davis v. School Directors*, 93 Ill. 394; and in those cases we held that school directors were powerless to enter into contracts with teachers extending substantially beyond the current year. What was said in those cases would seem to be applicable here. *East St. Louis v. East St. Louis Gas Light & Coke Co.*, 98 Ill. 415, although not clearly in point, involves a question somewhat similar. In conclusion, we are satisfied the county board exceeded its power in making the contract relied upon by appellant, and we fully concur with the judgment of the county court and appellate court in holding it invalid.

The judgment of the Appellate Court will be affirmed.

NEW YORK COURT OF APPEALS.

Walter V. WILSON, *Respt.*,
v.
City of TROY, *Appt.*

(.....N. Y.)

1. The jury must determine whether the plumber or the city was responsible for the acts of laborers in leaving unguarded an excavation made in the street to connect private property with the city water main, where a city ordinance prohibited any person without the consent of the water board from tapping or making any connection with a distributing pipe, which had been interpreted to include the making of the excavation, by the board whose custom had been to furnish men for that purpose, and the plumber employed by the landowner had in accordance with such custom applied for and received the men who were to be paid by the city which was to be reimbursed by the plumber.
2. The negligence of city employees in

leaving uncovered an excavation in a street made by them under direction of the superintendent of the city waterworks for the purpose of connecting a private house with the street main makes the city liable although the work was done at the request of a private contractor who had agreed with the owner of the house to do the work.

3. Notice to a city of a dangerous excavation in a street is not necessary to make it liable for injuries caused thereby where the excavation was made by employees of the city under proper authority.
4. Interest on the sum by which property is diminished in value on account of an accident in a street caused by the negligence of a city may be included in the damages awarded therefor.

(October 4, 1892.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Third Department, affirming a judgment of

NOTE.—Interest on sum allowed as damages.

I. For personal injuries.

Interest cannot be allowed on a sum awarded as damages for a personal injury to a brakeman on a railroad but the verdict should be for a sum in gross for all damages to the date of the judgment. *Louisville & N. R. Co. v. Wallace* (Tenn.) 14 L. R. A. 548.

Interest cannot be added to the discretionary damages allowed by the jury for a personal injury inflicted by reason of the negligence of a railroad company. *Western & A. R. Co. v. Young*, 81 Ga. 397.

Interest cannot be allowed on damages for personal injuries received by the running away of a horse caused by fright at cars which had run off the track at a crossing. *Pittsburgh S. R. Co. v. Taylor*, 104 Pa. 306. The judgment was, however, reversed on the ground that there had been no negligence.

Interest cannot be allowed on the damages given by the jury for unlawfully ejecting a person from a railroad train. *Nichols v. Union Pac. R. Co.* (Utah) Sept. 12, 1891.

But in *Ell v. Northern Pac. R. Co.* (N. Dak.) 12 L. R. A. 97, it was said that while an instruction to a jury to allow interest on the sum allowed as damages to an employee of the company for injuries received through the negligence of the foreman under whom he was working, was error, interest might be given in the discretion of the jury, under N. Dak. Comp. Laws, § 4573, providing that "in an action for the breach of an obligation not arising from contract . . . interest may be given in the discretion of the jury."

When death results.

Interest on damages for the death of a railroad employé cannot be allowed as a matter of right, but the allowance of it is in the discretion of the jury, and if allowed it must not be as interest, but as a part of the damages. *Central R. Co. v. Sears*, 66 Ga. 499.

But in New York interest must be added under N. Y. Laws 1847, chap. 450, as amended by N. Y. Laws 1870, chap. 78, N. Y. Code Civ. Proc., § 1904, providing that damages not to exceed five thousand dollars may be awarded for the death of a person, through the wrongful act, neglect, or default 18 L. R. A.

of another person or of a corporation, and that the clerk must add to the sum awarded interest from the decedent's death and include it in the judgment. *Salter v. Utica & B. R. Co.* 86 N. Y. 401; *Erwin v. Neversink S. B. Co.* 23 Hun, 578.

In *Cornwall v. Mills*, 12 Jones & S. 45, this provision was held not to be unconstitutional.

And in *Manning v. Port Henry I. O. Co. of Lake Champlain*, 61 N. Y. 664, it was held that the clerk must add this interest even though the jury had intended to include it in their verdict, the defendant's remedy being to move to set aside the verdict on that ground.

But in *Robostelli v. New York, N. H. & H. R. Co.*, 84 Fed. Rep. 719, it was held that when the complaint demanded \$5,000, but no demand was made for interest, none could be allowed on a verdict of \$5,000, but with the plaintiffs' consent the verdict might be reduced to such an amount that with interest it would amount only to that sum.

II. For injuries to property.

1. By railway fires.

On this subject there is a direct conflict in the authorities. In Missouri it is held that it cannot be recovered on the damages allowed for property destroyed by fire originating from a locomotive, as there is no statute providing for allowing it. *Kenney v. Hannibal & St. J. R. Co.* 63 Mo. 99; *Atkinson v. Atlantic & P. R. Co.* 63 Mo. 367; *Meyer v. Atlantic & P. R. Co.* 64 Mo. 542; *De Steiger v. Hannibal & St. J. R. Co.* 73 Mo. 83.

This was conceded by the plaintiff in *Flannery v. St. Louis, I. M. & S. R. Co.* 44 Mo. App. 306.

In *Garrett v. Chicago & N. W. R. Co.*, 36 Iowa, 121, it was held that while the jury might include interest in assessing damages in such a case, it could not be added by the court to their verdict.

In *Arthur v. Chicago, R. I. & P. R. Co.*, 61 Iowa, 648, it was held that interest was properly included by the court on the value of what was thus destroyed.

And in *Johnson v. Chicago & N. W. R. Co.*, 77 Iowa, 666, it was held that interest should be added to the value of hay thus destroyed.

Interest should be allowed, though not as such but as an addition to the damages. *Parrott v. Housatonic R. Co.* 47 Conn. 575.

Interest should be allowed on the value of property thus destroyed which has a definite money

the Rensselaer County Circuit in favor of plaintiff in an action brought to recover damages for injuries to a horse which resulted from a defect in a street. *Affirmed.*

The facts are stated in the opinion.

Mr. William J. Roche, for appellant:

In actions sounding in tort, such as the present, where the damages are unliquidated, are not readily ascertainable, and the claim is contested, the allowance of interest has no basis in law or reason; at most, it is to be left to the discretion of the jury to determine whether interest should be granted as a part of the indemnity.

Fitch v. Livingston, 4 Sandf. 492; *Walrath v. Redfield*, 18 N. Y. 457; *Mygatt v. Wilcox*, 45 N. Y. 306, 6 Am. Rep. 90; *McCollum v. Seaward*, 62 N. Y. 816; *Adams v. Fort Plain Bank*, 88 N. Y. 255; *McCormick v. Pennsylvania Cent. R. Co.* 49 N. Y. 308; *Van Rensselaer v. Jewett*, 2 N. Y. 185; *Day v. New York Cent. R. Co.* 22 Hun, 412, affirmed, 89 N. Y. 616; *Mercer v. Vose*, 67 N. Y. 56; *Smith v. Velie*, 60 N. Y. 106; *Black v. Camden & A. R. & Transp. Co.* 45 Barb. 40; *Hand v. Church*, 39 Hun, 303; *Holmes v. Ranken*, 17 Barb. 454; *De Witt v.*

De Witt, 46 Hun, 258; *Winch v. Mutual Ben. Ice Co.* 86 N. Y. 618; *Little v. Banks*, 85 N. Y. 258; *Re Strickland*, 23 N. Y. S. R. 901; *White v. Miller*, 78 N. Y. 393, 84 Am. Rep. 544; *Sargent v. Hampden*, 88 Me. 581; *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164; *Farrelly v. Cincinnati*, 2 Disney (Ohio) 516; *McMaster v. State*, 108 N. Y. 542; *Hodge v. New York Cent. & H. R. R. Co.* 27 Hun, 394; *Reiss v. New York Steam Co.* 85 N. Y. S. R. 86; *Farrott v. Knickerbocker Ice Co.* 46 N. Y. 361; *Mansfield v. New York Cent. & H. R. R. Co.* 114 N. Y. 381; *Sayre v. State*, 123 N. Y. 291.

Mr. Charles E. Patterson, for respondent:

Municipal corporations proper, having the usual duties and powers conferred upon them respecting streets within their limits, owe to the public the duty to keep them in a safe condition for use in the usual mode by travelers, and are liable in a civil action for special injury resulting from neglect to perform this duty.

Ehrgott v. New York, 96 N. Y. 264, 48 Am. Rep. 622.

Defendant cannot avoid the application of this principle to this case, unless it shall estab-

value susceptible of easy proof. *Regan v. New York & N. E. R. Co.* 60 Conn. 124.

And in *Jacksonville, T. & K. W. R. Co. v. Peninsular L. Transp. & Mfg. Co.*, 17 L. R. A. 33, 27 Fla. 1, it was allowed as a matter of right.

Interest should be allowed on the value of cotton thus destroyed. *Texas & P. R. Co. v. Tankersley*, 68 Tex. 57; *Texas & P. R. Co. v. Levi*, 60 Tex. 679.

And this whether the jury is so charged or not. *Galveston, H. & S. A. R. Co. v. Horne*, 69 Tex. 643.

An instruction to the jury requiring them to allow interest from the commencement of the suit, is proper. *Chapman v. Chicago & N. W. R. Co.* 26 Wis. 265, 7 Am. Rep. 81.

In *Kellogg v. Chicago & N. W. R. Co.*, 26 Wis. 223, 7 Am. Rep. 69, an exception to a similar charge was not urged.

And in *Whitney v. Chicago & N. W. R. Co.*, 27 Wis. 327, interest was allowed on the value of wool destroyed by fire before removal from the freight house.

Interest may be allowed in the discretion of the jury. *Chicago, St. L. & P. R. Co. v. Barnes*, 2 Ind. App. 213.

By way of additional damages. *Woodward v. Illinois Cent. R. Co.* 1 Biss. 403, 1 Biss. 447.

And an instruction that the jury must allow it is reversible error. *Home Ins. Co. v. Pennsylvania R. Co.* 11 Hun, 182.

But if the jury does not allow it no harm is done. *Eddy v. Lafayette*, 49 Fed. Rep. 307, 4 U. S. App. 247.

And in *Whitbeck v. New York Cent. R. Co.*, 86 Barb. 644, an instruction that if the jury found for the plaintiff, they should allow him interest on the value of fruit trees destroyed by fire from a locomotive was held proper.

In *Kendrick v. Towle*, 60 Mich. 363, 1 Am. St. Rep. 526, it was held that interest might be allowed on the value of a sawmill destroyed by fire originating from sparks from a locomotive on a private road, if the recovery was restricted to the actual value of the property destroyed.

2. By other fires.

Interest may be allowed on the value of property destroyed by sparks from a steam dredge used in excavating a canal. *Hinds v. Barton*, 25 N. Y. 544.

It is proper to allow it, though it is not demandable of right, on the value of buildings destroyed 18 L. R. A.

by a fire started by the defendant on his own land, if the recovery is restricted to the actual value of the property with interest. *Lucas v. Wattles*, 49 Mich. 380.

3. Injuries to stock by passing trains.

On this subject then is the same conflict. In *Dean v. Chicago & N. W. R. Co.*, 43 Wis. 305, an instruction that the plaintiff was entitled to recover interest from the time a cow was killed by a passing train was given, to which a general exception was taken, and it was held to be the law that he was entitled to interest from the institution of the suit; and as only a general exception was taken, the right to interest from the time of accident was not decided.

In *Baltimore & O. R. Co. v. Schultz*, 43 Ohio St. 270, it was held that the plaintiff was entitled to interest from the time his horse had been killed by reason of the bad repair of the company's fence.

An instruction that the proper measure of damages for stock killed by a passing train is the value of the animal with interest from the time of killing, is correct. *St. Louis, I. M. & S. R. Co. v. Biggs*, 50 Ark. 109; *Alabama G. S. R. Co. v. McAlpine*, 75 Ala. 113.

Interest should be allowed on the value of colts killed by a passing locomotive where the fence has been allowed to remain out of repair two or three weeks. *Varco v. Chicago, M. & St. P. R. Co.* 30 Minn. 18.

In *Hodge v. New York Cent. & H. R. R. Co.*, 27 Hun, 394, it was said that interest was not allowable as a matter of law, but might be allowed as damages in the discretion of the jury on the value of stock killed through a railroad company's neglect to fence.

And in *Lackin v. Delaware & H. Canal Co.*, 22 Hun, 306, it was held to have been properly allowed.

And in *Woodland v. Union Pac. R. Co.* (Utah) April 2, 1891, that there then was no error in allowing interest from the institution of the suit.

Also in *Wabash R. Co. v. Williamson*, 3 Ind. App. 190.

But in *Chatanooga, R. & C. R. Co. v. Palmer* (Ga.) March 31, 1892, it was held that it could not be allowed as such, but if allowed at all, it must be added into the principal sum.

lish as matter of law, from the facts in this case, that the defendant is not liable for the acts of the men who dug the trench in question, and are not chargeable with notice of its existence.

Pettengill v. Yonkers, 116 N. Y. 558.

The waterworks department exists solely for the benefit of the city. Therefore, the liability of the city for injuries resulting from the neglect to properly care for this ditch or trench rests primarily upon the defendant.

Ehrigott v. New York, *supra*; *Walsh v. New York*, 107 N. Y. 220; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440; *Brusso v. Buffalo*, 90 N. Y. 679; *Turner v. Newburgh*, 109 N. Y. 301; *Nelson v. Canisteo*, 100 N. Y. 89; *Russell v. Canastota*, 98 N. Y. 496.

Error was not committed in including interest in the amount of the verdict given by the jury.

Miller v. White, 78 N. Y. 398, 84 Am. Rep. 544; *Walrath v. Redfield*, 18 N. Y. 457; *Home Ins. Co. v. Pennsylvania R. Co.* 11 Hun, 182; *Mairs v. Manhattan Real Estate Assn.* 89 N. Y. 498; *Duryee v. New York*, 96 N. Y. 477; *Moore v. New York Elev. R. Co.* 126 N. Y. 671.

Also in *Western & A. R. Co. v. McCauley*, 68 Ga. 818.

And in *Toledo, P. & W. R. Co. v. Johnston*, 74 Ill. 83, that it could not be allowed at all on the value of stock killed for want of a fence.

In *Chicago & N. W. R. Co. v. Shultz*, 55 Ill. 421, the same question arose, and the court said that to allow interest from the time of the accident would only give the plaintiff compensation, but as the value of the colt killed was more than the verdict the opinion was not held decisive.

And in *Atchison, T. & S. F. R. Co. v. Gabbert*, 34 Kan. 122, it was held that interest could not be allowed when the action was brought under the Railroad Stock Law of 1874, as it contained no provision for the payment of interest.

In *Houston & T. C. R. Co. v. Muldrow*, 54 Tex. 233, it was also held, under the Texas Railway Law (Sayles' Civ. Stat., § 4245), limiting the measure of damages to the value of the stock killed, that no interest could be allowed.

In *Damhorst v. Missouri Pac. R. Co.*, 32 Mo. App. 350, interest was not allowed on damages caused to a wagon and harness by a locomotive.

Nor on the value of a horse killed while blasting rocks. *Marshall v. Bohrer*, 68 Mo. 308.

Interest cannot be allowed as such on the value of a horse killed by a railroad train through the neglect of a township to erect a barrier between the highway and the track, but the jury in computing the amount of damages may consider the time that has elapsed since the injury was received. *Plymouth Twp. v. Graves*, 126 Pa. 24.

4. Property injured, delayed, or lost in transportation.

The allowance of interest is in the discretion of the jury, and is not a matter of right, on damages done to cattle in the course of shipment, through the negligence of a common carrier. *Black v. Camden & A. R. & Transp. Co.* 45 Barb. 40.

Interest is properly allowed on the value of a jack transported in a grossly negligent manner such as to cause its death. *Gray v. Missouri R. Packet Co.* 64 Mo. 47.

And it may be allowed from the commencement of the suit, on damages sustained by mules, by being left in cars for a long time in cold, sleety weather, without food or water because of the company's failure to supply the necessary means for 18 L. R. A.

O'Brien, J., delivered the opinion of the court:

The record in this case presents two questions: *First*, whether the finding of the jury that the damage was the result of the defendant's negligence is sustained by any evidence; and, *secondly*, whether interest could legally be allowed by the jury in estimating the amount of the damages. On the night of the 13th of November, 1879, a valuable horse belonging to one Learned, while being driven through South street in the city of Troy, fell into an open ditch or unguarded excavation, made during that day, and was permanently injured. There is little, if any, controversy with respect to the value of the horse, the extent of the injury, or the amount of damages. The night was dark, and it is not denied that there was evidence for the jury sufficient to sustain a finding of negligence on the part of some one by reason of the failure to protect a place of danger in a public street, by proper guards and lights. It was not shown that the city had any actual notice of the existence of the excavation, if made by private parties with-

unloading them, as the negligence is gross. *Dunn v. Hannibal & St. J. R. Co.* 68 Mo. 288.

In *Gulf, C. & S. F. R. Co. v. McCarty*, 82 Tex. 808, it was held that interest should be allowed on damages resulting from the negligent delay of a railroad to receive and ship cattle according to contract.

And it is properly allowed, although not asked for, on damages resulting to beef cattle from the negligence of a railroad company and the unsafe condition of its track, by which they were delayed for twenty hours without food and water, and were bruised and injured by the train running off the track. *Fort Worth & D. C. R. Co. v. Greathouse*, 82 Tex. 104.

A charge authorizing the jury to allow interest on the damage done to cattle in transportation by the uncoupling and negligent bringing together of the cars in which they were carried, is proper. *Galveston, H. & S. A. R. Co. v. Johnson* (Tex.) May 20, 1892.

The court, sitting as a jury, should allow interest on the value of stock lost through being delivered to the wrong person by a common carrier by reason of the negligence of the railway clerk in making out the bill of consignment. *Chicago & N. W. R. Co. v. Ames*, 40 Ill. 249.

Interest is recoverable under the general rule as now understood and Iowa Revision, § 1737, on the value of property taken from a trunk, left by a railroad company in a baggage room, insecurely fastened and left without a guard. *Mote v. Chicago & N. W. R. Co.* 27 Iowa, 22, 1 Am. Rep. 212.

Interest should be added to the value of baggage lost in course of transportation. *Fraloff v. New York Cent. & H. R. R. Co.* 10 Blatchf. 18.

But in *Texas & P. R. Co. v. Ferguson* (Tex.) 9 Am. & Eng. R. R. Cas. 386, it was held that interest could not be allowed on the value of baggage lost, as, although the rule was somewhat unsettled in Texas, it had not yet reached the point where interest would be allowed on breach of contract to transport baggage.

In *St. Louis, I. M. & S. R. Co. v. Mudford*, 44 Ark. 439, the court said in a dictum, that interest is allowed on the value of goods lost or converted by a common carrier.

And in *Kyle v. Laurens R. Co.*, 10 Rich. L. 322, 70 Am. Dec. 231, it is said that interest from the time of

out its permission; and a sufficient period had not elapsed between the time of opening it and the accident to render the city liable on the ground of implied notice. The excavation was made for the purpose of conducting the water from the principal main in the street, through lateral pipes, into a private house. The owner of the house employed a firm of plumbers to do the work, which included the digging of the trench as well as laying and connecting the lateral pipes with the main in the street. The firm applied to the superintendent of the waterworks for men to open the trench in the street, and that officer directed laborers in the employ of the city to do so. The opening in the street was made by them, and they were paid for the work by the city, the plumbers refunding to it the sum so paid. The question is whether the men who dug the ditch were under the control and direction of the defendant, or subject to the orders of the plumbers engaged in performing a piece of work for the owner of the house.

demand of payment is properly allowed on the value of cotton lost during transportation under a contract to deliver at a certain place.

The measure of damages for non-delivery of goods by a common carrier according to contract is their value at the place of delivery with interest. *Spring v. Haskell*, 4 Allen, 112; *Cushing v. Wells*, 98 Mass. 550.

But in *Richmond v. Bronson, Fargo & Co.*, 5 Denio, 55, the allowance of interest in case of non-delivery was held to be in the discretion of the jury.

In *Galveston, H. & S. A. R. Co. v. Ball* (Tex.) April 23, 1891, it was held to have been no error to allow interest.

Interest was allowed without opposition on the value of goods lost by a ship's running on a cape in a fog. *Bazin v. The Steamship Co.* 3 Wall. Jr. 229.

And in *British Columbia & V. I. S. Mill Co. v. Nettleship*, 18 L. J. 604, L. R. 3 C. P. 499, 37 L. J. Ch. 235, it was allowed without opposition that the plaintiff was entitled to recover interest on the cost of replacing machinery lost by the negligence of a common carrier to whom it was entrusted for transportation.

Interest should not be allowed on the value of goods broken into and embezzled in the course of transportation in the absence of improper conduct on the part of the master of the vessel. *Watkinson v. Laughton*, 8 Johns. 218.

Nor can it be when destroyed by fire after delivery to a common carrier, in the absence of all negligence on his part. *Lakeman v. Grinnell*, 5 Bosw. 625.

But in *Sherman v. Wells*, 23 Barb. 403, the value of the goods with interest from the time they should have been delivered was held to be the proper measure of damages in case of non-delivery.

And in *Robinson v. Merchants D. Transp. Co.*, 45 Iowa, 470, it was held that the owner of freight, destroyed by fire under a contract that the carrier should not be responsible for loss from fire, but containing a provision that the delivery should be without transfer, which was violated, was entitled to interest from the time the goods should have been delivered.

In *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 360, interest from the time of their loss was allowed on the value of goods claimed to have been stolen from a depot.

And in *The Gold Hunter*, 1 Blatchf. & H. 300, the 18 L. R. A.

The system of waterworks in Troy is the property of the municipality, and is under the management and control of a board of water commissioners, which may be regarded as a department of the city government. The commissioners are by law required to nominate, and the common council of the city to appoint, a superintendent of the waterworks, who is the executive officer in that department, and who, in this case, directed the men in the employ and pay of the city to make the excavation in the street. The board is authorized by law to extend the distributing pipes of the waterworks wherever they might think proper, and to make such alterations and improvements in the works, and in the management and preservation thereof, as they might deem necessary and expedient, and to employ such persons and assistants as they might require, to execute any of these purposes, which employes were to be paid for their services from the city treasury. The commissioners were also empowered to enact such by-laws, regulations,

owner of wine shipped from Havre, and consumed by the passengers in consequence of being put on short rations, was held to be entitled to interest.

The defendant conceded that legal interest was allowable on the value of cotton destroyed by fire during transportation by a common carrier, in *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 28 L. ed. 527.

Interest from the time salvage proceedings were instituted for saving the wreck was allowed on the value of gold coin lost, after the partial wreck of the vessel in which it was carried, through the gross negligence of the master. *King v. Shepherd*, 3 Story, 849.

Interest from the time of demand may be allowed on the value of goods deposited in a warehouse, claimed to have been taken away by burglars. *Schwern v. McKie*, 51 N. Y. 130.

In *Smith v. Richardson*, 3 Cal. 213, it was said that interest could not be recovered on the price of staves lost by the plaintiffs in transporting them, by reason of the defendant's breach of contract to do so.

In *Illinois Cent. R. Co. v. Cobb*, 72 Ill. 143, it was held that interest could not be allowed on damages for an unreasonable delay in shipping grain, and for damage to it *in transitu*.

But in *Houston & T. C. R. Co. v. Jackson*, 62 Tex. 209, it was held that interest was allowable, as a matter of law, upon the loss resulting from the failure of a common carrier to transport with reasonable dispatch a quantity of cotton.

And in *Wolfe v. Lacy*, 30 Tex. 349, it was held that interest might be allowed as punitive damages on the loss resulting to cotton by the removal of planks with which it was covered, and a delay of three weeks in its transportation across a lake.

Interest is properly allowed as damages on the contract price of a cargo of lumber the delivery of which is delayed four months by the unseaworthy condition of the vessel on which it is shipped. *Murrell v. Dixey*, 14 La. Ann. 236.

In *Smith v. Whitman*, 13 Mo. 352, it was held that an instruction preventing the allowance of interest on the value of a cargo of lead from the time it should have arrived was improper.

It is proper to allow interest on the difference between the market value of goods at their arrival and at the time they ought to have arrived. *Newell v. Smith*, 49 Vt. 256; *Laurent v. Vaughn*, 30 Vt. 90.

Interest on sums lost by reason of a common

and ordinances as they should deem necessary for the protection of hydrants and water pipes, and the preservation, protection, and management of the waterworks. These by-laws, unless disapproved by a vote of two thirds of all the members of the common council of the city, were to have all the force and effect of law. In pursuance of the power thus conferred by the statute, the board of water commissioners enacted by-laws and ordinances on the subject which were in force at the time the excavation in question was made. They, in effect, prohibited any person except the superintendent, and those employed by him or by the commissioners, to tap or make any connection with the main or distributing pipe, or permit the same to be done, unless by the permission and under the direction of the superintendent. The learned counsel for the defendant contends that this regulation simply forbids the act of connecting the lateral pipes from the house with the main, and did not prohibit private persons from digging the necessary trenches

and uncovering the main or distributing pipe, and hence that part of the work was done by the contractors who were employed by the owner of the house to make the connection, and not by the city. But a private individual had no right to dig in the street for this or any other purpose without the permission of the proper municipal authorities, and the obvious purpose, as well as the language, of the ordinance indicates that it was intended to prevent the uncovering of the main, or any interference with the street in which it was placed, by private parties. At all events, the water board and its chief executive officer, the superintendent, in the discharge of the duties imposed upon them by the statute, might very properly give to it that construction, and act accordingly. To hold that such a by-law did not embrace within its object and purview the evils that might result from ungaurded and unregulated interference with the bed of the street by private parties in order to reach the main, would be giving to it a construction alto-

carrier's failure to deliver grain within a reasonable time may be included by the jury in their verdict. *Cobb v. Illinois Cent. R. Co.* 38 Iowa, 601.

In an action against a railroad company for non-delivery of a carload of cattle within a reasonable time, it is proper to instruct the jury that the plaintiff is entitled to interest from the date of the breach of contract if the suit be considered as one for breach of contract, or from the date of the injury, if the action be viewed as one in tort. *Illinois Cent. R. Co. v. Haynes*, 64 Miss. 604.

5. Vessel captured as a prize.

Interest on the prime cost of a vessel and its cargo is a proper element of damage for unlawfully seizing a vessel under the Non-intercourse Act. *Murray v. The Charming Betsey*, 6 U. S. 2 Cranch, 64, 2 L. ed. 208.

Interest was also said to be properly given in *The Anna Maria*, 15 U. S. 2 Wheat, 387, 4 L. ed. 253, on the value of captured property lost through the negligence of the captors. In neither of the foregoing cases was the allowance of interest questioned.

Nor was the giving of interest questioned in *The Amiable Nancy*, 16 U. S. 8 Wheat, 546, 4 L. ed. 456, an action for the unlawful seizure and plunder of a vessel as a prize.

In *Hallett v. Novian*, 14 Johns. 273, an instruction that additional damages equal to the interest on the value of the cargo of a ship unlawfully captured during war, was not questioned, but the judgment was reversed on another point in 18 Johns. 337.

Interest, however, was not allowed in *Amory v. McGregor*, 15 Johns. 24, 58 Am. Dec. 205, on the value of goods seized after the declaration of war between England and the United States, for the purpose of preventing their seizure by the enemy, the court saying that it should have been allowed if there had been any fraud or gross misconduct attending the transaction.

6. Collision.

The owner of a ship which causes a collision without his special fault is liable for interest from the time of the collision, beyond the value of his ship, appurtenances, and freight, to which his liability is limited by Stat. 53 Geo. III., chap. 159, § 1. *The Dundee*, 2 Hagg. Adm. 137.

In *African S. S. Co. v. Swanzy*, 25 L. J. Ch. 870, it was held that interest could not be allowed on the 18 L. R. A.

limited liability of the owners as fixed by Stat. 17 & 18 Vict. chap. 104, § 514, as the Act contained no provision therefor.

But in *Nixon v. Roberts*, 4 L. T. 679, 80 L. J. Ch. 844, it was held that interest should be allowed under this Act from the time when freight would become due if any were earned and if not from the time of the collision.

And interest was allowed under the same Act as amended by Stat. 25 & 26 Vict. chap. 63, § 54, limiting the liability of the owner to 8 £ per ton of the ship, goods, and merchandise. *The Northumbria*, 21 L. T. 681; *Straker v. Hartland*, 11 L. T. 622, 34 L. J. Ch. 122; *Smith v. Kirby*, L. R. 1 Q. B. Div. 131.

It should be allowed if payment is delayed. *The Amalia*, 84 L. J. Adm. 21, 8 L. T. 805.

Interest is allowed in cases tried in the admiralty division, or removed there by consent from the queen's bench division on the value of property lost by reason of a collision or loss of a vessel at sea. *The Baron Abendare and The Gertrude*, 59 L. T. N. S. 251, 36 Week. Rep. 618.

Interest is allowable from the time of collision on one half the damages for which a vessel is liable under an agreement of compromise made eleven years after. *The Kong Magnus* (1891) Prob. 223.

While interest might be properly allowed on the value of a pilot boat lost by reason of a collision, it cannot be awarded against the stipulators beyond the sum in which they have bound themselves. *The Wanata*, 35 U. S. 600, 24 L. ed. 461.

In *The Manitoba*, 122 U. S. 97, 30 L. ed. 1095, the value of a vessel lost by a collision was more than the bond given and interest was not allowed on that account.

Interest on the value of a vessel destroyed in a collision cannot be allowed against stipulators who have bound themselves only in a sum equal to the value of the vessel. *The Ann Caroline*, 69 U. S. 2 Wall. 538, 17 L. ed. 633.

Interest may be allowed or not, in the discretion of the jury, on the value of strippings saved from a ship which sinks after causing a collision. *The Scotland*, 118 U. S. 507, 30 L. ed. 153.

In *The Vaughan & Telegraph*, 81 U. S. 14 Wall. 258, 20 L. ed. 807, interest was allowed without question on the value of the cargo of a canal boat sunk in a collision through the negligence of the steamer conducting it, another steamer meeting it.

Interest was held to be allowable in *The Joshua Barker*, 1 Abb. Adm. 215, on the value of a cargo of flour which after being sunk at the wharf, was

gether too narrow. The evidence tends to show that the water board gave to it the broader and more comprehensive meaning, as it was the custom and practice for years before the accident in question to make application to the superintendent for men to do the digging, and they were always furnished, as in this case. As between the owner of the house and the plumbers employed by her to introduce the water into her house, the digging was undoubtedly a part of the contract or work of the latter. If no main had been placed in the street at that time, they could also have contracted with her to procure its extension, but that part of the work would be subject to the action and regulations of the water board, and, while the contractors might be obliged to pay the city for the whole or some part of the expense, it would be none the less the work of the city. One of the plumbers testified that while he agreed with the owner of the house to do all the work, yet he knew then that it was the practice and custom to apply to

the superintendent of the waterworks for men to do the digging and to make the connection, and acted upon the assumption that he had no right to do it. He also says that the men who made the excavation were not employed by him, but by the city. We think that, upon the proof, it could not be held, as matter of law, that the men who dug the trench and left it unguarded ceased for the time being to be the servants of the city, and subject to the directions of the superintendent, and became, while doing this job of work, the servants of the parties employed to put in the lateral pipes into the house, as is urged by the learned counsel for the defendant. What party sustained the relation of master to the men who dug the trench, and had the control and direction of them, and was charged with the duty of directing them to properly guard the ditch,—whether the plumbers on the one hand, or the city, through the superintendent of the waterworks, on the other,—was the important question to be determined, and the trial court

raised and sold without communication with the owners, though they were easily accessible.

And interest was allowed on the value of a cargo of barley lost by collision with the canal boat carrying it on the Hudson River. *The Mary J. Vaughan*, 2 Ben. 47.

In *Williamson v. Barrett*, 54 U. S. 13 How. 101, 14 L. ed. 83, the jury were instructed to allow as damages to a steamboat from a collision, the use of her during the time necessary to make repairs, and were told that they were not bound to give interest, but were to give such sum in damages as they should deem just and equitable. On appeal to the supreme court, it was held that nothing could be allowed for loss of use of the vessel, but that full damages for the injury at the time and place of its occurrence, with legal interest, was the proper measure of damages.

In *The North Star*, 44 Fed. Rep. 422, the allowance of interest in case of a collision was held to be in the discretion of the jury, and its allowance would not be disturbed where both parties were nearly equally in fault, and there was manifest discrepancy in the testimony of the party against whom it is awarded.

And in *The Alaska*, 44 Fed. Rep. 498, that while interest on the cost of repairs from a collision was usually allowed, it was a matter of discretion, and that where the vessel is materially improved, and there is doubt whether the entire bill for repairs should be allowed, it will be refused.

And in *Whitehall Transp. Co. v. New Jersey S. B. Co.*, 51 N. Y. 300, the owners of a canal boat, injured by a collision, were held to be entitled to interest on the cost of repairs.

And in *Mailler v. Express Propeller Line*, 61 N. Y. 312, interest was allowed on the cost of repairs and the rental value of a sloop injured by a collision.

Interest may be allowed on the value of a sloop and its cargo, sunk by a steamer's colliding with it, while drifting with the tide without sufficient wind to give it steegeage way. *Parrott v. Knickerbocker Ice Co.* 48 N. Y. 361.

The jury may allow interest on the damage done to a vessel by a collision. *Fitch v. Livingston*, 4 Sandf. 422.

But in *Ormsby v. Johnson*, 1 B. Mon. 80, it was held that interest could not be allowed on the damage done to a flatboat and its cargo run into and sunk by a steamboat.

And in *Fowler v. Davenport*, 21 Tex. 626, it was held to have been erroneous to allow interest on 18 L. R. A.

the value of cotton intrusted to a boat for transportation and which was damaged by reason of the boat's being run into by a raft.

Property destroyed by a mob.

Interest may be allowed by the jury, if justice requires it, on the value of an elevator and machinery destroyed by a mob in a riot, in an action against a city or county under N. Y. Laws 1855, chap. 423. *Orr v. New York*, 64 Barb. 106.

And in *Greer v. New York*, 3 Robt. 406, it was held that interest should be added as a matter of right if the jury ascertained the value of the property actually destroyed and the extent of damage to such as was injured.

In *St. Michael's Church v. Philadelphia County*, *Bright* (Pa.) 121, the jury were instructed that they might and in the opinion of the court ought to include in their verdict interest from the time the property was destroyed or at least from the commencement of the suit.

And in *Hermits of St. Augustine v. Philadelphia County*, *Bright* (Pa.) 116, the jury were told that the proper measure of damages was the value of the property with interest from its destruction, and the court preferred it should be assessed separately as interest, that the supreme court might say whether interest could be allowed, but as the defendant objected this course was not followed.

But in *Weir v. Allegheny County*, 95 Pa. 412, it was held that interest could not be allowed, as the statute under which the action was brought (Pa. Act 1841, Pamph. Laws, 416), extended to Allegheny County by Pa. Act 1849, Pamph. Laws, 184, contained no provision for its allowance.

From negligent construction of railroads, canals, etc.

The proper measure of damages for crops destroyed and land injured by being flooded by reason of the negligent construction of a railroad, is the actual value of the crops destroyed, and the cost of restoring the land with interest. *Sabine & E. T. R. Co. v. Joachimi*, 58 Tex. 452.

In *Gulf, C. & S. F. R. Co. v. Holliday*, 65 Tex. 512, a similar action, it was held that an instruction that the plaintiff was entitled to interest was correct, but as the jury had allowed none it was not specially discussed.

And in *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb. 138, interest was held to have been properly allowed in such an action.

Interest, *eo nomine*, cannot be allowed on the in-

submitted it to the jury. Under all the circumstances, the question became one of fact, and this disposition of it was not error. *Ward v. New England Fibre Co.* 154 Mass. 420. This finding of the jury is conclusive upon us, and imports that the city itself, through one of its officers or departments, caused the trench to be dug, and left it unguarded, resulting in the damage complained of. In such a case the negligent act is imputable to the city, and the doctrine of actual or implied notice has no application, or, at least, is unnecessary, where one injured by the neglect of the city to properly guard a place made dangerous by its own act brings the action. *Pettengill v. Yonkers*, 116 N. Y. 558; *Walsh v. New York*, 107 N. Y. 220; *Turner v. Newburgh*, 109 N. Y. 801; *Brusso v. Buffalo*, 90 N. Y. 679; *Russell v. Canastota*, 98 N. Y. 496; *Nelson v. Canistota*, 100 N. Y. 89; *Ehrgott v. New York*, 96 N. Y. 273, 48 Am. Rep. 622; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440.

The amount demanded in the complaint

juries to land from the construction of a railroad, and is within the discretion of the jury if allowed at all. *Reading & P. R. Co. v. Balthasar*, 126 Pa. 1.

Interest may be allowed on the injury done to abutting property by the construction of a railroad in a public street, although not provided for by statute, if reparation for the injury is delayed for a long time. *Lawrence R. Co. v. Cobb*, 35 Ohio St. 94.

Interest cannot be allowed as such, but the damages should be increased by that amount on consequential damages to abutting property from the construction of a street railway. *Pennsylvania S. V. R. Co. v. Ziemer*, 124 Pa. 560.

Interest upon damages caused by the erection of an elevated railroad may be awarded in the discretion of the jury, but cannot be directed as a matter of right. *Moore v. New York Elev. R. Co.* 126 N. Y. 671.

But in *Sayre v. State*, 123 N. Y. 291, it was held that interest could not be allowed on money expended in reclaiming land overflowed by reason of the negligent construction and maintenance of a feeder to a canal, as they were unliquidated damages arising from a tort.

The owner of canal boats is entitled to interest from the date of each loss he has sustained to them, through the neglect of a purchaser of the canal to keep them in repair as required by Pa. Act, May 15, 1857, and Pa. Act, May 8, 1864. *Pennsylvania R. Co. v. Patterson*, 73 Pa. 491.

The owner of premises diminished in value by reason of a nuisance may recover, as damages, the amount of such diminution, with interest from the time a sale could have been made, subject to the Statute of Limitations. *Hetzel v. Baltimore & O. R. Co.* 6 Mackey, 1.

But interest cannot be allowed unless there is an anticipated sale which is defeated by reason of the nuisance. *Moore v. Langdon*, 6 Mackey, 6.

Interest may be allowed as damages, without finding an unreasonable delay in payment in an action against a railroad company for trespassing upon land and removing material. *Pittsburgh, Ft. W. & C. R. Co. v. Swinney*, 97 Ind. 538.

Interest cannot be allowed on the sum found as damages for an injury caused by a defective highway, as the statute restricts the claim to the amount of damage sustained. *Sargent v. Hampden*, 38 Me. 531.

Interest will not be allowed on the value of a 18 L. R. A.

on account of the injury to this horse was \$3,000, and the court instructed the jury that they could not, in awarding damages, go beyond that sum, with interest. The defendant's counsel excepted to this in so far as it authorized interest, and requested the court to charge that the jury could not allow interest in the action. The court declined to so charge, and the defendant's counsel excepted. The jury afterwards came into court, and announced that they had found a verdict for the plaintiff for \$3,000 and interest. The court then said: "You must compute the interest if you give interest. You will have to render your verdict in dollars and cents." This direction was complied with, and the verdict as entered included interest from the date of the injury, which result has been modified by the general term by striking out the interest awarded prior to the date of the presentation of the claim to the city, which was held to be a prerequisite to the maintenance of the action. The fair construction of the charge is

horse killed and wagon broken at a railroad crossing allowed to remain out of repair. *Kimes v. St. Louis, I. M. & S. R. Co.* 85 Mo. 611.

Interest is properly allowed on the value of a private bridge negligently thrown down and destroyed while being moved to another spot by direction of the common council of Buffalo, under N. Y. Laws 1843, chap. 198, authorizing its entire removal if the plaintiff did not construct a draw therein on fifteen months' notice, as such moving was not a strict compliance with the statute. *Buffalo & H. Turnp. Co. v. Buffalo*, 58 N. Y. 639.

From explosion, etc.

Interest, in Colorado, is a creature of the statute, and will not be allowed on damages to property caused by an explosion, as it is not one of the cases there recognized. *Denver, S. P. & P. R. Co. v. Conway*, 8 Colo. 1; *Denver, S. P. & P. R. Co. v. Moynahan*, 8 Colo. 56.

Interest cannot be allowed as such, or as a matter of right, on damages caused by the explosion of natural gas, through the negligence of the defendant company, but its allowance is in the discretion of the jury as compensation for delay. *Richards v. Citizens Nat. Gas Co.* 130 Pa. 37.

Also on damages done to the walls of a barn by the negligent mining of coal underneath. *Emerson v. Schoonmaker*, 135 Pa. 437.

In *Holmes v. Barclay*, 4 La. Ann. 63, interest was allowed without question on the value of a warehouse destroyed by a steamer's running into it during a high flood.

Interest may be allowed, if necessary to give the plaintiff compensation on the damage done to goods stored in the vault of his store, which has been flooded by reason of an excavation made by the defendant in the street in front, for the purpose of erecting a building, whether there was negligence on his part or not. *Mairs v. Manhattan Real Estate Assn.* 39 N. Y. 498.

But in *Reiss v. New York Steam Co.*, 35 N. Y. S. R. 86, it was held that an instruction that the plaintiff was entitled to interest, if anything, on damages caused to goods by the negligent escape of steam, was reversible error, unless interest was remitted. The judgment was reversed in 38 N. Y. S. R. 842, after interest had been remitted, on the ground that the defendant was not liable.

Interest should be allowed against a city for the value of flats carried away from a wharf and lost by reason of its removal of posts therefrom, and

that the jury could include in the damages interest upon the sum found to represent the diminished value of the horse in consequence of the injury, and not that the plaintiff was entitled to interest as matter of right. The exception, therefore, presents the question whether, in an action to recover damages to property by reason of negligence on the part of the defendant, it is within the power of the jury, in the exercise of discretion, to include in their award of damages interest on the sum found to represent the diminished value of the property in consequence of the injury from the time that the cause of action accrued. When interest may be allowed as part of the damages, in actions of this character, is a question which, in the present state of the law, is involved in much confusion and uncertainty, and in regard to which the decisions of the courts are not harmonious. It is perhaps impossible from the decisions to formulate a general rule embracing every possible case. The tendency of courts in modern times has been to extend the right to recover interest on demands far beyond the limits within which that right was originally confined. What seemed to be the demands of justice did not permit the principle to remain stationary, and hence it has been for

years in a state of constant evolution. This, in some measure, accounts for many of the apparently contradictory views to be found in the adjudged cases. There are certain fundamental principles, however, established by the decisions in this state, which, when properly applied, will aid in the solution of the question. There is, of course, a manifest distinction, always to be observed, between actions sounding in tort and actions upon contract. In the latter class of actions there is not much difficulty in ascertaining the rule as to interest until we come to unliquidated demands. The rule in such cases has quite recently been examined in this court, and principles stated that will furnish a guide in most cases. *White v. Miller*, 78 N. Y. 393, 84 Am. Rep. 544. We are concerned now only with the rule applicable in actions of tort. The right to interest, as a part of the damages, in actions of trover and trespass *de bonis asportatis*, was given first in England by Stats. 3 & 4 Wm. IV. The recovery was not, however, allowed by that statute as matter of right, but in the discretion of the jury. The earlier cases in this state followed the rule thus established in England, and permitted the jury, in their discretion, to allow interest in such cases. *Beals v. Guern-*

neglect to replace them. Allegheny v. Campbell, 107 Pa. 530, 52 Am. Rep. 478.

In *Hogg v. Zanesville C. & Mfg. Co.*, 5 Ohio, 410, it was held that interest might be allowed on the value of a boat and its loading, lost by reason of a dam constructed across a river, although *Hitchcock, J.*, who delivered the opinion, considered that the law did not allow the giving of interest as such in the case.

In *Coburn v. Muskegon Boom Co.*, 72 Mich. 134, it was held, two of the five judges dissenting, that interest could not be allowed on expenses caused by a booming company's so jamming a river with logs that the plaintiff could not float his logs.

Interest may be added to the damages caused to a tannery by diverting water from it, from the date of such diversion. *Bare v. Hoffman*, 79 Pa. 71, 21 Am. Rep. 42.

It is not improper for the jury to add interest to the value of a slave killed while assisting another person in a hazardous occupation, for which he was not employed. *Collier v. Lyons*, 18 Ga. 648.

The owner of a slave negligently carried off by a railroad without his permit may recover as damages the hire of the slave while gone, with interest, and the cost of recovering him. *Brown v. Southwestern R. Co.*, 36 Ga. 377.

In an action for trespass for causing the death of a slave interest is allowed from the time of trespass. *Fall v. Presley*, 50 Ala. 342.

Interest is not allowable on a sum assessed by the jury for damages done by trespassing cattle. *Jean v. Sandford*, 39 Ala. 317; *Glidden v. Street*, 68 Ala. 600.

Interest may be added to the amount found as damages resulting from negligence in the conduct of a ferry. *Borden v. Bradshaw*, 68 Ala. 362.

Interest should not be allowed on the damages sustained by a lessor's failure to rebuild a mill and elevator destroyed by fire under a contract that in case of fire it should be rebuilt with all reasonable promptness. *Chamberlain v. Dunlop*, 23 N. Y. S. R. 376.

Interest will not be allowed against a stakeholder on money retained by him after a wager has been revoked, when the record shows nothing more

than a mere delay on his part to pay over the money. *Corson v. Neatheny*, 9 Colo. 212.

One whose property has been destroyed by the negligence of another, and who has made a demand for his claim, without stating the amount of his loss, but delays instituting suit, from its novel character, until the determination of another similar suit, is entitled to interest in the discretion of the jury. *Frazer v. Bigelow Carpet Co.*, 141 Mass. 128.

Against agents and officers.

An agent who has departed from positive instructions of the principal in leaving unsold certain goods is liable for their loss, but interest thereon as such cannot be awarded, though the jury might include it in the total amount of damages. *Survivor of Holmes & Co. v. Misroon*, 8 Brev. 200.

Interest should be allowed as a matter of right on the loss sustained by the owners of flour through the consignee's negligently selling it before they were authorized to do so. *Milbank v. Dennistoun*, 1 Bosw. 246.

An agent who, on the positive instructions of his principal, fails to convert money into certificates, is liable to pay legal interest on all sums not so converted. *Short v. Skipwith*, 1 Brock. 108.

Bankers who have gratuitously accepted charge of bonds under an agreement to return them on demand or pay their full value including gold interest, are liable for the full interest, if the bonds are lost through their failure to use common prudence. *Maury v. Coyle*, 84 Md. 236.

In an action against an executor for waste in allowing an execution to be levied on shares of stock, and the shares to be sold at an amount much below their value, interest on such reduction should be allowed, only from the purchase of the writ. *Dawes v. Winship*, cited in 5 Pick. 97, note.

The allowance of interest on the value of property unlawfully retained by a sheriff after the vacation of an attachment, is unauthorized by law. *Green v. Garcia*, 3 La. Ann. 702.

Interest is not allowable in an action against a sheriff for failure or refusal to issue a writ of restitution in an ejectment suit, under Mo. Rev. Stat.,

sey, 8 Johns. 446; *Hyde v. Stone*, 7 Wend. 354, 23 Am. Dec. 583; *Bissell v. Hopkins*, 4 Cow. 58; *Rowley v. Gibbs*, 14 Johns. 385. The principle that the right to interest in such cases was in the discretion of the jury, was, however, gradually abandoned, and now the rule is that the plaintiff is entitled to interest on the value of the property converted or lost to the owner by a trespass as matter of law. The reason given for this rule is that interest is as necessary a part of a complete indemnity to the owner of the property as the value itself, and in fixing the damages is not any more in the discretion of the jury than the value. *Andrews v. Durant*, 18 N. Y. 496; *McCormick v. Pennsylvania Cent. R. Co.* 49 N. Y. 815; *Buffalo & H. Turnp. Co. v. Buffalo*, 58 N. Y. 639; *Parrott v. Knickerbocker Ice Co.* 16 N. Y. 369. It is difficult to perceive any sound distinction between a case where the defendant converts or carries away the plaintiff's horse and a case where, through negligence on his part, the horse is injured so as to be valueless. There is no reason apparent for a different rule of damages in the one case than in the other. In an early case in this state the principle was recognized that interest might

be allowed, by way of damages, upon the sum lost by the plaintiff in consequence of defendant's negligence. *Thomas v. Weed*, 14 Johns. 255. We think the rule is now settled in this state that, where the value of property is diminished by an injury wrongfully inflicted, the jury may, in their discretion, give interest on the amount by which the value is diminished from the time of the injury. That is the rule laid down in the elementary books and sustained by the adjudged cases. 1 Sedgw. Damages, 8th ed. §§ 817, 820; *Walrath v. Redfield*, 18 N. Y. 457, 462; *Mairs v. Manhattan Real Estate Assn.* 89 N. Y. 498; *Durys v. New York*, 96 N. Y. 477, 499; *Homa Ins. Co. v. Pennsylvania R. Co.* 11 Hun, 182, 188; *Moore v. New York Elev. R. Co.* 126 N. Y. 671; *Pennsylvania S. V. R. Co. v. Ziemer*, 124 Pa. 560.

There is a class of actions sounding in tort, in which interest is not allowable at all, such as assault and battery, slander, libel, seduction, false imprisonment, etc. There is another class in which the law gives interest on the loss as part of the damages, such as trover, trespass, replevin, etc.; and still a third class in which interest cannot be recovered as of right, but may be allowed

§ 4430, permitting the jury in actions of tort, if they shall think fit, to give damages in the nature of interest over and above the value of the property at the time of the conversion or seizure. *State v. Harrington*, 44 Mo. App. 297.

An attorney should not be charged with interest on a debt given him for collection, which is lost through his negligence. *Rootes v. Stone*, 2 Leigh, 650.

An attorney is not liable for interest on money collected by him until demand made by the party entitled to receive it, or until a wrongful conversion. *Walpole v. Bishop*, 81 Ind. 156.

An attorney is liable for interest on money collected for a client from the time of judicial demand, when the entire means of ascertaining the balance due his client is in his hands. *Dwight v. Simon*, 4 La. Ann. 490.

An attorney is liable for interest on money which he neglects to turn over to his client for an unreasonable time, even though no demand had been made for it. *Chapman v. Surt*, 77 Ill. 337.

An attorney who uses money collected for a client as his own, is liable for interest while he so used it. *Manafield v. Wilkerson*, 26 Iowa, 468.

On exemplary damages.

In a case of tort, where the law allows the jury in its discretion to award exemplary damages, interest cannot be allowed. *Batteree v. Chapman*, 79 Ga. 574.

In *Wade v. Missouri Pac. R. Co.*, 78 Mo. 362, an instruction that the jury might allow interest if they saw fit, on double the value of a bull killed on a railway track, through the company's neglect to erect and maintain proper fences and guards, was said to be erroneous, but that it was harmless, as the jury had not allowed interest.

Interest cannot be allowed on damages double the value of the stock killed on a railroad track through the company's neglect to provide a fence since the statute, (McCain's Stat. § 1289,) in fixing the damages, makes no provision for interest. *Brentner v. Chicago, M. & St. P. R. Co.* 68 Iowa, 530.

Rate of interest.

In admiralty cases in the United States courts, the rate of interest allowed by the different states 18 L. R. A.

is not taken into consideration where interest is allowed, and no rule fixing a certain amount of interest upon a decree if affirmed in the supreme court can be adopted. *Hemmenway v. Fisher*, 61 U. S. 20 How. 255, 15 L. ed. 799.

In *The Scotland*, 105 U. S. 24, 28 L. ed. 1001, an action for causing the loss of a ship by collision on the high seas, six per cent was held to be the proper rate of interest.

In *The Amiable Nancy*, 16 U. S. 3 Wheat. 546, 4 L. ed. 456, an action for the unlawful seizure of a vessel as a prize, the district court allowed six per cent, and on appeal to the circuit court the judgment was reduced, interest allowed at the rate of ten per cent on damages allowed, and on appeal to the supreme court certain other items were added on which six per cent interest was allowed, nothing being said as to the rate allowed by the circuit court.

Interest at six, not seven, per cent, should be allowed on the value of barley shipped from Canada to New York city, and lost on the Hudson River by a collision. *The Mary J. Vaughan*, 2 Ben. 47.

In *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 28 L. ed. 527, the defendant contended that the legal rate of interest in Louisiana, where a contract for the shipment of cotton destroyed by fire was to be performed, was the proper rate, instead of the rate in Alabama, where the contract was made, but as no proper exception had been taken the point was not decided.

In *Erwin v. Neversink S. B. Co.*, 23 Hun, 578, it was held that interest at seven per cent, the legal rate of interest in New York at the time of an accident causing the death of the plaintiff's intestate, instead of at six per cent, the legal rate at the time of the verdict, was proper.

But in *Salter v. Utica & B. R. R. Co.*, 86 N. Y. 401, six per cent was held to be the proper rate.

The holder of a note bearing interest at the rate of four per cent per month, secured by a mortgage, who, after assigning both note and mortgage, satisfies the mortgage of record and thus destroys the assignee's security, is liable for interest at the rate of seven per cent per annum not at the rate of four per cent per month. *Sanborn v. Webster*, 2 Minn. 823.

J. H. H.

in the discretion of the jury, according to the circumstances of the case. This action belongs to the latter class, and, as we have construed the charge as a direction that the jury might, in their discretion, allow interest on the diminished value of the horse, it was not erroneous.

Our attention has been called to the case of *Sayre v. State*, 128 N. Y. 291, and it is urged, upon the authority of that case, that interest cannot be allowed in any case for the recovery of unliquidated damages arising from negligence. We think that the case, when correctly understood, does not sustain the contention, but, in effect, holds the contrary. In that case a party appealed from the decision of the board of claims upon an award in his own favor, and the only question was whether, upon the evidence and findings the claimant had been allowed all the damages that he was entitled to, and this court not only affirmed his right to all the damages that the board had awarded him, but increased the award from \$3,000 to \$8,186. The claim was based upon the negligent act of the state in overflowing the lands of the claimant, from which the damages claimed resulted. The board of claims allowed no interest, nor did this court. In adding to the award a sum of over \$5,000, this court acted, in some sense, as a court of original jurisdiction, and in making up the sum which was to constitute the final award it refused to allow an item of interest claimed. Now, it is admitted that a court or jury, charged with the duty of making up the amount of damages in such cases, may refuse to allow interest, and that is precisely what this court did, and nothing more, and therefore the case is in harmony with the rule above stated, and with the cases from which we have deduced it. It is far from holding that it is error when, in such a case, the jury, or the original court, after considering all the facts and circumstances bearing upon the loss, allows interest, in the exercise of discretion, as part of the indemnity to which the party is entitled. It simply recognized the rule that interest in such cases was not a matter of right, but of sound discretion, and held that the claimant was fully indemnified for his loss without adding interest. It is true that the learned judge who gave the opinion cited the cases arising upon contract in which it has been held that interest is not allowable, and remarked that he found no case justifying an allowance of interest. That was probably an inadvertence, but the decision refusing interest was right, though the reasons may have been based upon a principle applicable to another class of actions. It must be remembered that the court was not reviewing any question decided below in regard to interest, but seeking to make up for itself a new award from the items of the claim appearing in the record, and whatever was said by way of argument, and as the reason for throwing out an item of interest on a sum claimed to have been expended in restoring or reclaiming the land, cannot be considered as the judgment of the court on the question now under consideration. That question was not noticed in the 18 L. R. A.

argument, and was not involved in the case, except, perhaps, as a matter of discretion.

For these reasons *the judgment should be affirmed.*

All concur, except Earl, Ch. J., and Finch and Gray, JJ., dissenting.

John HOPE, by Guardian *ad Litem*, Appt.,
v.

William A. BREWER *et al.*, Exrs., etc., of
Thomas Hope, Deceased, *et al.*, *Respts.*

(.....N. Y.....)

1. **Real estate is converted into personality** by a provision of a will that the executors shall as soon as may be conveniently done after testator's death sell and convert into money all the real estate.
2. **An unlawful perpetuity is not created** by a provision that executors shall sell all the real estate as soon as may be conveniently done after testator's death.
3. **A gift in trust to a charity in a foreign country in which the trustees are competent to take and hold and the trust is capable of being executed and enforced** is not invalid because such a trust would contravene the law of the testator's domicile in respect to the creation of trusts and perpetuities.

(November 20, 1902.)

APPPEAL by plaintiff from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of a Special Term for New York County in favor of defendants in a proceeding brought to establish the invalidity of a certain clause in the will of Thomas Hope, deceased. *Affirmed.*

The facts are stated in the opinion.

Mr. Delos McCurdy, with Messrs. Vanderpoel, Cuming & Goodwin, for appellant:

The validity of the gift of the residuary estate must be determined by the laws of this state.

Holmes v. Remsen, 4 Johns. Ch. 460, 1 L. ed. 920, 8 Am. Dec. 581; *Mills v. Fogal*, 4 Edw. Ch. 559, 6 L. ed. 975; *Andrews v. Herriot*, 4 Cow. 508, note; *Parsons v. Lyman*, 20 N. Y. 112; *Bascom v. Albertson*, 34 N. Y. 587; *Manice v. Manice*, 43 N. Y. 803; *Chamberlain v. Chamberlain*, 48 N. Y. 424.

A gift *in futuro* to an institution to be created and enabled to take after the death of the testator, has never been held to be a valid gift by the courts of this state unless such gift was, by its express terms, limited to take effect and

NOTE.—The oft-quoted rule that the validity of a testamentary gift of personal property is to be determined by the law of the testator's domicile is shown by the above case to be subject to a very important exception.

For the law of the domicile of the testator as governing the execution of a power created by will, see *Cotting v. De Sartiges*, 18 L. R. A. 367, 17 K. I.—

For some general rules as to what law governs wills, see note to *Cook v. Winchester* (Mich.) 8 L. R. A. 622.

vest within the period prescribed for the vesting of future estates.

In *Kerr v. Dougherty*, 79 N. Y. 327, the bequest was a present unconditional gift to an existing corporation authorized to take, except in cases where the will was executed within one month before the death of the testator.

The same is true of the gifts considered in—*Draper v. Harvard College*, 57 How. Pr. 269; *Kennedy v. Palmer*, 1 Thomp. & C. 581; *Harries v. American Bible Soc.* 4 Abb. Pr. N. S. 421; *Sherwood v. American Bible Soc.* 1 Keyes, 565; *Riley v. Diggs*, 2 Dem. 184; *Re Bullock*, 6 Dem. 335; *Re Huss*, 12 L. R. A. 620, 126 N. Y. 587; *Hollis v. Drew Theological Seminary*, 95 N. Y. 166.

In *Phelps v. Pond*, 23 N. Y. 69, and *Bascom v. Albertson*, *supra*, the gifts were to foreign corporations not *in esse* and were held void.

A trust for a foreign charity cannot be supported in England if the trust itself contravene the policy of the English law, although it may not be illegal according to the laws of the state where the charity is to be established.

Oliphant v. Hendrie, 1 Bro. Ch. 571; *Campbell v. Radnor*, Id. 271; *Atty-Gen. v. Chester*, Id. 444; *Atty-Gen. v. Lepine*, 19 Ves. Jr. 309, 2 Swanst. 181; *Society for Prop. Gomp. v. Atty-Gen.* 3 Russ. 142; *Curtis v. Hutton*, 14 Ves. Jr. 537; *Mackintosh v. Townsend*, 16 Ves. Jr. 330; *Edinburgh v. Audrey*, Amb. 286; *Emery v. Hill*, 1 Russ. 111; *Collyer v. Burnett*, Tam. 79; *Lyons v. East India Co.* 1 Moore, P. C. 175; *Mitchel v. Reynolds*, 1 P. Wms. 185; *New v. Bonaker*, 36 L. J. Ch. 846; *Burbank v. Whitney*, 24 Pick. 146, 85 Am. Dec. 312; *Atty-Gen. v. London*, 8 Bro. Ch. 171, 1 Ves. Jr. 243; *Atty-Gen. v. Sturge*, 23 L. J. Ch. 495.

An executory device must be so limited that by the terms of its creation it must take effect within the period prescribed for the vesting of future estates.

If the limitation be in such terms that it may or may not vest within that time it is void.

Caddell v. Palmer, 1 Clark & F. 372; 4 Kent, Com. 267; 1 Jarman, Wills, 221; 4 Cruise, Dig. title 32, chap. 24, § 18; *Nightingale v. Burrell*, 15 Pick. 111; *Atkinson, Conveyancing*, 2d ed. 264; *Brattle Square Church Proprs. v. Grant*, 3 Gray, 142, 63 Am. Dec. 725; *Lewis, Perpetuity*, 168-172; *Hooper v. Hooper*, 9 Cush. 123; *Thorndike v. Loring*, 15 Gray, 391; *Foodick v. Foodick*, 6 Allen, 41; *Odell v. Odell*, 10 Allen, 1; *Loring v. Blake*, 98 Mass. 253; *Sears v. Putnam*, 103 Mass. 5; *Jocelyn v. Nott*, 44 Conn. 55; *Donohue v. McNichol*, 61 Pa. 78; *Patterson v. Ellis*, 11 Wend. 259; *Hawley v. James*, 16 Wend. 120; *Schettler v. Smith*, 41 N. Y. 344; *Knox v. Jones*, 47 N. Y. 889; *Yates v. Yates*, 9 Barb. 324; *Gott v. Cook*, 7 Paige, 540, 4 L. ed. 256; *Boynton v. Hoyt*, 1 Denio, 53.

If a gift is made to a charity on a contingent event, and the happening of the event is a condition precedent to the gift taking effect, then, if the condition is too remote, the gift to the charity is void.

Chamberlayne v. Brockett, L. R. 8 Ch. 206; *Cherry v. Mott*, 1 Myl. & C. 123; *Atty-Gen. v. Goulding*, 2 Bro. Ch. 428; *Atty-Gen. v. Oxford*, 4 Ves. Jr. 421, note; *Atty-Gen. v. Whitchurch*, 3 Ves. Jr. 141; *Corbyn v. French*, 4 Ves. Jr. 418; *Clark v. Taylor*, 1 Drew, 642; *Carberry v.* 18 L. R. A.

Cox, 8 Ir. Ch. Rep. 231; *Sims v. Quinlan*, 16 Ir. Ch. Rep. 191; *De Themmines v. De Bonneval*, 5 Russ. 288; *Jocelyn v. Nott*, *supra*; 1 Jarman, Wills, 4th ed. 245 *et seq.*; *Tudor*, Lead. Cas. Real Prop. 3d ed. 580, 581.

The question is, whether by possibility the estate is so limited upon a contingency that it may remain more than the allowed period before the contingent interest will become vested, and if it can it is not good as an executory devise.

Nightingale v. Burrell, 15 Pick. 111.

There can be no limitation of a term not measured by lives.

Lives must be designated, and a life must, in some form, enter into the limitation.

Hawley v. James, 16 Wend. 133; *Boynton v. Hoyt*, 1 Denio, 57; *Yates v. Yates*, 9 Barb. 346; *Phelps v. Pond*, 23 N. Y. 69; *Bascom v. Albertson*, 84 N. Y. 596; *Rose v. Rose*, 4 Abb. App. Dec. 108.

Mr. James Thomson, for the executors:

The entire estate of the testator must be regarded as consisting of personal property.

Hobson v. Hale, 95 N. Y. 588; *Bispham*, Eq. pp. 371, 372; *Gerard*, Titles of Real Estate, pp. 396-399; *Leigh & Dalzell*, Equitable Doctrine of Conversion, 5, 109; *Lent v. Howard*, 89 N. Y. 169; *Asche v. Asche*, 118 N. Y. 232; *Pruer v. Cassidy*, 79 N. Y. 602, 85 Am. Rep. 550; *Kane v. Gott*, 24 Wend. 641, 85 Am. Dec. 641; *Stagg v. Jackson*, 1 N. Y. 206; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Eversitt v. Eversitt*, 29 N. Y. 39; *Phelps v. Pond*, *supra*; *Davis v. Gallagher*, 124 N. Y. 437; *Vincent v. Newhouse*, 88 N. Y. 505; *Fraser v. United Presby. Church Trustees*, 124 N. Y. 479; *Underwood v. Curtis*, 127 N. Y. 523; *Chamberlain v. Taylor*, 105 N. Y. 185; *Ross v. Roberts*, 2 Hun, 90, affirmed 63 N. Y. 652; *Riley v. Diggs*, 2 Dem. 184.

The residuary estate must be paid over to the Scotch trustees to be dealt with by the Scotch courts.

The bequest now before the court is not of itself contrary to public policy.

Hollis v. Drew Theological Seminary, 95 N. Y. 166.

The trust in the will now under consideration is to be established and worked out in Scotland, and upon that distinction is not obnoxious to the laws of New York, nor to the decisions of her courts.

It is no part of the public policy of this state to interdict perpetuities in other states and countries, and action tending to that end would not be, by reason of public policy, working toward the welfare of the citizens of this state, but would appear to be rather begotten of prejudice, and an unjustifiable interference.

Atty-Gen. v. Stewart, 2 Meriv. 143; *Vansant v. Roberts*, 3 Md. 119; *Re De Renne's Estate*, 12 W. N. C. 94; *Draper v. Harvard College*, 57 How. Pr. 269; 2 Story, Eq. Jur. § 1185.

Chamberlain v. Chamberlain, 43 N. Y. 424, is controlling in the case at bar.

See also *Manice v. Manice*, 43 N. Y. 303; *Despard v. Churchill*, 53 N. Y. 192; *Kerr v. Dougherty*, 79 N. Y. 327; *Hollis v. Drew Theological Seminary*, *supra*; *Kennedy v. Palmer*, 1 Thomp. & C. 581; *Mapes v. American Home Missionary Soc.* 83 Hun, 860; *Draper v. Harvard College*, *supra*; *Re Bullock*, 6 Dem. 335;

Riley v. Diggs, 2 Dem. 184; *Re Huss*, 12 L. R. A. 620, 126 N. Y. 537; *Doty v. Hendrix*, 16 N. Y. Supp. 284.

The doctrine laid down in the *Chamberlain Case* is not confined to the state of New York.

Taylor v. Bryn Mawr College Trustees, 84 N. J. Eq. 101; *Ford v. Ford*, 70 Wis. 19, 72 Wis. 621; *Burbank v. Whitney*, 24 Pick. 146, 35 Am. Dec. 812; *Harrison v. Nizon*, 84 U. S. 9 Pet. 488, 9 L. ed. 203; *Green v. Van Buskirk*, 72 U. S. 5 Wall. 307, 18 L. ed. 599, 74 U. S. 7 Wall. 189, 19 L. ed. 109; *Fordyce v. Bridges*, 2 Phil. Ch. 497; *Oliphant v. Hendrie*, 1 Bro. Ch. 571; *Emery v. Hill*, 1 Russ. 112, note.

The principle that the law of the domicile is to prevail proceeds upon a fiction of law that the domicile draws to it the personal estate of the owner wherever situated, and is by no means of universal application.

Warner v. Jaffray, 96 N. Y. 248, 48 Am. Rep. 616; *People v. Tax Comrs.* 28 N. Y. 225; *People v. Smith*, 88 N. Y. 576.

The contention that the period within which the executors of the will are to pay over the fund to Messrs. Malcolm, Maxwell and Smellie is not limited upon a life or lives, is without merit.

The duties of Messrs. Brewer & Crowell as regards the estate of the testator are simply the administrative functions of executors.

Re Crawford, 113 N. Y. 560; *Re Mason's Accounting*, 98 N. Y. 527; *Loytin v. Davidson*, 95 N. Y. 268.

The will of the testator does not in any way postpone the time of payment of the bequest of his residuary estate.

Nor does the will of the testator in any way postpone the time of "realizing" on his residuary estate.

Campbell v. Purdy, 5 Redf. 481.

The contention that the clause of the second codicil directs a suspension of the power of alienation of real property and of the absolute ownership of personal property is without foundation.

Robert v. Corning, 89 N. Y. 225; *Radley v. Kuhn*, 97 N. Y. 26; *Greene v. Greene*, 125 N. Y. 506; *Stewart v. Hamilton*, 87 Hun, 19.

The disposition made by testator of his residuary estate is valid under the law of Scotland.

Dundas v. Morris, 3 MacQ. H. L. Cas. 184; *Hill v. Burns*, 3 Shaw, 889, affirmed, 2 Wilson & Shaw, 80; *Black v. Miller*, 14 Shaw, 555, affirmed, 2 Shaw & McLean, App. 866; *Dundas v. Dundas*, 15 Shaw, 427; *Presbytery of Deer v. Bruce*, 6 Sc. Sess. Cas. 8d Series, 940.

There is no indefiniteness or uncertainty in the disposition of the residuary estate, as claimed in the complaint.

Any question to be raised in respect of indefiniteness or uncertainty must be tested and disposed of by Scotch law.

It is sufficient discharge to the executors to pay over the fund to the Scotch trustees.

2 Story, Eq. Jur. § 1186; *Edinburgh v. Aubery*, Amb. 236; *Atty-Gen. v. Lepine*, 2 Swanst. 181, 19 Ves. Jr. 309; *Emery v. Hill*, 1 Russ. 112; *Minet v. Vuillamy*, 1 Russ. 113, note.

As a matter of fact the provisions of the second codicil made a sufficient and complete

formula for the administration of the trust in perpetuity.

Such minuteness, however, is not essential to the validity of the bequest.

Bruce v. Welsh, 6 Sc. Sess. Cas. 8d Series, 940; *Hill v. Burns*, *Black v. Miller* and *Dundas v. Dundas*, *supra*; 13 Faculty Dec. 872; 1 MacLaren, Scotch Laws of Wills and Successions, chap. 24, p. 246, § 829; 2 MacLaren, Scotch Laws of Wills & Successions, chap. 66, p. 388, § 2097; Boyle, Charities, p. 89.

Messrs. Robert Hunter McGrath, Jr., and Daniel G. Rollins, for the foreign trustees:

The twenty-seventh article of the last will and testament of Thomas Hope works a conversion of the real estate of which he died seised into personalty, and subjects that real estate to the operation of the rules of law which govern the devolution of personal property.

Fraser v. United Presby. Church Trustees, 124 N. Y. 479; *Asche v. Asche*, 113 N. Y. 232; *Moncrief v. Ross*, 50 N. Y. 431; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Power v. Cassidy*, 79 N. Y. 602, 85 Am. Rep. 550; *Vincent v. Newhouse*, 83 N. Y. 505.

The bequest made by the codicil of October 24, 1888, to Malcolm, Maxwell and Smellie, residents of Scotland, is under the law of Scotland a legal and valid bequest to them, as trustees for a charitable use.

Dundas v. Morris, 3 MacQ. H. L. Cas. 184; *Bruce v. Welsh*, 6 Sc. Sess. Cas. 8d Series, 940.

The existence of a foreign law and its terms are matters of fact that may be proved like any other fact necessary to establish in the course of a judicial inquiry.

N. Y. Code Civ. Proc. § 942.

The bequest being valid under the law of Scotland, the foreign legatees, who are not shown to be subject to any disability here or at the place of their domicile, are competent to take the estate.

Chamberlain v. Chamberlain, *supra*; *Re Huss*, 12 L. R. A. 620, 126 N. Y. 537; 1 Roper, Legacies, 28-31; 2 Bouvier, Law Dict. 61.

The bequest here assailed is legal and valid, and the court has properly directed that the residuary estate be paid over to the trustees.

Manice v. Manice, 43 N. Y. 808; *Chamberlain v. Chamberlain*, *supra*; *Draper v. Harvard College*, 57 How. Pr. 269; *Kennedy v. Palmer*, 1 Thomp. & C. 581; *Mapes v. American Home Missionary Soc.* 83 Hun, 860; *Riley v. Diggs*, 2 Dem. 184; *Re Bullock*, 6 Dem. 335; *Despard v. Churchill*, 58 N. Y. 192; *Re Huss*, *supra*; *Cross v. United States Trust Co.* 13 L. R. A. 606, 131 N. Y. 830.

O'Brien, J., delivered the opinion of the court:

The general question presented by this appeal is the validity of the twenty-sixth or residuary clause of the will of Thomas Hope, who died on March 3, 1890, without issue. The will contains numerous bequests to collateral relatives, and to institutions and corporations for charitable purposes. By the residuary clause, all the rest, residue, and remainder of the testator's estate was devised and bequeathed to his executors and their survivors, in trust for the purpose of found-

ing and endowing an infirmary for the care and relief of sick and infirm persons, to be established at the testator's native place of Langholm, in Dumfriesshire, Scotland. The testator directed his executors, as trustees, to promptly take all necessary and proper steps for procuring the incorporation and organization of this infirmary. He further directed that if within three years from his decease, and during the lives of the two executors and trustees named, or within the three years, and during the life of either of them, such infirmary was incorporated and organized, so as to be able to take the bequest, and should, in respect to its organization, purposes, and plan of management, be accepted as satisfactory by the trustees, or the survivor of them, then the trustees, or the survivor of them, should forthwith, or as soon as practicable, sell and convert into money all of the said property remaining unsold, and pay over the whole of said trust fund or estate to such infirmary, to have and to hold forever for its uses and purposes; but if an infirmary, in accordance with these provisions, should not be incorporated and organized and be accepted as satisfactory by the trustees, within three years after the testator's death, and during the life of the trustees, then the trustees, or the survivor, and his or their successor or successors, were directed to divide the whole of the said trust fund and estate among, and to pay it over to, such charitable institutions, then established and existing at Langholm, and competent to take the same, as the trustees should decide, and in such proportions as they or the survivor of them might think proper. The testator left both real and personal estate, and in a subsequent clause of the will the executors were directed to sell the real estate, and convert the same into money, as soon after the testator's death as convenient. The will bears date June 12, 1886, but the residuary clause was materially changed and modified by subsequent codicils. The first codicil, bearing date November 24, 1886, directed that, in case the trustees should meet with any difficulties or cause of delay in incorporating and organizing the infirmary, provided for in the will, they were authorized and directed, if lawful so to do, to realize the whole of the residuary estate, and pay the same over to three trustees in Scotland, named in the codicil, for the purpose of establishing and maintaining such infirmary, and the testator gives directions for the government of the institution and the investment of the fund. It is not necessary to make further reference to this codicil as it was substantially abrogated by another, bearing date October 24, 1888, and which furnishes the principal ground for this controversy.

The twenty-sixth or residuary clause of the will, as well as the first codicil, in so far as they relate to the founding and endowment of the infirmary in Scotland, were also changed and modified by this second codicil by substituting the following provision: "Instead of said institution being founded and endowed by said trustees in the manner therein mentioned, I direct them, as soon after my decease as they can conven-

iently do so, to realize all the rest, residue, and remainder of my said property and estate so bequeathed to them, and to pay, assign, and make over the whole proceeds thereof, when and as realized, to and in favor of William Elphinstone Malcolm, . . . George Maxwell, . . . and Robert Smellie, residing in Langholm aforesaid, . . . as trustees and in trust, to the end that they may apply the same in founding, endowing, and maintaining an institution for the care or relief of sick or infirm persons to be established and located at Langholm, my native place, . . . and to be called 'The Thomas Hope Hospital.'" These Scotch trustees and their successors are made perpetual governors of the hospital, and are directed and empowered to apply the funds to be received by them from the executors to the erection, completion, and organization of the hospital, and provision is made in great detail with respect to the investment of the fund and the application of the income. Power is also expressly conferred upon the governors of the institution to enact statutes and by-laws for its government, and to change or modify them, at their pleasure whenever in their judgment the object of the charity would be promoted thereby.

The particular beneficiaries of the trust, or the persons to be received and cared for in the hospital, are described by the testator in the codicil in the following language: "And I recommend and appoint the preferences of admission to the said hospital to be as follows, viz.: *First*, sick or infirm persons natives of and resident in the said town of Langholm, or the parish of Langholm, or such other parishes in the county of Dumfries as the said governors and trustees in Scotland may from time to time select and determine; *second*, sick or infirm persons, natives of or resident in said town or parishes as aforesaid; and I declare that the said governors and trustees in Scotland shall be the sole judges as to the eligibility of the persons to be admitted to the said hospital and benefits thereof, or to participate in this endowment, and shall likewise be the sole judges when any such sick or infirm person shall cease to be an inmate of said hospital, or be recipient of the funds of the endowment; and I empower the said governors and trustees in Scotland, at their discretion, and if the funds will admit thereof, to give and afford out of said revenues such assistance as they may think suitable to such sick, infirm, or aged persons in reduced circumstances, natives of or resident in the said town of Langholm, or parishes as aforesaid, as they may judge to be proper objects of this endowment, without the necessity of their being admitted to the said hospital."

The scheme of the original will contemplated the foundation, endowment, and management of the hospital by the executors as trustees. The codicil required the executors to convert the residuary estate into money, and pay the same over to the Scotch trustees, who were empowered to establish the institution and administer the charity. It has been found as a fact by the trial court, and is not now disputed, that this disposition of

the residuary estate contained in the residuary clause of the will, and in the second codicil, is perfectly valid under the laws of Scotland. The foreign trustees are competent to take the fund and to administer the trust under Scotch law. The power and duty of the executors to convert the estate into money is thus expressed by the testator immediately following the residuary clause: "It is my will that my executors hereinafter named, as soon as may be conveniently done after my death, shall sell and convert into money all the real estate, of every name or nature, and wheresoever situated, of which I shall die seised, possessed, or entitled unto; and I hereby authorize and empower my said executors, and the survivor of them, to sell and dispose of said real estate at public or private sale at such time or times, and in such parcels, and upon such terms, and in such manner, as to them shall seem meet." This provision of the will operates to convert the real estate, of which Thomas Hope died seised, into personalty, and subjects it to the operation of the rules of law governing the devolution of personal property. *Moncrief v. Ross*, 50 N. Y. 431; *Pouer v. Cassidy*, 79 N. Y. 602, 35 Am. Rep. 550; *Vincent v. Newhouse*, 88 N. Y. 505; *Asche v. Asche*, 118 N. Y. 232; *Fraser v. United Presby. Church Trustees*, 124 N. Y. 479; *Underwood v. Curtis*, 127 N. Y. 523; *Lent v. Howard*, 89 N. Y. 169; *Bispham*, Eq. §§ 311, 312.

The plaintiff is the nephew of the testator, and one of the legatees under the will, and he brings this action to set aside as void the disposition of the residuary estate, contained in the twenty-sixth clause and the codicils, on the ground that the several provisions for the establishment of the infirmary or hospital are too indefinite and uncertain in their subjects and objects, and unlawfully suspend the power of alienation of real estate and the absolute ownership of personal property. The courts below have, in all respects, sustained the validity of the will and codicils, and the plaintiff alone appeals from the judgment. Although it appears that when the testator made the final provision contained in the second codicil for the establishment of a charity in his native place, he was temporarily residing at that place in Scotland, yet it is found that, at the time that the will and codicils were executed, he was domiciled in this state, and the will has been proved and established here. The scheme of the testator, as outlined in the residuary clause of the will, contemplated the creation of a corporation to hold the property and administer the charity, but in the second codicil the execution of the trust through a corporation to be created in the future seems to have been abandoned. The testator there finally provided that the Scotch trustees named should take and hold the fund, and apply it as trustees to the erection of proper buildings, upon land already purchased by the testator and conveyed to them as trustees, and to the furnishing of the same in a manner suitable for the purposes of the institution, and the income of the balance to be applied to the maintenance of the same. The three trustees and their successors in perpetuity were to be the

governors and managers, and as such they were to hold and own the property for the purposes of the trust. The functions of the two executors with respect to the fund were administrative merely. They were to pay the debts and legacies and pay the residuary fund over to the Scotch trustees, and then their powers and duties terminated. Henceforth both the title and management of the fund was conferred by the will and codicil upon the foreign trustees. I am unable to see how the vesting of the estate was postponed, or the absolute ownership suspended, in consequence of any power or duty conferred upon the executor for any period of time whatever. The payment of the bequest of the residuary estate to the trustees in Scotland was to be made by the executors as soon and when the same was converted into money. The fact that such conversion might require a period of time, not measured by lives, does not create an unlawful perpetuity. It was said in *Robert v. Corning*, 89 N. Y. 225, that such result is accomplished only when there are no persons in being by whom an absolute fee in possession can be conveyed, and that a discretionary power conferred upon executors, with respect to the time of sale, did not suspend the power of sale or the absolute ownership. It was within the legal power of the executors to convert the whole estate into money the day after their appointment and qualification, and to pay over the residuary fund to the foreign trustees, and this fact would seem to constitute a sufficient answer to the contention that the absolute ownership was suspended, by reason of any power or duty conferred upon the executors.

Reference has already been made to the language of the will and codicil, wherein the testator undertook to specify and define the persons who were to be the recipients of his charity or the beneficiaries of the trust. There is no defined beneficiary either named or capable of being ascertained within the rules of law applicable to such cases in order to constitute a valid testamentary trust under the law of this state. The words, "sick, infirm, or aged persons in reduced circumstances," within a certain town or parish, or within such other towns and parishes, in a certain county as the governors of the institution might from time to time select and determine, are entirely too vague and indefinite to satisfy the rule, with respect to the beneficiaries of a trust, which prevails in this state. *Fordick v. Hempstead*, 125 N. Y. 581, 11 L. R. A. 715; *Holland v. Alcock*, 108 N. Y. 312. The principle upon which this rule is founded, or at least one of the reasons for the rule, is that such a trust is incapable of enforcement, and in some of the cases there was no trustee competent to take. Here, however, the trustees are competent to take and hold the fund, and the execution of the trust does not depend upon the will of the trustees, but upon the law of the country where the testator directed the fund to be used, and the power of its courts over the trustees in the application and management of the property. The fund can lawfully be held, and the will of the donor fully carried out, at the place where he intended to found

the charity, and in the manner prescribed by him.

This brings us to the important question in this case, whether the courts of this state are required in such a case to interpose our own laws with respect to the requisites of valid testamentary trust in order to defeat the disposition which the testator has made of his property, and which is perfectly valid where he intended the gift to take effect. In the great variety of cases bearing upon the validity of trusts of this character, and in the manifold aspects in which questions growing out of such dispositions of property have arisen and been presented to the courts, it is not, perhaps, surprising that, in some of the opinions of the courts, *dicta*, expressed in general language, may be found giving support to the plaintiff's contention. But I have not been able to find any well-considered case, in which the question was directly involved, where a gift to a foreign charity in trust, contained in a valid testamentary instrument, has been held void, where there was a trustee competent to take and hold, and the trust was capable of being executed and enforced, according to the law of the place to which the property was to be transmitted under the will of the donor. The law of this state inhibiting the creation of trusts not expressly authorized by statute, and the suspension of the power of alienation of real estate, and the absolute ownership of personal property, is founded upon a public policy of our own. It was said of the English Statute of Mortmain that its object was political, and intended to have but a local operation. It was enacted to prevent what was deemed a public mischief, and not to regulate, as between ancestor and heir, the power of disposing by will, or to prescribe, as between grantor and grantee, the forms of alienation. It is an incident only, and with reference to a particular object, that the exercise of the owner's dominion over the property is abridged. The restraints which the statutes imposed upon owners of property had reference to a mischief existing in England only. *Atty-Gen. v. Stewart*, 2 Meriv. 143. Statutes of a kindred nature, enacted in this state and in the various states of the Union, whatever their form, were intended to operate within and promote the welfare of the people of each particular state, and it was not contemplated that they should have any extraterritorial effect. It is not a matter of any public concern whatever to this state whether the personal property of a person domiciled here shall pass to his heirs or next of kin in a foreign country, or to trustees in trust for charity residing there, or even to a foreign corporation for purposes of charity. *Vansant v. Roberts*, 8 Md. 119.

Our law with respect to the creation of trusts, the suspension of the power of alienation of real estate and the absolute ownership of personal, was designed only to regulate the holding of property under our laws and in our state, and a trust intended to take effect in another state, or in a foreign country, would not seem to be within either its letter or spirit. When a citizen of this state, or a person domiciled here, makes a gift of per-

sonal estate to foreign trustees for the purpose of a foreign charity, our courts will not interpose our local laws with respect to trusts and accumulations to arrest the disposition made by the owner of his property but will inquire as to two things: *First*, whether all the forms and requisites necessary to constitute a valid testamentary instrument, under our law, have been complied with; and, *second*, whether the foreign trustees are competent to take the gift, for the purposes expressed, and to administer the trust under the law of the country where the gift was to take effect; or, as *Judge Rapallo* stated the rule with respect to gifts to charity generally, the inquiry is "whether the grantor or deviser of a fund designed for charity is competent to give, and whether the organized body is endowed by law with capacity to receive and to hold and administer the gift." *Holland v. Alcock*, 108 N. Y. 337. In this case the testator was unquestionably competent to give, and did make the gift under all the forms and requisites necessary to constitute a valid testamentary disposition. So were the trustees to whom the gift was made, competent to take and administer it, under Scotch law, and the only question is whether we must defeat the gift and frustrate the intentions of the testator because he neglected to observe, in all respects, the rules of our local law with regard to the creation of trusts and perpetuities.

Unless we are concluded upon this question by established principles of law, there is no reason growing out of the facts surrounding the case, or founded upon public policy, for diverting the property into channels not contemplated by the testator. It is no doubt true that the validity of a disposition of personal property at the domicile of the owner is generally the test of its validity in other jurisdictions. But this rule, I apprehend, only requires compliance with forms and with principles of law generally or universally recognized as essential to the transfer or transmission of property. If personal property is disposed of by will, and in trust for charity, to take effect in another country, no good reason is apparent for insisting that a full compliance with the local law of the domicile, with respect to the form or duration of the trust, or the definition of the beneficiaries, is necessary to the validity of the disposition. Such laws are not generally regarded as limitations upon the power of the owner to transfer or transmit the property, but regulations applicable to the holding of property in the particular community, founded upon political or social considerations. In *Cross v. United States Trust Co.*, 131 N. Y. 330, 15 L. R. A. 606, we held that a disposition of personal property by will and in the form of a trust, to be executed in this state, made by a person domiciled in another state, valid at the place of the domicile, was valid here, though the absolute ownership of the property was suspended for a period longer than is permitted by our statute. The principal ground of that decision was that our courts were required, under the doctrine of comity, to recognize a disposition of personal property made in another state as valid, if valid

there, and not in its nature unlawful, or against public policy. In the creation of the trust our statute in regard to perpetuities was disregarded, but we held that it did not apply to a will made by a person who was domiciled in another state. In order to sustain this will, we must go a step further, and hold another, but a kindred, proposition, namely, that a disposition of personal property made in this state, by a competent testator, in a valid testamentary instrument, to trustees in a foreign country, for the purposes of a charity to be established in that country, is valid, although not in compliance with our statute or the rules of law in force here in regard to trusts and perpetuities, providing it is valid by the law of the place where the gift is to take effect, and which governs the trustees and the property when transmitted there. If our statute, as I have attempted to show, does not apply to such a case, then there is nothing in the way of the validity of such a disposition of property. The question has been often referred to in this court, and though the precise question was not involved, the expressions of opinion are in favor of sustaining this will. In the leading case of *Chamberlain v. Chamberlain*, 48 N. Y. 424, Allen, J., discussing the question, said: "The courts of this state will not administer a foreign charity, but they will direct money devoted to it to be paid over to the proper parties, leaving it to the courts of the state within which the charity is to be established, to provide for its due administration and for the proper application of the legacy. Hill, Trustees, 468; 2 Story, Eq. Jur. § 480; *Edinburgh v. Aubery*, Amb. 236; *Burbank v. Whitney*, 24 Pick. 154, 35 Am. Dec. 812; *Atty-Gen. v. Lepine*, 2 Swanst. 181. . . . A gift by will of a citizen of this state to a charity or upon a trust to be administered in a sister state which would be lawful in this state, the domicile of the donor, would not be sustained, if it was not in accordance with the laws of the state in which the fund was to be administered. Bequests in aid of foreign charities, valid and legal in the place of their existence, will be supported by the courts of the state in which the bequests are made. Hill, Trustees, 457. If the legatee, whether a natural or artificial person, and whether he takes in his own right or in trust, is capable, by the law of his domicile, to take the legacy in the capacity and for the purposes for which it is given, and the bequest is in other respects valid, it will be sustained irrespective of the law of the testator's domicile. . . . It is no part of the policy of the state of New York to interdict perpetuities or gifts in mortmain in Pennsylvania or California. Each state determines these matters according to its own views of policy or right, and no other state has any interest in the question, and there is no reason why the courts of this state should follow the funds bequeathed to the Centenary Fund Society to Pennsylvania to see whether they will be there administered in all respects in strict harmony with our policy and our laws. The question was before the court in *Fordyce v. Bridges*, 2 Phil. Ch. 497, upon the bequest of a fund

in England to be invested in a Scotch entail. Lord Cottenham says: 'An objection was made that the bequest of a fund, to be invested in a regular Scotch entail, was void as a perpetuity. The rules acted upon by the courts of this country, with respect to testamentary disposition tending to perpetuities, relate to this country only. What the law of Scotland may be upon such a subject the courts of this country have no judicial knowledge, nor will they, I apprehend, inquire. The fund being to be administered in a foreign country is payable here, though the purposes to which it is to be applied would have been illegal, if the administration of the fund had been to take place in this country. This is exemplified by the well-established rule in cases of bequests within the Statute of Mortmain. A charity legacy void in this country under the Statute of Mortmain is good and payable here, if for a charity in Scotland.' To the same effect is *Vansant v. Roberts*, 8 Md. 119.

In the case of *Manice v. Manice*, 43 N. Y. 303, Judge Rapallo, discussing the validity of a bequest by a person domiciled in this state to Yale College, said: "The direction to pay to the treasurer is a good gift to the college, the college having been shown to be capable of taking. *Emery v. Hill*, 1 Russ. 112; *De Witt v. Chandler*, 11 Abb. Pr. 459; *Hornbeck v. American Bible Soc.* 2 Sandf. Ch. 133, 7 L. R. A. 587. The college is a foreign corporation, it being authorized by the laws of its own state to take. . . ." After discussing the question whether the words of the will were sufficient to create a trust, the learned judge continued: "These are questions, however, which must necessarily be determined by the courts of the state in which the corporation legatee is situated. The fund is to go there, and be there administered. The will of the testator, so far as the courts of this state can act upon it, it fully executed when the money is paid to the proper officer of the foreign corporation; and there is no law of this state prohibiting gifts to such foreign corporation. Though the laws of the state of that corporation may permit it to hold and administer property in perpetuity, or to accumulate it, the local policy of this state upon that subject is not interfered with by allowing property of our citizens to pass to such foreign corporation, and be administered by it in such foreign state according to its own laws. *Fordyce v. Bridges*, 10 Beav. 105, 2 Phil. Ch. 497; *Vansant v. Roberts*, 3 Md. 119; *Chamberlain v. Chamberlain*, 43 N. Y. 424.

The same doctrine was approved in the subsequent case of *Despard v. Churchill*, 53 N. Y. 192, and property in this state of a testator in California was remitted to that state, to be administered under the will, notwithstanding it was devoted to the purposes of a trust which would have been unlawful in this state, though valid there. We have recently held that a bequest of the residuary estate of a testator domiciled here to a municipality in the German empire was valid, it appearing that the municipality had capacity by the law of the place to take and hold the gift. *Re Huss*, 126 N. Y. 537,

12 L. R. A. 620. See also *Kerr v. Dougherty*, 79 N. Y. 827; *Hollis v. Drew Theological Seminary*, 95 N. Y. 166.

We have examined the cases cited by the learned counsel for the plaintiff in support of his contention. They contain general expressions of the rule that a testamentary disposition of property invalid at the domicile of the owner is invalid everywhere, and indeed, this rule is stated in some of the cases to which I have referred, and, as a general principle, cannot be questioned. But when it is said that such a disposition is invalid everywhere if invalid at the domicile, the rule refers to some defect in the execution of the instrument, the capacity of the testator, the legal construction of the instrument, the form or object of the disposition, and not to the noncompliance, in framing the terms of the trust, with a local statute or rule of law regulating the holding of property by the citizens of the state or country where the will was made, and which had no extraterritorial force. Perhaps the strongest case in support of the plaintiff's view is that of *Bascom v. Albertson*, 34 N. Y. 587. In that case there was a bequest of the residuary estate by a testator in this state to five unnamed persons as trustees, to be appointed by the Supreme Court of the state of Vermont, to found and establish an institution in that state for the education of females. This bequest was held to be void. The discussion in this court proceeded almost entirely upon the question whether it could be sustained under the English doctrine of charitable uses sanctioned by a majority of the court in *Williams v. Williams*, 8 N. Y.

525, and it was held that it could not. The case differs from the one at bar in, at least, one important particular. The testator failed to appoint trustees competent to take, and it did not appear that those appointed by the action of the judges of the Supreme Court of Vermont could take or hold, or that the trust could be administered, under the laws of that state. Besides, the views expressed in the prevailing opinion, in so far as they are in conflict with the judgment now under review, must be deemed to be modified by the subsequent cases of *Chamberlain v. Chamberlain*, *Manice v. Manice*, and *Despard v. Churchill*, *supra*. Our conclusion is that, even if it be assumed that the bequest of the residuary estate to the Scotch trustees, in trust for the purpose of founding and maintaining the hospital, should be held void under our law for the reason that the absolute ownership of personal property is unlawfully suspended, or that the beneficiaries of the trust are not sufficiently specified or defined, still that does not render the disposition invalid, as these objections do not apply to a gift in trust to be administered in Scotland, and perfectly valid there. This result, I think, is in harmony with the general tendency of courts to sustain testamentary dispositions of property when it fairly can be done under the rules of law, and in accordance with principles of enlightened justice.

The judgment should therefore be affirmed, with costs to the executors, the foreign trustees, and the plaintiff, payable out of the estate.

All concur.

CALIFORNIA SUPREME COURT.

SAN GABRIEL VALLEY LAND & WATER CO., *Respt.*,

v.

WITMER BROTHERS CO., *Appt.*

(.....Cal..... ..)

1. **The validity of a tax upon a mortgage interest in land cannot be questioned by the mortgagee** on the ground that the description in the assessment varies from that in the mortgage, where the land has been divided into lots and blocks and the assessment description complies substantially with the statutory requirements as to the assessment of a mortgage interest in such property and is sufficiently particular and certain to afford the mortgagee the means of identification without being misled although the mortgage describes the property with reference to the government survey.
2. **Statutory permission to the mortgagor to pay the taxes levied on the mortgage interest and deduct the amount from the mortgage debt does not make that remedy exclusive, but in case he pays the mortgage debt in full and is afterwards compelled to pay**

such taxes to relieve his property from their lien he may recover their amount from the mortgagee.

3. **The assessment book is prima facie evidence not only of the assessment of all taxes** required by statute to be levied by the supervisors and to appear therein including road and school taxes, and of their amount, but also of the fact that all forms of law in relation to the assessment and levy have been complied with and consequently of their validity, under Pol. Code, § 3739.

4. **Mere assignment of a mortgage before the levy of the tax** upon the mortgage interest will not discharge the obligation of the assignor to pay the tax if the assignment was made after the date which the statute fixes for its assessment.

(Beatty, Ch. J., and Harrison and Paterson, JJ., dissent.)

(March 31, 1892.)

APPEAL by defendant from a judgment of the Superior Court for Los Angeles County in favor of plaintiff, and from an or-

NOTE.—On the subject of power to tax mortgagees, see *Detroit v. Rentz* (Mich.) 18 L. R. A. 59, and note.

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On the question when taxes on land become a lien or incumbrance thereon, see *Craig v. Summers*, 15 L. R. A. 236, and note, 47 Minn. 189.

der denying motion for new trial, in an action brought to recover taxes which had been assessed to defendant but paid by plaintiff in order to relieve his property from their lien. *Affirmed.*

The facts are stated in the opinions.

Mr. P. W. Dooner, for appellant:

Describing the property assessed as "blocks 1 to 44 of the town of East San Gabriel" while the mortgage description was the N. W. $\frac{1}{4}$ and the W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of S. 18, T. 1 S., R. 12 W., S. B. M. was not sufficient.

People v. Mahoney, 55 Cal. 286; *People v. Cons*, 48 Cal. 427; *People v. Flint*, 39 Cal. 670; *Keane v. Cannovan*, 21 Cal. 802; *Lachman v. Clark*, 14 Cal. 181; *People v. Empire G. & S. Min. Co.* 33 Cal. 171; *People v. Pearis*, 37 Cal. 259.

The assessment roll is simply prima facie evidence of the facts stated therein and it is properly in evidence for what it is worth with that limitation.

Cal. Code Civ. Proc. § 1920.

It is not to the form, as provided by the Code, that appellant objects, but it is to the substantial matter supplied by the assessor.

Cal. Pol. Code, § 8651; *People v. San Francisco Soc. Union*, 81 Cal. 182.

There is no evidence, by stipulation or otherwise, either of equalization or levy under the assumed assessment, but the burden is on the plaintiff to show a complete case, and upon the authority of *People v. Castro*, 39 Cal. 65, plaintiff might have been nonsuited.

Pierce v. Law, 51 Cal. 580; *People v. Hastings*, 29 Cal. 449; *People v. Waterman*, 31 Cal. 412.

Of course the validity of special school or road tax is not determinable by the assessment roll.

Section 8789 expressly limits the sufficiency of an assessment roll as prima facie evidence to the roll "showing unpaid taxes." It is the "delinquent" roll to which the section refers, and we are not dealing with that. Hence the assessment roll as evidence, in any other than a delinquent tax suit, must be interpreted under the rules as laid down by section 1920, Cal. Code Civ. Proc. Such interpretation, it will be observed, would not countenance the inference that an assessment is constructively correct in a case where its sufficiency does not appear.

People v. Castro, *supra*; Cal. Pol. Code, §§ 1830-1839, 2651-2655, 3789.

There is no evidence at all that any of the provisions of the statute authorizing the assessment or levy of school or of road tax have been complied with.

People v. Castro, *supra*; *People v. Seale*, 52 Cal. 71, 620; *People v. San Luis Obispo County* *Supra*, 50 Cal. 561.

In certain actions the assessment roll is expressly made prima facie evidence of due assessment, but it is plain that the creation of such exceptional instances confirms the contrary as the rule.

Cal. Stat. (Act April 23, 1880), p. 402; Cal. Pol. Code, §§ 3899, 3900; *Lake County v. Sulphur Bank Q. S. Min. Co.* 66 Cal. 18; *Modoc County v. Churchill*, 75 Cal. 173.

No one can be made a debtor for money paid to his use unless it was done at his request or unless the party paying was bound as surety to pay it for him.

Curtis v. Parks, 35 Cal. 106; 1 Parsons, Cont. 6th ed. *471.

Taxes are not debts and "will not raise the relation of debtor and creditor."

Perry v. Washburn, 20 Cal. 318; *Shaw v. Peckett*, 26 Vt. 485; *Dyer v. Barstow*, 50 Cal. 654; *Taylor v. Palmer*, 31 Cal. 255.

Where a right is given and a remedy provided by statute, the remedy so provided must be pursued.

Cal. Pol. Code, § 8627; *People v. Craycroft*, 2 Cal. 243, 56 Am. Dec. 331.

The power of taxation must be exercised by the Legislature within the limitations of the Constitution. The taking of other property than that assessed to satisfy a personal liability is no part of the mode.

Taylor v. Palmer, *supra*.

If the Act merely imposes a tax upon property and provides a particular process for enforcement, as a sale of the property, no suit can be brought against the person to collect the tax.

State v. Poulterer, 16 Cal. 530; *Camden v. Allen*, 26 N. J. L. 396; *Augusta v. North*, 57 Me. 392; *Peirce v. Boston*, 8 Met. 520.

When a purchaser buys land which is subject to an existing tax lien, he must see at his peril that the tax is paid.

Reeve v. Kennedy, 43 Cal. 643.

If the plaintiff upon paying the mortgage debt desired to avail itself of the statutory remedy (Cal. Pol. Code, § 8627), it could only do so against the State Loan & Trust Company, the owner and holder of the security, not against parties no longer entitled to receive the debts or discharge the mortgage.

The assignment to the trust company carried the security.

Cal. Civ. Code, 2986.

The trust company became the owner by the assignment.

Id. § 3124; *Reeve v. Kennedy*, *supra*.

The plaintiff paid over to the trust company on the 24th day of July, 1890, money in excess of what the trust company was entitled to demand or receive, and which was then the money of plaintiff and in its possession and under its control, not due owing to the trust company and need not have been paid.

Cal. Pol. Code, § 8627.

The obligation of defendant had theretofore been extinguished.

Cal. Const. art. 13, § 4; Cal. Civ. Code, §§ 1473, 1474, 3164.

The statute, (Cal. Pol. Code, § 8627) declares a "right" and "prescribes the remedy." In such case the remedy is exclusive and "must be pursued."

State v. Poulterer, 16 Cal. 524; *Almy v. Harris*, 5 Johns. 175; *Andorer & M. Turnp. Corp. v. Gould*, 6 Mass. 42; Cal. Pol. Code, § 8627; *People v. Craycroft*, 2 Cal. 245, 56 Am. Dec. 331; *Cannovan v. Gray*, 64 Cal. 5.

The allegation is that upon the settlement of the mortgage debt the mortgage tax "was not considered." It follows that if it was not considered there could not be any manner of compulsion. It was a case of admitted negligence, and the courts will not grant relief.

Cal. Civ. Code, §§ 3514, 3515, 3543; *Curtis*

v. *Parks*, 55 Cal. 106; *Boggs v. Fowler*, 16 Cal. 566, 76 Am. Dec. 561; 1 Hilliard, Cont. p. 71; 1 Parsons, Cont. 6th ed. *471.

Money paid under mistake or ignorance of the law, but with knowledge of the fact, cannot be recovered back.

2 Greenl. Ev. § 128; 8 Addison, Cont. §§ 1408, 1409; *Brumagim v. Tillinghast*, 18 Cal. 271.

At most the assessment only created a lien upon the premises, not a personal obligation against the owner, unless he was also the contractor, as in the case of mechanics' and other statutory liens.

Cal. Pol. Code, § 8718; *Curtis v. Parks*, *supra*.

The creation of such lien does not imply any personal obligation which could only arise by contract.

Cal. Civ. Code, § 2890; *Dyer v. Barstow*, 50 Cal. 654.

The mortgagor who pays such mortgage tax, and likewise pays the mortgage debt without making the deduction, has waived a lien created in his interest and maintained for his protection by the Constitution; and as against the mortgagee or owner of the security to be charged, the proceedings being *in invitum* and a lien upon his security, the tax never did and never could be or become a personal charge or the foundation of a personal action.

Perry v. Washburn, 20 Cal. 850; *Meriwether v. Garrett*, 102 U. S. 514, 26 L. ed. 205; Cal. Civ. Code, § 2890.

To constitute duress the party aggrieved must have acted against his conscious, rational convictions, under direct compulsion, superinduced by threats.

Hatter v. Greenlee, 1 Port. (Ala.) 222, 26 Am. Dec. 877.

And he must be blameless in the whole transaction.

Kohler v. Wells, Fargo & Co. 26 Cal. 606; Story, Eq. Jur. § 845 a. See also § 846.

In a statute the word "may" means "must" or "shall" in cases where the public interest or rights are concerned, and when the public or third persons have a claim *de jure* that the power shall be exercised.

Frank v. San Francisco, 21 Cal. 701; *Palache v. Pacific Ins. Co.* 42 Cal. 480; *Re Ballentine's Estate*, 45 Cal. 696; *Pickett v. Hastings*, 47 Cal. 270.

Messrs. Judson, Hester & Russell, for respondent:

The Constitution and laws of the state require that a mortgage interest in real property shall be assessed and taxed to the owner thereof, and make the taxes so levied a lien on the whole of the mortgaged property.

Cal. Const. art. 13, § 4; Cal. Pol. Code, § 8627.

The Code further provides that every tax has the effect of a judgment against the person, and the force and effect of an execution duly levied against all property of the delinquent. And this judgment is not satisfied until the taxes are paid, and the lien upon the property is not removed until payment of the taxes, or sale of property for such payment.

Cal. Pol. Code, § 8716; *Yuba County v. Adams*, 7 Cal. 85; *Covell v. Washburn*, 22 Cal. 622; *Reeve v. Kennedy*, 43 Cal. 643.

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The owner of the property to whom the same has been assessed for taxation is personally liable for the payment of the taxes levied thereon, and a personal action may be maintained against him for the recovery of such taxes.

People v. Seymour, 16 Cal. 841, 76 Am. Dec. 521; *Guy v. Washburn*, 28 Cal. 116; *People v. Todd*, 28 Cal. 182; *Oakland v. Whipple*, 89 Cal. 114; *San Francisco Gas Co. v. Brickwedel*, 63 Cal. 645; *San Luis Obispo County v. Hendricks*, 71 Cal. 245.

There is no provision in the statute that the payment of the mortgage debt shall release the person to whom such mortgage interest is taxed from this personal liability, or from the effect of this personal judgment, or free any of the property from the lien of the tax levied.

Appellant was legally bound to pay this tax. The tax was a lien on respondent's land; and, if respondent had not paid it, it would have become delinquent, the charges upon the land would have been increased, and the land would have been liable to be sold under legal process for the payment of the delinquent tax.

Respondent had no alternative but to lose its land or pay the tax.

Where the plaintiff is compelled to pay the defendant's debt in consequence of his neglect or omission to do so, the law implies that the defendant requested the plaintiff to make the payment for him, and gives him the action for money paid.

Chitty, Cont. 8th Am. ed. 518; 2 Greenl. Ev. § 108; *Bailey v. Buasing*, 28 Conn. 455; *Nichols v. Bucknam*, 117 Mass. 491; *Hogg v. Longstreth*, 97 Pa. 255.

In order to save its property from being sold on legal process, it was compelled to pay money which the appellant ought to have paid. The common law, as we have shown, gave in such a case a right of action in assumption. When the right existed at the common law, the plaintiff might pursue either remedy, the statutory one being regarded merely as cumulative.

People v. Oroycroft, 2 Cal. 244, 56 Am. Dec. 881; *Ward v. Severance*, 7 Cal. 126; *State v. Poulterer*, 16 Cal. 528; *Monterey County v. Abbott*, 77 Cal. 543.

Per Curiam:

When this case was pending in department, an opinion was prepared by Commissioner Vanclef. After full consideration in bank, we adopt that opinion, and the conclusion therein reached; and for the reasons therein given the judgment and order appealed from are affirmed. The said opinion is as follows:

"The plaintiff having paid the taxes, amounting to \$185.12, assessed to the defendant on its mortgage interest in land, brought this action in a justice's court to recover the sum so paid from the defendant. The cause was properly transferred to the superior court for trial, and judgment passed for plaintiff. The defendant appeals from the judgment, and from an order denying its motion for a new trial. The material facts found by the court and stipulated by the parties are as follows: One Sanborn, being the owner of two hundred and forty acres of land, situate

in Los Angeles county, mortgaged the same on the 14th day of March, 1887, to Hall and Stilson to secure the payment of \$20,000, and the mortgage was duly recorded. On May 7, 1888, Hall and Stilson assigned the mortgage and debt thereby secured to the defendant, and defendant continued to own them until June 7, 1889, when it assigned them to the State Loan & Trust Company, a corporation. Before the taxes were assessed upon the land or mortgage for the year 1889, the plaintiff became the owner of the land subject to the mortgage, and divided it into blocks and lots. While the defendant was the owner of the mortgage, to wit, on March 4, 1889, the taxes in question were assessed to defendant on its mortgage interest. On July 24, 1889, the plaintiff, as successor in interest of the mortgagor, paid the mortgage debt in full to the State Loan & Trust Company, without any deduction or provision on account of the taxes on the mortgage interest assessed to defendant. On December 19, 1889, the tax collector demanded the taxes (\$185.12) of the defendant by sending it a bill for the amount. On the following day the defendant inclosed the bill in a letter to the plaintiff, stating that it (defendant) had no interest in the mortgaged premises. Thereupon the plaintiff requested the defendant to pay the taxes assessed to it, but defendant refused, and failed to pay the same or any part thereof. On December 30, 1889, the plaintiff, to prevent the taxes from becoming delinquent, and to remove the lien thereof from its land, paid them.

"1. The validity of the tax is questioned upon the ground that the description of the mortgaged land varies essentially from that contained in the mortgage. The mortgage describes it as 'the northwest quarter, and the west half of the northeast quarter, of section thirteen, (13,) township one (1) south, of range twelve (12) west, of the San Bernardino meridian, containing two hundred and forty (240) acres.' As the land had been divided by plaintiff into blocks and town lots before the assessment of the taxes for 1889, it is so described in the assessment book. It is agreed, however, that the blocks and lots assessed to the defendant constitute the identical land described in the mortgage, and no more; and that the assessment was in substantial conformity with the requirements of section 8651 of the Political Code, and in proper form for the assessment of a mortgage interest in town lots. As the taxes were paid before they became delinquent, they were not increased by costs of advertisement or sale in lots. I think the assessment described the mortgaged land in accordance with the statute, and with such particularity and certainty as to afford the defendant the means of identification, and so as not to mislead him. This was sufficient. Cooley, Taxn. 282-286.

"2. It is claimed that respondent's exclusive remedy was to deduct the amount of the taxes from the mortgage at the time of payment, on the basis of the levy of the preceding year, in pursuance of section 3627 of the Political Code. But the statute giving that privilege is permissive, and not man-

datory, in its terms. It has been expressly decided by the circuit court of the United States for the district of California that, under section 4, art. 13, of the Constitution of California of 1879, it is the duty of the mortgagee, and not of the mortgagor, to pay the taxes levied on the mortgage interest; that the Constitution and statute give the mortgagor the right to pay the tax, and deduct it from the debt; but that he is not bound to do so; and that if the mortgagee dispute the tax, and decline to allow it, and the whole mortgage debt is paid by the mortgagor, without deduction of the tax, the mortgagor, if afterwards compelled to pay it to relieve his property of the lien, may recover the amount paid from the mortgagee, whose debt it is. *Blythe v. Luning*, 7 Sawy. 506, 507, 14 Fed. Rep. 281. The principle of this decision is in accordance with the well-settled rule, that, 'where the plaintiff, either by compulsion of law, or to relieve himself from liability, or to save himself from damage, has paid money, not officiously, which the defendant ought to have paid, a count in assumpsit for money paid will be supported.' *Bailey v. Bussing*, 28 Conn. 462; *Exall v. Partridge*, 8 T. R. 310. In such case, 'the law implies a request on the defendant's part, and a promise to repay, and the plaintiff has the same right of action as if he had paid the money at the defendant's express request.' *Nichols v. Bucknam*, 117 Mass. 491; *Nutter v. Sydenstricker*, 11 W. Va. 535. The right of contribution or reimbursement for money necessarily paid for another's benefit does not necessarily depend upon contract, but may arise from the equity of the case. *Freem. Co-ten.* § 322. See also *Hay v. Hill*, 65 Cal. 383.

"3. It is also insisted that there is no proof of the validity of the 'road-tax' or of the 'special school-tax' which were included in the sum sued for. Each of these is required to be levied by the supervisors and to appear upon the assessment book, (Pol. Code, §§ 1887, 2654;) and the assessment book itself is prima facie evidence, not only of the assessment and of the amount of the unpaid taxes but of also the fact that all the forms of law in relation to the assessment and levy have been complied with, (Pol. Code, § 3789; *Modoc County v. Churchill*, 75 Cal. 172.) The assessment book in due form was in evidence, and there was no evidence tending to overcome the prima facie case proved by it.

"4. It is further claimed that the liability of the defendant to pay the tax was discharged by his assignment of the mortgage before the levy of the tax. But the law required the mortgage to be assessed to the person who owned it on the first Monday of March, (Pol. Code, §§ 3627, 3628;) and such person could not escape the obligation to pay the tax by mere assignment of the mortgage. The personal obligation to pay taxes does not depend upon the continued ownership of the property assessed until after the levy of the tax, or until the time for payment arrives.

"I think the judgment and order should be affirmed.

"We concur: **Belcher, C.; Fitzgerald, C.**"

Harrison, J., dissenting:

1. Although the interest in the land represented by the mortgage was assessed as of the first Monday of March, 1889, and the tax which was afterwards levied upon that interest became by relation a lien upon the land as of that date, yet until the tax was levied there was no liability or obligation for its payment created against either the property or its owner. This tax was levied on the first Monday in October of that year, (Pol. Code, § 3714;) but prior to that date the plaintiff had paid the mortgage debt and caused the mortgage to be canceled. The Constitution, (article 13, § 4,) and the statute passed in pursuance thereof, (Pol. Code, § 3827,) authorizing the assessment of a tax upon the mortgage, provide that, "if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a free discharge thereof; provided that, if any such security or indebtedness shall be paid by any such debtor or debtors after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year." There is no provision in the Constitution or statute which gives to the mortgagor the right to be reimbursed for this payment in any other mode, and under the familiar rule that, when the right and the remedy are purely statutory, the remedy provided by the statute is the only mode of preserving the right, if the plaintiff would insist upon this right he should have deducted the amount of the tax from the debt at the time that he paid the debt. In the absence of the constitutional provision there would be no obligation upon the mortgagee, as between him and the owner of the land, to pay the tax upon the mortgage, and the owner of the land would not be able to compel such payment by him. The obligation created by such tax exists only in favor of the state, and the tax is a charge upon the property against which it is assessed, and not a personal obligation against the mortgagor. With the exception of poll-taxes, taxes are always levied upon property, and not against individuals, and the mortgage tax is a tax upon the security, and not against the mortgagee. The mortgage is made by the Constitution "an interest in the property affected thereby," and the entire tax against the property is divided between the mortgagee and the owner. The provision that the value of the security shall be assessed and taxed to the "owner thereof" creates no different obligation upon the mortgagee from that which is created upon the owner of the property by the provision requiring the value of the property to be taxed to the "owner of the property." The tax is not a debt, and there is no personal obligation created by it. It is a burden imposed by the state upon property within its limits; but that burden is a charge against the property, and not against the individuals who own the property, and follows the property through all changes in its ownership, and is eventually paid by the individual who is the owner when the tax is

collected. "A debt is a sum of money due by contract, express or implied. A tax is a charge upon persons or property to raise money for public purposes; it is not founded upon contract; it does not establish the relation of debtor and creditor between the tax-payer and the state; it does not draw interest; it is not the subject of attachment, and it is not liable to set-off. It owes its existence to the action of the legislative power, and does not depend for its validity or enforcement upon the individual assent of the tax-payer. It operates *in invitum*." *Perry v. Washburn*, 20 Cal. 350. Nor is its character affected by the fact that the statute authorizes a personal action to be brought for its recovery. Such procedure is merely the statutory method prescribed for its collection, and does not create a debt or personal obligation against the individual to whom it is assessed. *Meriwether v. Garrett*, 103 U. S. 514, 26 L. ed. 205. In the absence of statutory authority, an action for the recovery of a tax cannot be maintained; (*Camden v. Allen*, 26 N. J. L. 393;) whereas, if the tax was a debt or personal obligation, its collection could be enforced by suit without statutory authority. See also *Augusta v. North*, 57 Me. 392; *Shaw v. Peckett*, 26 Vt. 482; *Peirce v. Boston*, 8 Met. 520.

2. The taxes levied against the property are divided between the mortgagee and the owner, and become a lien upon both the land and the security as of the first Monday in March, and remain a lien thereon until paid. If the owner of the land parts with the property during that period, he is exonerated from any liability to the state for the payment of this tax, and the individual who is the owner of the land when the tax becomes payable must discharge the lien, if he would save it from sale by the collector. The purchaser may protect himself against this lien by proper covenants in the deed from his grantor, as he would against any other lien or incumbrance; but if his conveyance is a naked quitclaim, he cannot call upon his vendor for remuneration for the amount of the tax so paid, any more than for the payment of any other incumbrance which was not a personal obligation against the vendor. The tax against the mortgage is in all respects identical in character with the tax against the land. It is levied and assessed in the same manner and at the same time, is a lien upon the same property, and collected by the same means. The same results, therefore, must follow the transfer of the security as follow the transfer of the land. The vendor is thereby absolved from all obligations for the tax previously levied thereon, and when the tax is payable it must be paid by the individual who is at the time the owner of the security. By the transfer all relations between the mortgagee and the owner of the land terminate, and the assignee of the mortgage is substituted in the place of the mortgagee, with all the rights and obligations previously resting upon the mortgagee. The provision in the Constitution that "the taxes so levied may be paid by either party to such security" refers to this assignee, and not to the original mortgagee.

It is only the "owner" of the security that is permitted to pay the tax levied upon the property, and have the amount so paid become a part of the debt secured, but, if the original mortgagee to whom the mortgage has been assessed has assigned the mortgage, he is not the "owner" of the security, or of any debt to be increased by the payment of such tax, and consequently is not the "party" to the security referred to in the above provision of the Constitution. For the same reasons the provision in the Constitution that a payment by the owner of the property of the tax levied on the security shall constitute a payment thereon, and to the extent of such payment a full discharge thereof, is applicable only to the holder of the mortgage in case of an assignment, and not to the original mortgagee. Consequently, if such payment be made by the owner of the property after assessment and before the tax levy, his right to reimbursement can be enforced only against the holder of the mortgage, and not against the original mortgagee, and only in the mode pointed out in the Constitution.

8. If it can be maintained that, by virtue of his relations to the land, there was an implied obligation upon the mortgagee to discharge the lien thereon created by the tax upon his security, that obligation by the transfer of the security became only a secondary obligation upon him. The primary obligation for the tax is upon the security itself, and the owner of that security is the individual to whom the owner of the land must look primarily for the discharge of the lien. The Constitution refers to him alone, and the provision that, if the debtor pays the indebtedness "after assessment and before the tax levy," the amount of the tax may be "retained" by him, implies that he must "retain" it from the holder of the security, or lose the right to proceed against any other person for reimbursement. The owner of the land, having in his custody this fund—the mortgage debt—out of which to discharge the lien of the tax, must, in equity, apply it to that purpose, or lose any right he may have to resort to other securities. The most favorable position which the owner can claim that the original mortgagee holds towards him in reference to this mortgage tax is that he is under some obligation to ultimately discharge this lien, but this is only the position of a surety, and as a surety he is entitled to have this fund applied to the payment of the tax, or be discharged therefrom. Civ. Code, §§ 2840, 2849. The payment by the plaintiff of the mortgage debt, without making any deduction for the mortgage tax, was a voluntary surrender by him of a security which he held for the purpose of protecting himself and his property against the burden of the tax, and such payment must be regarded as a release by him of any liability which he would claim against the defendant. In *Blythe v. Luning*, 7 Sawy. 506, 14 Fed. Rep. 281, the mortgagor sought to avail himself of the very remedy pointed out by the Constitution, by deducting the estimated amount of the mortgage tax, but the mortgagee refused to cancel the mortgage, except

upon payment of the full amount of the mortgage debt. In that case the mortgagor and mortgagee were the respective owners of the land and of the security at the time of the assessment, as well as at the time of the payment, and there was no question presented involving the right or liability of any other person than the mortgagor and mortgagee, and the court held that the payment of the tax by the mortgagor, under the circumstances of that case, was made under duress, and could be recovered in an action therefor. In my opinion, the judgment and order should be reversed.

Paterson, J.:

I concur in the views expressed by **Harrison, J.**

There having been a rehearing, on December 2, 1892, the following opinions were handed down:

Per Curiam:

After further consideration, we adhere to the opinion heretofore prepared by *Commissioner Vanciel*, and adopted by the court at the former hearing, (29 Pac. Rep. 500,) and for the reasons stated in that opinion the judgment and order appealed from are affirmed.

Harrison, J.:

I dissent upon the reasons stated by me at the former decision of the case.

Beatty, Ch. J.:

I dissent. The case turns altogether upon the meaning of section 4, art. 13, of the Constitution, which reads as follows: "Sec. 4. A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad and other quasi corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected is situated. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security. If paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and, to the extent of such payment, a full discharge thereof: provided, that, if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year." This section of the Constitution not only defines the reciprocal rights and obligations of mortgagor and mortgagee with respect to the payment of the taxes assessed or

assessable against their respective interests in the mortgaged premises, but was evidently intended to provide a simple and effective remedy for their enforcement. As security for the collection of the whole tax on both interests, the state reserves to itself a first lien upon the land, — a lien superior to the mortgage lien. To secure the mortgagee for taxes paid on the mortgagor's interest, the effect of these provisions is a virtual transfer to him of the claim and lien of the state by tacking it to the mortgage. But, the whole section being intended mainly for the benefit of the mortgagor, we find, as we should naturally expect to find, that especial pains have been taken to secure the enforcement of his right. His land being subjected to a lien in favor of the state, not only for the tax which it is his duty to pay, but also for the tax which it is the duty of the mortgagee to pay, he must, for his own protection, see that both are discharged. It is therefore provided that he may pay the tax on the mortgagee's interest, and that such payment shall count as a payment on, and as a full discharge *pro tanto* of, the mortgage debt. This is an ample and perfect remedy and protection to the mortgagor when he desires to pay off his mortgage at any time after the accrued taxes have become payable. He has only to pay the tax assessed to the mortgagee, and deduct the sum so paid from the amount of his debt. But there was another case to be provided for. It was foreseen that payment of mortgages would frequently be made after the taxes had accrued and become a lien, and before they were payable, or their amount ascertained by the order establishing the rate and making the levy. The taxes for each fiscal year accrue on the first Monday of March, preceding (Const. art. 18, § 8,) and, when assessed, take effect and become a lien from that date. (Pol. Code, § 8718;) but, the rate to be levied being dependent upon the amount of the assessment, the levy cannot be made until assessments have been equalized, and the roll completed. The statute accordingly designates the first Monday of October as the date for making the levy. Pol. Code, § 8714. In other words, there is an interval of at least seven months in each year, as the law stands, after the mortgagee's tax has accrued, and before it is payable. And this case, as I have said, was foreseen by the framers of the Constitution, and express provision made in the last clause of the section above quoted for the protection of the mortgagor who pays off his mortgage during such interval. Without this provision, he would, no doubt, have had another remedy in case of neglect by the mortgagee to pay the tax assessed upon the security; that is, he could have paid the tax himself, and have recovered it back in an action against the mortgagee for money paid. The authorities cited in the commissioner's opinion fully sustain this proposition. But this remedy would always be expensive and vexatious, and often ineffectual, by reason of the insolvency of the mortgagee, and therefore the Constitution gave a simpler, an entirely inexpensive, and perfectly efficacious, remedy, by allowing the mortgagor in such case to retain out of the amount due on the

mortgage the amount of the accrued taxes, computed according to the tax levy of the previous year.

The question is whether this remedy is exclusive; whether, in other words, the new remedy so given has the effect of abrogating the remedy which the law would have afforded in the absence of any such constitutional or statutory provision; and this, in my opinion, depends upon whether the change of remedy also involves a change of right. If a remedy exists for the enforcement of a right, the provision of a new remedy for the enforcement of the same right by a statute permissive in its terms does not abrogate the existing remedy. But if the statute changes the right, — if it gives a new and different right in place of the old one, and at the same time provides a new remedy, perfectly adapted to the complete enforcement of such new right, — the statutory remedy then becomes exclusive. What, then, is the effect upon the rights of the parties to a mortgage of the proviso at the end of section 4, art. 18, of the Constitution? Does it or does it not change the right of the mortgagor? It is clear, in my opinion, that it does. Without it a mortgagor paying his debt after assessment and before levy would, in case of the failure or refusal of the mortgagee to pay the tax subsequently levied on his security, have the right to free his land of the lien by paying such tax himself, and then to recover the sum so paid in an action against the mortgagee. In other words, the measure of the reciprocal right and obligation of the parties would be the tax levy for the current year. But the proviso under consideration creates a different right, and necessarily a different obligation. It empowers the mortgagor to retain the amount of the mortgagee's assessment, computed according to the rate levied the previous year. This may be more or may be less than the actual levy for the current year. It will seldom be the same, and may sometimes be very considerably greater or less. Whatever it is, however, the mortgagor may retain it, and the mortgagee must submit to the deduction. Though both parties may have the best reason to believe that the rate of levy for the current year will not be half that of the previous year, the mortgagor may nevertheless retain an amount computed according to the old rate, and it is not pretended that the mortgagee can, after the new levy, recover the difference. If this is so, — if the mortgagee must submit without redress to all the burdens of a rule enacted for the advantage of the mortgagor, — it would seem that he ought also to enjoy its benefit. The mortgagor, if he can always take according to the previous year's levy when he finds his advantage in so doing, ought not to be allowed to take according to the levy for the current year when that happens to be to his advantage. The rule, to be fair, ought to be invariable, and, in my opinion, it is. What the mortgagee must give the mortgagor must take. It was never intended to establish two standards of compensation, to either of which the mortgagor may resort, as his interest may dictate. On the contrary, it is much more reasonable to hold that the Constitution fixes

one exact measure of the rights and obligations of the parties, which is equally binding upon both.

If this conclusion is well founded it follows that the question first above stated must be answered in the negative for two reasons: The mortgagor paying his debt after assessment and before levy cannot neglect to retain the taxes computed according to the levy of the previous year, and afterwards maintain an action to recover the taxes subsequently assessed and paid—*First*, because such subsequently assessed tax is not the sum which he is entitled to receive; and, *second*, because the Constitution has given him an exclusive remedy for the enforcement of the right (to retain an amount computed according to the previous year's levy) which it has substituted for that which he would otherwise have had. The reasons for this conclusion are greatly strengthened by its expediency. It is not only advantageous to the parties; it is emphatically to the interest of the public to avoid and discourage unnecessary litigation. The mortgagor, having in his own hands the absolute power to protect himself, should not be allowed to deliberately disregard the constitutional provisions for his security in order to vex the public tribunals with a gratuitous lawsuit. The mortgagor who purposely neglects to avail himself of the proviso under consideration is entitled to no more favor than one who has actually paid taxes on the mortgagee's interest before he pays his debt, and yet deliberately omits to deduct the amount so paid for the purpose of suing to recover it back. Each case in fact stands upon precisely the same footing. In each the mortgagor at the time of paying his debt knows that there is a certain fixed sum which he is entitled to deduct from the total amount secured,—a sum in no way dependent as to its amount upon future contingencies. Why should he be allowed in one case any more than in the other, after making a purely voluntary payment of such sum, to maintain an action to recover it back? It will be observed that I speak of a voluntary and deliberate payment, and I do so for the reason that such is the case before us. If the payment of the whole amount of the debt without deduction of the taxes had been induced by any fraud or duress or mistake, or if the deduction had been waived in consideration of a promise by the appellant to pay the tax subsequently levied, the case would have been essentially different.

In the case of *Blythe v. Luning*, 7 Sawy. 504, 14 Fed. Rep. 281, the mortgagor paid the whole debt under protest, and under what seems to have been regarded as a species of duress, the mortgagee refusing to satisfy the mortgage upon any other terms, and thereby preventing the mortgagor from making use of his property. The conduct of the mortgagee in that case may well have justified the decision, and I should myself be disposed to uphold an action based upon the same or analogous grounds. If the mortgagor is forced to pay by duress; if he pays in ignorance of his rights, or is induced by any fraud or promise to pay without making the deduction,—I should say that he was entitled

to recover, not the sum which he afterwards actually pays on account of the mortgagee's taxes, but the sum which he overpaid by the mistake, etc., or the sum which the mortgagee has agreed to pay in consideration of his forbearance. I cannot, however, bring myself to the view that the Constitution gives a double right to the mortgagor, by which he is enabled to take out a sum computed according to the levy of the previous year if he so desires, or, if it appears more profitable, waive his right of deduction for the chance of recovering a larger sum by action. The Constitution was not designed to encourage that kind of speculation.

These views, if correct, are decisive of the present appeal, and a discussion of the second question above stated might be dispensed with. But it will throw some additional light upon the meaning of the Constitution to consider the effect of its provisions upon the rights and duties of an assignee of the mortgage who holds it at the time of payment by assignment made subsequent to the assessment. It is plain that in such case the assignment does not impair the right of the mortgagor to deduct the tax at the time of paying his debt, and the parties to the assignment necessarily treat with reference to the known right of the mortgagor and the corresponding liability of the holder of the mortgage. The assignee will not pay, and the assignor cannot expect to receive, more than the amount of the debt, less the amount which the mortgagor has the right to deduct. The necessary effect of the Constitution, therefore, is not only to compel the person who holds the mortgage at the time of payment to submit to a deduction of his accrued tax, but also to compel each successive owner of the security to pay such tax to his assignee at the time of the transfer. This being so, it would be a manifest injustice to compel him to pay it a second time, but this is precisely what the respondent is seeking to do if the fact is such as, in the absence of evidence to the contrary, it must be presumed to be. The appellant has already paid its tax to its assignee. The assignee necessarily assumed the duty of paying it to respondent, and respondent had the absolute right and power to compel it to pay. Instead of standing on its right, it releases the assignee, and seeks to compel the appellant to pay twice. Thus, upon the theory that the mortgagor may at his option deduct the mortgagee's tax computed according to the levy of the previous year, or sue for the actual amount subsequently levied, a rule sufficiently unequal and unfair between the original parties to the mortgage is made to operate with still greater injustice between parties by assignment. The only answer to this proposition is that the assignor can protect himself by exacting a special agreement on the part of the assignee to refund the amount of the accrued tax in case the mortgagor shall not elect to deduct it at the time of payment. It is true that he might protect himself in this way, but to hold that he must do so is to assume that the framers of the Constitution intended to plant in every assignment of a mortgage the seeds of future litigation. In

the face of a provision evidently designed to secure absolutely the rights of the parties without litigation, it ought not to be held that a part of the scheme was to make a transaction so usual, so legitimate, and often so necessary, as the assignment of a mortgage, impossible, except upon conditions involving a new subject of contention.

A great part of the argument of the respondent to sustain his claim against the assignor of the mortgage is devoted to the proposition that the tax levied upon the mortgagee's interest becomes and remains a personal liability to the state. The question whether a tax is a debt or personal liability of the person assessed depends altogether upon the statutory provisions for the time being; but the question here is not as to the construction of our revenue laws, but wholly as to the meaning of a clause of the Constitution. It is plain that the Constitution compels the holder of the mortgage to pay the accrued tax, or what is treated as its equivalent, to the mortgagor at the time the mortgage debt is paid. He is at the same time compelled to satisfy and discharge the mortgage. Can it be supposed that the framers of the Constitution, while making it compulsory upon him to pay his tax to the mortgagor, and surrender his security, intended still to hold him personally liable to the state for the same tax? Such a conclusion is little short of absurd, and it seems equally so to suppose that such personal liability was intended to be contingent

upon the choice of the mortgagor to deduct or not to deduct the accrued tax at the time of paying his debt. On the contrary it seems to me clear that, as to this particular tax at least, the Constitution intends that the state shall rely for its enforcement upon its lien on the mortgaged premises,—a security which is more than sufficient in every case. Upon this view of the Constitution, the rights of all parties, including the state, are amply secured without the necessity of any legal proceedings. Upon the opposite view,—the view that the mortgagor has an option as to the amount he shall take, and the time when any person from whom he shall take it,—all is uncertainty and confusion. There should be no hesitation in adopting the view which leads to certainty, security, and substantial justice in preference to that which involves uncertainty, insecurity, and inevitable injustice. My conclusion is that, if a mortgagor intentionally and deliberately omits to deduct the tax accrued upon the mortgagee's interest at the time of payment, he cannot afterwards maintain an action to recover it. If he pays his debt without deduction of the tax by mistake or fraud or under duress, he may have an action to recover back the overpayment, but in such case his right of action is against the party to whom the overpayment was made,—in this case the State Loan & Trust Company. The judgment and order of the superior court should be reversed.

I concur: **Paterson, J.**

MAINE SUPREME JUDICIAL COURT.

Mary JEWELL

v.

George F. JEWELL.

(84 Me. 304.)

A right to a new trial as matter of law is not lost by failure to take the statutory

course to remove from the panel a juror who is related to the parties within such a degree as to be by statute disqualified to sit, if knowledge of the relationship is not obtained until after the trial.

(February 11, 1892.)

REPORT by the Supreme Judicial Court for Somerset County of a motion for new

NOTE.—Disqualification of juror as ground for new trial.

1. General statement of the law.

It is said that it has been long settled in England that after a juror is once sworn he cannot be challenged for any pre-existing cause. *Mr. Justice Catron* in *McClure v. State*, 1 Yerg. 208, citing 1 Inst. 188a; 3 Vin. Abr. B. 11, p. 764; Hawk. P. C. chap. 43. In this case it was objected after verdict that one of the jurors was an atheist, but it was held that the objection came too late.

State v. Davis, 80 N. C. 412, was almost identical in facts with *McClure v. State*, *supra*.

Lord Tenterden, Ch. J., in *Rex v. Sutton*, 8 Barn. & C. 417, said that he "was not aware that a new trial had ever been granted, on the ground that a juror was liable to be challenged, if the party had an opportunity of making the challenge."

In *United States v. Baker*, 3 Ben. 68, it was found after verdict that one of the jurors was deaf, and a motion was made to set aside the verdict. In denying the motion, *Blatchford, J.*, said: "On principle, as well as on authority, nothing that is a cause of challenge to a juror before verdict can be used to set aside a verdict, as for a mistake, 18 L. R. A.

even though the cause of challenge was unknown to the party when the jury was sworn." To the same effect, see *Selleck v. Sugar Hollow Turnp. Co.* 18 Conn. 453.

A new trial will not be granted on account of the disqualification of a juror for matter that is a principal cause of challenge, which existed before he was elected and sworn, unless it appears from the whole case that the party suffered injustice from the fact that such juror served on the trial. *Simmons v. McConnell*, 86 Va. 494. And to the same effect, see *Com. v. Hughes*, 5 Rand. (Va.) 666; *Smith v. Com.* 2 Va. Cas. 8; *Poore v. Com.* Id. 474; *Com. v. Jones*, 1 Leigh, 598; *Bristow v. Com.* 15 Gratt. 646; *Com. v. Hallett*, 3 Gratt. 564; *Curran's Case*, 7 Gratt. 622; *Polindexter v. Com.* 38 Gratt. 732; *State v. McDonald*, 9 W. Va. 456; *Beck v. Thompson*, 31 W. Va. 459; *State v. Howard*, 17 N. H. 171.

In *Beck v. Thompson*, *supra*, the juror was disqualified by reason of his interest in a similar case set for trial in the same court.

The fact that an incompetent juror sat at the trial of a cause does not vitiate the verdict. *State v. White*, 68 N. C. 159; *Briggs v. Byrd*, 34 N. C. 377;

trial in an action brought to compel defendant to comply with his contract to support plaintiff which resulted in a verdict in defendant's favor, which motion was based upon the ground that one of the jurors was related to the parties to the action within such a degree as to be disqualified by statute from sitting as juror in the case. *New trial granted.*

The facts are stated in the opinion.

Mr. J. Wright for plaintiff.

Messrs. Walton & Walton for defendant.

Whitehouse, J., delivered the opinion of the court:

In an action against her son for the alleged failure to perform his contract for her support, the plaintiff had a verdict against her, and moved to set it aside on the ground that one of the jurors who rendered the verdict was disqualified by his relationship to the parties.

It appears that the juror's mother and the plaintiff's mother were sisters. The juror was therefore related to the plaintiff within the

State v. Patrick 48 N. C. 422; State v. Douglass, 68 N. C. 500.

Though one of the jurors who tried the cause was related to the plaintiff, yet, if he was not challenged at the trial, the objection cannot be afterwards made, there appearing to be no unfairness in the trial. Eggleston v. Smiley, 17 Johns. 122; Cole v. Van Keuren, 61 How. Pr. 451; Hayes v. Thompson, 15 Abb. Pr. N. S. 220, citing People v. Jewett, 6 Wend. 896.

The fact that one of the parties was a member of the county court which selected the panel from which a jury was drawn is not ground for setting aside a verdict, although the complaining party then learned the fact for the first time, unless substantial injustice has been done. Boteler v. Roy, 40 Mo. App. 284; Samuels v. State, 8 Mo. 63; Vierling v. Stifel Brew. Co. 15 Mo. App. 125.

In Amherst v. Hadley, 1 Pick. 38, a motion to set aside a verdict because a juror had been irregularly returned was not sustained, the party having suffered no injury.

In Brill v. State, 1 Tex. App. 572, a new trial asked for because one of the jurors had served in a former trial, was refused because no partiality was shown, and it did not appear that injury resulted to the objecting party.

In a civil case, a verdict should not be disturbed for the mere technical reason that one juror was incompetent, unless the moving party was injured thereby. United States v. Angney, 5 Mackey, 66.

In a criminal case it is good cause for a new trial that one juror was incompetent, whether the moving party was injured thereby or not. *Id.*

Proof that a juror was not qualified to serve as such by reason of his not being a householder in the county, a freeholder in the state, or a resident in the county, is sufficient to support a motion for a new trial, although upon being interrogated he had claimed such qualification under oath, and although Code Crim. Proc., art. 681, provides that if a juror makes such claim "he shall be held qualified until the contrary be shown, etc." Brackenridge v. State, 4 L. R. A. 360, 27 Tex. App. 513; Henrie v. State, 41 Tex. 573. And see Read v. State and Boren v. State, *infra*.

Mere disqualification of a juror is not, under Tex. Code Crim. Proc., art. 777, ground for a new trial; it must further appear that probable injury resulted to the defendant by reason of such juror having served. Lane v. State, 29 Tex. App. 310; Leeper v. State, 29 Tex. App. 63; O'Mealy v. State, 1 Tex. App. 180; People v. Scott, 56 Mich. 154, 6 Crim. L. Mag. 384.

Leeper v. State, *supra*, expressly overruled Leeper v. State, 2 Tex. App. 422; Armendarces v. State, 10 Tex. App. 44; Boren v. State, 23 Tex. App. 28; Brackenridge v. State, *supra*,—as not being consistent with the statute.

A new trial on the ground that the service of a disqualified juror injured defendant's rights because he advocated a verdict of guilty of murder in the first degree, while other jurors were in favor of finding lower degrees, is properly denied, where the character of the information and its source are

not set forth in the affidavits. Lane v. State, *supra*.

In South Carolina the courts recognize no exception to the general rule that that which furnishes a cause for challenge shall form no ground for a new trial. State v. Cooler, 3 L. R. A. 181, 30 S. C. 105, citing State v. Quarrel, 2 Bay, 150; State v. O'Driscoll, 2 Bay, 152.

In Boland v. Greenville & C. R. Co., 12 Rich. L. 363, the fact of the interest of a juror in the cause was held no ground for a new trial although unknown to the party in time to challenge.

In Josey v. Wilmington & M. R. Co., 12 Rich. L. 134, a cause of challenge going to the impartiality of a juror was held insufficient ground for a new trial.

The fact that a juror who sat in a criminal case was also a member of the grand jury by which the bill was found will not sustain a motion to arrest judgment, where no objection to the juror was made on the trial. State v. Cooler, *supra*.

a. Party knowing of disqualification waives objection by silence.

In Fox v. Hazelton, 10 Pick. 275, Shaw, Ch. J., in the course of his opinion said if an objection to a juror was known, and no exception taken when the jury was impaneled, the party must be held to waive all objection.

This was expressly held in Com. v. Dailey, 12 Cush. 82; Kent v. Charlestown, 2 Gray, 251; Russell v. Quinn, 114 Mass. 103; Brown v. Webster, 6 Cush. 563; Davis v. Allen, 11 Pick. 466, 23 Am. Dec. 386; Hallock v. Franklin County, 2 Met. 553, citing Howland v. Gifford, 1 Pick. 43, cited in note; Merrill v. Berkshire, 11 Pick. 200; People v. Stonecipher, 6 Cal. 405; People v. Sanford, 43 Cal. 29; Brown v. Autrey, 78 Ga. 753; Parmelee v. Guthery, 3 Root, 135, 1 Am. Dec. 65; Rollins v. Ames, 2 N. H. 349, 9 Am. Dec. 79; Quinebaug Bank v. Leavens, 20 Conn. 87, 50 Am. Dec. 272.

In Widder v. Buffalo & L. H. R. Co., 24 U. C. Q. B. 222, 520, the court declined to relieve a party from a verdict returned by a jury one of whom was objectionable by reason of prejudice, when the party had been at the trial aware of the objection but had taken his chance of a verdict in his favor.

The same principle was asserted in Lafayette Pl. Road Co. v. New Albany & S. R. Co., 13 Ind. 90. But in this case a new trial was granted because of the inability of one of the jurors to understand the English language, where the defendants were not aware of the fact until after the trial.

Acquiescence in the continuance of a trial after a juror has, in response to questions, proclaimed his part in a former trial of the same cause precludes objection to the verdict for the incompetency of the juror. *Re Lindsey*, 46 N. J. Eq. 353.

Facts coming to the knowledge of counsel as to incompetency of a juror, after the jury is sworn but before further steps are taken, should be then presented and not withheld until after conviction, and then used as a ground for setting the verdict aside. Lampkin v. State, 87 Ga. 516; Keener v. State, 18 Ga. 194, 63 Am. Dec. 200.

If a party or his counsel knows of an objection

fourth degree, and to the defendant within the fifth degree, according to the rules of the civil law.

In his classification of challenges to the polls Lord Coke says of the challenge *propter affectum* that the right exists, "if the juror be of blood or kindred to either partie, *consanguineus*, which is compounded *ex con* and *sanguine*, *quasi eodem sanguine natus*, as it were issued from the same blood; and this is a principal challenge, for that the law presumeth

that one kinsman doth favor another before a stranger, and how far remote soever he is of kindred, yet the challenge is good. And if the plaintiff challenge a juror for kindred to the defendant, it is no counter-plea to say that he is of kindred also to the plaintiff, though he be in nearer degree; for the words of the *entire facias* forbideth the juror to be of kindred to either partie." Co. Litt. 157, (a.)

But there are several provisions of our statute touching this subject. Rule 22, § 6, chap.

before verdict and in time to obtain a rehearing before another jury and allows the opportunity to pass he will be held to have waived objection. State v. Tuller, 34 Conn. 295.

Where the intoxication of a juror, which a party to an action or prosecution avers commenced at the beginning of the trial and continued to its close, was patent or apparent to all the parties, such party cannot keep quiet on the subject, and, after taking the chances of a favorable verdict, avail himself of it for the first time after defeat. Ipwitich v. Fernandez, 84 Cal. 689.

In State v. Coleman, 8 S. C. 237, it was not known to the defendant till after the jury was formed that a juror had expressed an opinion. The defendant's counsel then refused to move for the removal of the juror, but moved after verdict for a new trial because the judge had not dismissed the juror of his own accord, and the motion was denied.

b. Petitioner must show ignorance of the disqualification.

In State v. Browne, 10 Iowa, 149, it was held that it must appear that the defendant had knowledge of the disqualification of a juror before it can be held that he waived objection.

In other cases it is held that the petitioner must show that he was ignorant of the disqualification.

In Powell v. Haley, 28 Tex. 52, one of the jurors was not sworn but a new trial was refused because the affidavit did not show that the petitioner's counsel was ignorant of the fact.

In Roseborough v. State, 43 Tex. 570, a new trial was refused because it was not shown that the disqualification was unknown to the party and his counsel. See, to the same effect, State v. Tuller, 34 Conn. 295; Morrison v. McKinnon, 12 Fla. 552.

A juror's false statement that he had not served in a former trial is not cause for a new trial, where the defeated party did not object to him before the trial and it is not shown that she did not know that he served at the former trial. Buok v. Hughes, 127 Ind. 46.

It is not ground for a new trial that a juror has served, within a year, in the same court, in another case where the objection is first raised after verdict, and it is not shown that the fact was unknown when he was accepted, or that prejudice resulted from his retention. State v. Ready, 44 Kan. 607; State v. Jackson, 27 Kan. 581.

c. Neglect to make inquiries defeats the party's right.

Where a party fails to make inquiry as to the competency of a juror he waives objection, and cannot after conviction have a new trial on the ground of the incompetency of the juror and his ignorance thereof at time of trial. George v. State, 39 Miss. 570.

A defendant cannot avail himself of the partiality of a juror to secure a new trial where he has failed before trial to make necessary inquiries. Collier v. State, 20 Ark. 36; State v. Funck, 17 Iowa, 365.

"A party against whom a verdict has been rendered who has not seasonably availed himself of the means of inquiry thus afforded him, may in- 18 L. R. A.

deed, upon proof to the satisfaction of the court that a juror did not stand indifferent, by reason of facts unknown to the party until after the verdict be granted, a new trial on review at the discretion of the court; but he is not entitled to it as matter of law and has no right of exception if it is refused. Gray, Ch. J., in Woodward v. Dean, 113 Mass. 297.

Where there is a failure to interrogate a juror as to whether he is a freeholder objection cannot be made after verdict because he is not a freeholder. Croy v. State, 33 Ind. 384; Kingen v. State, 45 Ind. 132.

Quinebaug Bank v. Leavens, 20 Conn. 36, 50 Am. Dec. 272, held that a party who failed to inquire as to a person's interest could not thereafter object on that account.

The discovery of the incompetency of a juror after his acceptance and swearing is not ground for a new trial if due diligence would have led to the discovery in time. Burns v. State, 80 Ga. 344. In this case a man named Charles W. Foster, incompetent as a juror, served instead of Charles Foster who was on the jury list and was competent.

The fact that the foreman of the jury was uncle of the treasurer of the defendant corporation who was also a stockholder and a witness on the trial, is not sufficient ground for setting aside the verdict, when diligence has not been used to ascertain the juror's disqualification and objection is not made before the verdict. Harrington v. Manchester & L. R. Co. 62 N. H. 77.

In Daniels v. Lowell, 139 Mass. 53, an action for injuries resulting from a defective highway, the plaintiff moved for a new trial on the ground that a juror was a taxpayer in the city. He having neglected to make proper investigation on this point the motion was denied.

A party may or may not use his right of peremptory challenge, and if he chooses not to exercise the right and an incompetent juror under an erroneous ruling of the judge is actually sworn, and tries the case the verdict will be set aside. Brown v. State, 57 Miss. 434.

In State v. Vogel, 22 Wis. 471, the question was one of alienage. It was said that, while in capital cases the prisoner does not waive anything, in other cases, civil or criminal, the rule is otherwise; and where in these cases the defendant fails to make inquiries as to the qualifications of a juror he waives objection.

2. Objections on the ground of age of jurors.

A new trial will not be granted where one of the jurors was over sixty years of age when he sat without objection from either party. Williams v. State, 37 Miss. 407; State v. Fisher, 2 Nott & McC. 281; Seacord v. Burling, 1 How. Pr. 175; Davis v. People, 19 Ill. 74.

The statute exempting persons over sixty-five years of age from sitting on juries does not render such persons incompetent. Munroe v. Brigham, 19 Pick. 363.

To the same effect, see Green v. State, 59 Mo. 123. In Wassum v. Feeney, 121 Mass. 93, 23 Am. Rep. 258, a new trial was refused which had been moved for on the ground that one of the jurors was an

1, Rev. Stat., provides that, "when a person is required to be disinterested or indifferent in a matter in which others are interested, a relationship by consanguinity or affinity within the sixth degree according to the civil law, or within the degree of second cousin inclusive, except by written consent of the parties, will disqualify."

Section 80, chap. 82, Rev. Stat., declares that "the court, on motion of either party in a suit, may examine, on oath, any person called as a

juror therein, whether he is related to either party, has given or formed an opinion, or is sensible of any bias, prejudice, or particular interest in the cause;" and if he does not stand indifferent he may be set aside. And section 88 of the same chapter provides that, "if any party knows any objection to a juror in season to propose it before trial, and omits so to do, he shall not afterwards make it, unless by leave of court for special reasons."

In the case at bar the court informed the

infant. And see *Trueblood v. State*, 1 Tex. App. 630.

3. *Alienage.*

In *Hollingsworth v. Duane*, 4 U. S. 4 Dall. 354, 1 L. ed. 364, it was held that though the alienage of a juror might be a cause of challenge, it was not sufficient ground for granting a new trial.

The principle of *Hollingsworth v. Duane*, *supra*, was maintained in *McCorkle v. Binna*, 5 Binn. 348, 6 Am. Dec. 420; *Presbury v. Com.* 9 Dana. 206; and in a case in Illinois where the fact of alienage was unknown to the parties at the trial. *Chase v. People*, 40 Ill. 332, approved in *Davison v. People*, 90 Ill. 231. See, to the same effect, *Kennedy v. Com.* 14 Bush. 340; and *George v. State*, 39 Miss. 570, a capital case; *Bennett v. Matthews*, 40 How. Pr. 423.

But in Vermont a verdict rendered by jurors one of whom is an alien will be set aside if the disqualification is unknown by the defeated party and his counsel. *Richards v. Moore*, 80 Vt. 449; *Quinn v. Halbert*, 53 Vt. 363.

In *Hill v. People*, 16 Mich. 351, a juror sat who was excluded by statute, being an alien, a fact unknown at the time by the defendant, and a new trial was granted.

In *People v. Scott*, 56 Mich. 154, one of the jurors was an alien, but a new trial was refused because that fact was known to the objecting party at the time of the trial.

In *People v. Reece*, 3 Utah, 72, a juror falsely swore that he was a citizen of the United States. The complaining party was held not to have waived his right to a jury of twelve qualified men, he not having shown negligence, and a new trial was granted.

4. *Want of property qualifications.*

In *Draper v. State*, 4 Baxt. 253, a new trial was asked for because a juror was neither a freeholder nor a householder, facts of which the defendant was ignorant at the trial. The motion was denied.

State v. Crawford, 3 N. C. 296, was a case where a juror was not a freeholder, which was not known to defendant till after trial, but a new trial was refused.

In *Briggs v. Georgia*, 15 Vt. 61, the want of a freehold qualification was held sufficient ground for setting a verdict aside. But in *Wassum v. Feeney*, *supra*, the unsoundness of the decision was said to have been clearly demonstrated in *Mr. Justice Bennett's* dissenting opinion.

In *Calhoun v. State*, 4 Humph. 477, a new trial was denied in a capital case though the defendant did not know till after verdict that one of the jurors was not a freeholder.

A new trial must be granted where a juror who was incompetent because neither a freeholder nor a householder was permitted to sit, on his mistaken testimony that he was a freeholder and householder. *Read v. State* (Tex. App.) Oct. 23, 1889.

Where a juror qualified himself on his *voir dire*, answering that he was a freeholder in the state, when in fact he was neither a freeholder nor a householder in the county, proof that appellant and his counsel had intimately known the juror for 18 L. R. A.

years should not prevail over their oaths that the disqualification of the juror was unknown to them before the trial; and a new trial may be granted. *Boren v. State*, 23 Tex. App. 23.

5. *Irregularities of selection.*

It was held in *State v. Breen*, 59 Mo. 417, that where the objection to the juror goes only to the formalities by which he was selected, and no injury has resulted to the defendant, a new trial will not be granted.

By the Missouri statute (Wag. Stat. 707, § 3), it is provided that "no exception to a juror on account of his citizenship, nonresidence, state, or age, or other legal disability, shall be allowed after the jury is sworn."

After plea of not guilty and conviction, defendant will not be allowed to object to the *venue*, or the jurors summoned under it. *State v. Cole*, 9 Humph. 623.

In *Page v. Danvers*, 7 Met. 323, it was sought to set aside the verdict because the jury had been irregularly selected, but the motion was denied.

In *Russell v. Ball*, Barnes (3d ed.), 455, a son answered to the name of his father, and for this cause the verdict was set aside. But this case was overruled in *Hill v. Yates*, 13 East, 230, where the facts were similar, and no injustice had been done.

In *Dovey v. Hobson*, 6 Taunt. 460, *Hill v. Yates*, *supra*, was expressly affirmed, but under the circumstances of the case a new trial was granted. One who occupied the house formerly occupied by him who had been summoned appeared and answered to the latter's name. The fact was discovered after the case had been gone through with, but before verdict.

In *Rex v. Hunt*, 4 Barn. & Ald. 490, which was the case of an information for libel, where two special jurymen had not been summoned and two talesmen were sworn, the court refused to set aside the verdict.

The objection to a juror that his name was not in the box or in the list came too late after verdict. *Osgood v. State*, 58 Ga. 791; *Edwards v. State*, 53 Ga. 433.

The absence of a juror's name from the books of the tax receiver is not ground for a new trial where no objection is made until after verdict. *Pool v. Callahan* (Ga.) March 5, 1892; *Osgood v. State*, *supra*.

Where a name on the petit jury in a criminal case was answered to by another person, who served in the place of the person bearing such name, and the substitution was unknown to the defendant and his counsel until after the trial, it was held cause for a new trial. *Stripling v. State*, 77 Ga. 103.

A case resembling this was *Anderson v. Green*, 46 Ga. 361, where a new trial was refused. But in that case it did not appear that both substitute and principal were unknown to the defendant.

6. *Bias of jurors.*

The want of purely statutory qualifications, such as citizenship, age, property, etc., which do not go to make up the necessary qualities to enable a

jury before the commencement of the trial who the parties to the suit were, and explained that, if any member of the panel was related to the parties within the degree of second-cousin, he would be disqualified to sit, and must step aside. But it appears from the admissions in the report that neither the plaintiff nor the defendant had any knowledge that this kinsman was a member of the panel until after the verdict; and the juror testified that he had not seen the Jewells since his childhood, and

did not recognize the parties in the court-room, and hence was not made aware of his relationship until after the trial had concluded.

In *Woodward v. Dean*, 118 Mass. 297, it appeared that Henry Macomber, one of the jurors, was the husband of the plaintiff's niece, but that the defendant was personally unacquainted with Macomber, and did not know that he was on the panel until after the trial. It further appeared that the defendant had not availed himself of the opportunity offered by

juror to perform his duty with intelligence and impartiality, have never been treated with the same strictness as objections for bias, criminality, and like causes. *Brewer v. Jacobs*, 28 Fed. Rep. 234.

In this case a new trial was refused though one of the jurors was an infant and had not the necessary property qualifications.

In *Hollins v. Ames*, 2 N. H. 842, 9 Am. Dec. 79, it was said that the better opinion was that a cause of challenge going to the partiality of a juror might be taken advantage of after verdict. See, to the same effect, *Herbert v. Shaw*, 11 Mod. 111; *Dent v. Hertford*, 2 Salk. 645; *Wynn v. Bangor*, 2 Com. Ins. Rep. 601; *Eggleston v. Smiley*, 17 Johns. 123.

In each of the cases of *Howerton v. State*, Meigs, 232; *Troxdale v. State*, 9 Humph. 411, and *Brakefield v. State*, 1 Sneed, 215,—a new trial was granted because of bias, or partiality, or prejudice, evidenced by the expressed opinion of the juror.

In *Bronson v. People*, 23 Mich. 84, a reversal of conviction was asked on the ground that two jurors were disqualified by reason of a previously formed opinion; but the conviction was affirmed. *Cooley, J.*, delivering the opinion, distinguished this case from *Hill v. People*, *supra*, saying: "The case is not parallel to this. Here the facts were all known to the party and he made no seasonable objection. . . . Moreover, the objections in their nature are different. In *Hill v. People* a person sat as a juror who was excluded by statute. There is no complaint that the two jurors who were accepted in this case were thus disqualified; the complaint is that the court erred in holding that their examination disclosed no definite opinion in their minds on the facts. The disqualification was absolute in the one case; in the other it depended on a fact which is not found, and which we are asked to find in a review of the evidence. So far as concerns this question, there can be no claim that the jury was not a lawful one on the judge's ruling on the facts. It is not therefore a mistrial, and if the judge erred, his attention should have been particularly called to the error by requesting him to note an exception."

In *Nomaque v. People*, 1 Ill. 109, a capital case, a new trial was granted on the ground of bias of a juror.

A new trial was awarded on the ground of bias, in *United States v. Fries*, 3 U. S. 3 Dall. 515, 1 L. ed. 701, which was an indictment for treason.

In *Block v. State*, 100 Ind. 357, a criminal case, a new trial was granted because one of the jurors was a deputy prosecuting attorney.

In *Kennedy v. Com.*, 14 Bush, 840, a new trial was refused on the ground that a juror had formed an opinion before being accepted and the decision of the court not being subject to exception on a motion for a new trial, its ruling was not reviewed.

a. Relationship.

By N. Y. Code Civ. Proc., § 1166, a person is disqualified to sit as a juror if related by consanguinity or affinity within the sixth degree to a party. The party to whom he is related must raise the ob-

jection before the case is opened, but another party may object within six months after verdict, by a motion to set aside the verdict and for a new trial. *Baylies, New Trials*, p. 161.

Where by mistake a juror has answered erroneously that he is not related to the person injured by the offense charged, and the fact of his relationship is not discovered until after conviction, it is ground for a new trial. *Powers v. State*, 27 Tex. App. 700; *Page v. State*, 22 Tex. App. 551.

A party moving for a new trial on the ground of a juror's relationship to a party in the case must negative any knowledge of such relationship, on the part of himself and counsel. *Tilton v. Kimball*, 52 Me. 500; *Goodman v. Cloudman*, 43 Me. 577.

As maintaining the same principle, see *State v. Bowden*, 71 Me. 89.

In *Lane v. Goodwin*, 47 Me. 593, a juror was related to one of the parties and this fact was clearly shown, as was also the fact that both the objecting party and his counsel were ignorant thereof and a new trial was granted. To the same effect, see *Chase v. Jennings*, 38 Me. 44; *Hardy v. Sprowle*, 33 Me. 310.

In *Hudspeth v. Herston*, 64 Ind. 123, neither the juror nor the party knew of the relationship of the juror to the successful party till after the verdict. A new trial was granted.

In *Brown v. State*, 23 Ga. 439, a new trial was granted because a juror was cousin to the prosecutor, which fact was unknown to the defendant.

Where an attorney after the case was closed and all the evidence submitted to the jury, was told by another that he thought there must be some relationship between the foreman of the jury and the adverse party, though he did not know; and the attorney sent him home to find out, but failed to disclose the matter to the other side, or to make any other effort himself to find out the facts until after the verdict, because he did not put any confidence in what was told him,—a motion to set aside the verdict will be denied. *Brown v. Reed*, 81 Me. 158.

In *Wright v. State*, 13 Tex. App. 163, a new trial was granted because there had been forced on the defendant one juror who could not read or write the English language, and another who was related to one of the parties.

In *Woodward v. Dean*, 118 Mass. 297, it was sought to have a verdict set aside because one of the jurors was disqualified by relationship to the plaintiff. The court refused to grant the motion, although the party was ignorant of the fact before the trial, where he had not claimed his right under the statute to have the juror examined under oath.

To the same effect, see *Smith v. Earle*, 118 Mass. 581.

A new trial was refused where the counsel of the defeated party knew before the trial that the juror of whom he complained was related to the other party in the case, but had forgotten it. *Cannon v. Bullock*, 26 Ga. 451.

In *Weutworth v. Sanford Mfg. Co.*, 33 Me. 547, verdict was rendered for the defendant, and the plaintiff moved to set it aside because a nephew of the plaintiff served on the jury. The objecting

the Massachusetts statute (in substance the same as section 80, chap. 82, Rev. Stat. *supra*) to have the members of the panel examined before the trial respecting their relationship to

the parties, and the court said: "A party against whom a verdict has been rendered, who has not seasonably availed himself of the means of inquiry thus afforded him, may in-

party knew the fact but did not know that relationship was a disqualification. The motion was denied.

b. Language evidencing a preconceived opinion.

Evidence that a juror on a trial for murder, who on his *voir dire* declared that he had neither formed nor expressed an opinion, and who was accepted and served on the trial, had in fact, on the morning after the killing, said, in speaking of the defendant: "He has killed his man at last, has he? This is not the first crime of that kind that he has been guilty of. He is a bad man, a desperate man, and they ought to hang him or do something with him not to put the county at any expense."—is sufficient to warrant a new trial, where the question involved was one of fact entirely and a grave doubt might have been entertained. *State v. Cleary*, 40 Kan. 287.

A new trial was granted in the following cases, in each of which similar declarations had been made by a juror: *Sam v. State*, 81 Miss. 430; *People v. Plumer*, 9 Cal. 206; *Bustick v. State*, 19 Ohio, 196; *Bishop v. State*, 9 Ga. 121; *Achey v. State*, 64 Ind. 56; *Sewell v. State*, 15 Tex. App. 56; *Norfleet v. State*, 4 Sneed, 340.

A new trial will be granted where a juror during an adjournment of the court immediately after the swearing in of the jury used brutal language regarding the defendant in a criminal case, when the matter is at once brought to the attention of the court. *State v. Wheeler (Mo.)*, March 2, 1892.

In *State v. Strauder*, 11 W. Va. 745, during the course of the trial the counsel for the prisoner handed to the judge an affidavit of a juror who said before trial he had heard a juror say that the prisoner ought to be hung. But no motion was made and no action was taken by the court. It not appearing that prejudice resulted to the prisoner a new trial was refused.

c. The objection that a trial juror was a member of the grand jury.

That one of the jury which convicted the defendant in a criminal prosecution was in the grand jury which found the indictment, which fact was unknown to the defendant till after the verdict, is a proper ground for granting a new trial. *United States v. Christiansen (Utah)* July 12, 1890; *Com. v. Hussey*, 18 Mass. 221.

To the same effect, see *Rice v. State*, 16 Ind. 236, where the defendant was guilty of no negligence in not sooner discovering the incompetency of the juror.

An objection that a juror was a member of the grand jury by whom the indictment was presented is too late where raised for the first time on motion for a new trial. *State v. McCarthy*, 44 La. Ann.—; *State v. Thomas*, 35 La. Ann. 24; *State v. Smith*, 41 La. Ann. 686; *State v. Turner*, 6 La. Ann. 309.

In *People v. Lewis*, 4 Utah, 42, where a member of the grand jury which found the indictment sat on the trial jury which convicted the defendant, the motion for a new trial was overruled on the ground of defendant's negligence in failing to sufficiently inquire as to the qualifications of the jury.

In *Gillespie v. State*, 8 Yerg. 507, the motion for a new trial was made on the ground that two of the jurors had been members of the grand jury which found the indictment, and was supported by affidavits that the defendant did not know this fact till after the judge's charge, and the motion was denied.

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d. Concealment of interest by juror.

In *Lamphier v. State*, 70 Ind. 322, a juror by his answers had deceived the court as to his qualifications. There being no negligence on the part of the appellant a new trial was ordered.

Where a juror, on being examined as to qualification, falsely answered that he held no policy in the defendant company, and the truth was unknown at the time to the plaintiff, a new trial was granted. *Pearcy v. Michigan Mut. L. Ins. Co.* 111 Ind. 59.

Concealment by a juror of the fact that he sat upon a former trial of the same case, with statements on his *voir dire* that he had not formed any opinion in the case, is ground for a new trial where the fact of his former service was not learned by the unsuccessful party until after verdict. *Johnson v. Tyler*, 1 Ind. App. 387.

e. Petitioner must negative knowledge of bias.

A party moving for a new trial alleging as cause bias or partiality of a juror must negative his knowledge of the juror's interest. *Jameson v. Androscooggin R. Co.* 52 Me. 412.

To entitle the defendant to a new trial on account of a previously expressed opinion of a juror, he must show affirmatively that he was ignorant of the expression of such juror at the time of accepting him. *Kennegar v. State*, 120 Ind. 179; *Achey v. State*, 64 Ind. 56.

In *State v. Ross*, 20 Mo. 32, a new trial was granted on account of partiality and prejudice of a juror unknown to the defendant till after verdict.

In *Bronson v. People*, 32 Mich. 34, two jurors had previously expressed opinions on the case, a fact which was known to the defendant. A new trial was refused.

A new trial should be granted in a criminal case where a juror has already formed and expressed an opinion, which fact was unknown to the defendant before trial. *Wade v. State*, 112 Ga. 25; *Ray v. State*, 15 Ga. 223.

But this is open to explanation by the juror to the effect that his opinion did not actually influence the verdict. *Ray v. State, supra*.

f. Preponderance of evidence necessary to show bias.

A verdict will not be set aside because of the disqualification of a juror who tried the case, who swears that he had no bias or prejudice and was perfectly impartial, unless there are affidavits of at least two witnesses, or what is equivalent thereto, to show his disqualification. *Fogarty v. State*, 80 Ga. 450; *Hudgins v. State*, 61 Ga. 182; *Turner v. State*, 70 Ga. 765.

A new trial will not be granted on the ground that a juror was intoxicated during the trial, where the allegation of such intoxication is supported only by the affidavit of the defendant, and is contradicted by the affidavit of the juror. *State v. Lee*, 80 Iowa, 75, 20 Am. St. Rep. 401; *State v. Kennedy*, 77 Iowa, 208; *State v. Livingston*, 64 Iowa, 600.

7. Criminality of juror.

In *State v. Powers*, 10 Or. 145, a capital case, it was discovered after verdict that one of the jurors had been convicted of a crime involving moral turpitude and was therefore unqualified to sit. The motion for a new trial was overruled.

A new trial will not be granted because during the trial a juror was accused of grave crime, and employed one of the counsel engaged in the trial to defend him against the charge when the juror was not rendered incompetent. *Hill v. Corcoran*, 15 Colo. 270.

A. P. W.

deed, upon proof to the satisfaction of the court that the juror did not stand indifferent, by reason of facts unknown to the party until after the verdict, be granted a new trial or review at the discretion of the court; but he is not entitled to it as a matter of law, and has no right of exception if it is refused." But there appears to be no statute in Massachusetts which, like ours, rigidly prescribes one of the limits of disqualification. In the absence of such a statute, the prevailing rule of the common law undoubtedly is that a new trial will be granted only when the court, in the exercise of a sound discretion, deems it reasonable and proper in the furtherance of justice.

In such case, one of the principal inquiries would obviously be whether the aggrieved party has exercised reasonable diligence to ascertain the qualifications of the jurors; for the rule is definitely settled that a party who is aware of any circumstance affecting the competency of a juror is bound to make his objection by way of challenge before that juror is sworn; otherwise he will be deemed to have waived it. *Wassum v. Feeney*, 121 Mass. 93, 23 Am. Rep. 258; *Jeffries v. Randall*, 14 Mass. 206; *Thompson & M. Juries*, § 302, and authority cited.

A waiver involves the idea of assent, and assent is primarily an act of the understanding. We cannot assent to a proposition without some intelligent apprehension of it. It presupposes that the person to be affected has knowledge of his rights, but does not wish to enforce them. He cannot properly be said to waive that of which he has no knowledge.

In the case at bar the juror in question was undoubtedly disqualified, and would have

been excused if the relationship had been disclosed at the trial, and the objection been seasonably made. But the plaintiff was not apprised of the relationship until after the verdict; she could not make the objection until she had knowledge of the fact. The statute explicitly and absolutely declares that relationship within the sixth degree "will disqualify." Under that statute William Ballentine was not "disinterested," and was not a legal juror. The plaintiff had a constitutional right to a trial by a legal jury. She has not willingly submitted to a trial by any other than legal jurors, and she is now entitled to a new trial as a matter of law. *Hardy v. Sproule*, 32 Me. 311; *Quinn v. Halbert*, 52 Vt. 353.

If the institution of trial by jury is to retain the confidence of the court and respect of the people, as a reliable and efficient agency for the investigation of facts and discovery of truth, not only must the municipal authorities charged with the duty of revising the list of jurors carefully heed the requirement of the statute to "take the names of such persons only as are of good moral character, of approved integrity, of sound judgment, and well informed," and otherwise qualified under the Constitution and the laws, but the courts must continue to exercise no less care to preserve all the safeguards which the law has placed around it. "All questions touching the formation of juries," said Coleridge, *J.*, in *O'Connell v. Reg.*, 11 Clark & F. 358, "must be examined by the judges with very critical eyes."

Verdict set aside. New trial granted.

Peters, Ch. J., and Walton, Libbey, Emery and Haskell, JJ., concurred.

WISCONSIN SUPREME COURT.

John E. BURT, *Reppt.*,

v.

DOUGLAS COUNTY STREET R. CO.,
Appt.

(.....Wis.....)

1. An electric street railway company is liable for injuries to a passenger from an electric shock received while passing from one car to another by grasping a hand-rail charged with electricity because of imperfect insulation where it has ready means of ascertaining the escape of electricity from the works of the car, and the passenger is free from contributory negligence.
2. It is not as matter of law negligence contributing to injury from an electric shock caused by imperfect insulation for a passenger to swing around from the step of an electric street-car to that of the trailer when the railway company has no rule prohibiting and allows it without objection.

(October 25, 1892.)

NOTE.—In the amazing development of electrical uses every legal decision as to the rights and liabilities of the users is of interest and importance. This is, we think, a pioneer case as to the liability of an electric railway for injury to a passenger by an electric shock.

18 L. R. A.

APPEAL by defendant from a judgment of the Circuit Court for Douglas County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence.
Affirmed.

Statement by Lyon, Ch. J.:

The action is to recover damages for personal injuries to plaintiff, alleged to have been caused by the negligence of the defendant company. The company owns and operates a street railway in Superior City. The cars used thereon are propelled by electric power. On the evening of December 23, 1890, two cars, attached together by a drawbar, were being run by the company on its railway, for the transportation of passengers. Each car was constructed in the usual way, with a platform on either end outside the car, guarded by a dashboard with an iron handle or guard attached thereto. The plaintiff took passage on the first car, called a "motor car;" but because there was no fire

As to the liability for shock from wires in various cases, see *Clements v. Louisiana Electric-Light Co.*, 16 L. R. A. 43, 44 La. Ann. —; *Southwestern Teleg. & Teleph. Co. v. Robinson*, 16 L. R. A. 545, 50 Fed. Rep. 810; *Bourget v. Cambridge (Mass.)*, 16 L. R. A. 605.

therein, and the weather was cold, he attempted, when the cars were in motion, to pass to the rear car, or trailer, in which there was a fire. To do so it was necessary that he should take hold of the iron handle on each car, and step about three feet from the lower step of one platform to the lower step of the other. There was no proper insulation of the wires attached to these cars for conducting the motive power, and as a result thereof the electricity escaped, and such iron handles became heavily charged therewith. This condition was unknown to the plaintiff. When he took hold of the two handles a circuit was formed for the passage of the electricity, and he received a severe shock. He was unable to loosen his hold therefrom, and was dragged a considerable distance, helpless and insensible, and was quite severely injured. On the trial the jury found 'specially that the cars in which the plaintiff was a passenger were out of repair, in that the electricity was allowed to escape from its proper channel to the handles which the plaintiff took hold of in attempting to pass from one car to the other; that the company was guilty of negligence in allowing its cars and electrical appliances to remain in that condition; that such negligence was the proximate cause of the plaintiff's injuries; and that plaintiff was not guilty of any negligence which contributed to such injuries. The jury also assessed plaintiff's damages at \$1,500. A motion on behalf of defendant for a new trial was denied, and judgment entered for plaintiff pursuant to the verdict. The defendant appeals from the judgment.

Messrs. Ross, Dwyer, Smith, Hanitch & Douglas, with Mr. F. G. Wixon, for appellant:

The act of the plaintiff under all the circumstances was contributory negligence on his part such as to bar recovery; the testimony shows that as matter of law the attempt to cross was fraught with great danger and that it was not designed or intended that passengers should cross there.

See *Downey v. Hendrie*, 46 Mich. 498, 41 Am. Rep. 177; *Hickey v. Boston & L. R. Co.* 14 Allen, 429; *Indianapolis & O. R. Co. v. Rutherford*, 29 Ind. 82, 92 Am. Dec. 386; *Solomon v. Central Park, N. & E. R. Co.* 1 Sweeney, 298; *Spooner v. Brooklyn O. R. Co.* 31 Barb. 419; *Galena & C. N. R. Co. v. Yarwood*, 15 Ill. 468; *Clark v. Eighth Ave. R. Co.* 36 N. Y. 136, 93 Am. Dec. 495; *Tregear v. Dry Dock, E. B. & B. R. Co.* 14 Abb. Pr. N. S. 50.

The plaintiff had full knowledge of the danger, yet he unnecessarily and voluntarily put himself in a place of exposure. The danger was obvious. His having crossed between the cars before, is no defense to his reckless and negligent act.

Downey v. Hendrie, *supra*; *Morrison v. Erie R. Co.* 56 N. Y. 302; *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. ed. 506; *Dietrich v. Baltimore & H. Springs R. Co.* 58 Md. 857; *Griswold v. Chicago & N. W. R. Co.* 64 Wis. 652.

Moving from one car to another while a train is in motion is generally evidence of gross neg-

ligence, and a case of urgent necessity must be shown in order to justify it.

2 Shearm. & Redf. Neg. § 525, and cases cited.

If a person thinks it proper to make an experiment under circumstances of peril and which he could have reasonably avoided, it is no injustice that he should be required to bear the consequences of his own acts.

Dietrich v. Baltimore & H. Springs R. Co. supra.

When the plaintiff's evidence conclusively shows contributory negligence on his part, a nonsuit will be granted.

Lloye v. Chicago & N. W. R. Co. 67 Wis. 1, and cases cited.

It was culpable negligence on his part to put himself in a position where it was possible to receive the jury.

Galena & C. U. R. Co. v. Yarwood, supra; *Gavett v. Manchester & L. R. Co.* 16 Gray, 501, 77 Am. Dec. 422; *Ricketts v. Birmingham Street R. Co.* 85 Ala. 600.

Mere inconvenience is no excuse for taking risks on the part of the passenger on a street-car.

Morrison v. Erie R. Co. 56 N. Y. 302; *Clark v. Eighth Ave. R. Co.* 36 N. Y. 135, 98 Am. Dec. 495.

Messrs. Knowles, Dickinson, Buchanan, Graham & Wilson, for respondent:

We have overcome the presumption of negligence of the plaintiff arising out of his exposed position, by showing that the position had nothing to do with the injury. The proximate cause was the terrible current of electricity which the defendant negligently allowed to escape from its proper channel, and without warning to clutch the respondent in its grasp and transfer what otherwise was a comparatively safe position to one of extreme danger. In the absence of instructions or notice by the company to passengers not to go from one car to the other while the train was in motion, there is an implied license that they may do so, subject, however, to the ordinary risks obviously involved. If the electricity had not been in the handles of the car, so far as appears, the respondent would have gone over in perfect safety.

Costikyan v. Rome, W. & O. R. Co. 58 Hun, 590; *Nolan v. Brooklyn, C. & N. R. Co.* 87 N. Y. 63, 41 Am. Rep. 345; *Willis v. Long Island R. Co.* 34 N. Y. 670; *Upham v. Detroit City R. Co.* 12 L. R. A. 129, 85 Mich. 12; *Thirteenth & Fifteenth Street Pass. R. Co. v. Boudron*, 92 Pa. 475, 2 Am. & Eng. R. R. Cas. 30, 87 Am. Rep. 707; *Cummings v. National Furnace Co.* 60 Wis. 603.

If the plaintiff, though negligent, would not have been injured had proper care been observed by the railway company, he may maintain the action.

Baltimore & O. R. Co. v. Kean, 65 Md. 395, 28 Am. & Eng. R. R. Cas. 580; *Troy & Cape Fear & Y. V. R. Co.* 99 N. C. 298, 34 Am. & Eng. R. R. Cas. 18.

Unless the inference of negligence or its absence is necessarily deducible from the facts and circumstances proved, it is a question for the jury.

Dahl v. Milwaukee City R. Co. 62 Wis. 652;

Nelson v. Chicago, M. & St. P. R. Co. 60 Wis. 320.

Lyon, Ch. J., delivered the opinion of the court:

The learned counsel for the defendant company made the point in his argument that the company had no notice or knowledge of the peril that a person passing from one car to another, in the manner the plaintiff attempted so to pass, might receive an electric shock. He argues therefrom that the company is not liable in this action. We think the point is not well taken. The company was chargeable with notice that the electrical apparatus on its cars was in a defective condition, for it appears that it had the means of readily ascertaining whether any electricity was escaping from the machine and works in the body of the car, and knowledge must be imputed to the company that if it escaped the iron handles of the platform were liable to become charged therewith.

The only other question argued in the case is whether the evidence conclusively proves that the attempt of plaintiff to pass from one car to the other when the cars were in motion, in the manner he did, was negligence on his part which contributed directly to the injury of

which he complains. Or, stated in another form, was it error for the trial court to submit the question of contributory negligence to the jury? The testimony tends to prove that the company had no rule prohibiting passengers from stepping from the platform of one car to the platform of the other when the cars were in motion, and had never given any caution against the practice; that before plaintiff was injured, passengers on those cars, among whom was the plaintiff, frequently did so without objection on the part of the company; and that the car conductors constantly passed from one car to another when the same were in motion, in the same manner. Moreover, while it may reasonably be claimed that in thus passing from one car to another there was some peril of being thrown from and under the cars, there was no apparent reason to apprehend, and the plaintiff did not apprehend, the presence of any peril that by so doing he would come in contact with a current of electricity. Under these circumstances, we cannot say that contributory negligence on the part of plaintiff was conclusively proved. Hence it was not error to submit that question to the jury.

The judgment of the Circuit Court is affirmed.

MICHIGAN SUPREME COURT.

Nancy M. BEEBE
v.

OHIO FARMERS' INSURANCE CO.,
Pf. in Err.

(.....Mich.....)

1. Each of two persons owning in severalty respective shares of personal

NOTE.—How far an undivided interest in property is a complete or full ownership for the purposes of insurance.

A proposition that an undivided interest in property is insurable by a contract fairly made and not stipulating for any greater interest in the insured is unquestioned and no authorities need be cited in support of it.

But there has been some uncertainty as to the validity of an insurance policy issued on an application describing the property generally as that of the insured.

In *Columbian Ins. Co. of Alexandria v. Lawrence*, 27 U. S. 2 Pet. 23, 7 L. ed. 335, and again on a subsequent appeal in the same case in 35 U. S. 10 Pet. 507, 9 L. ed. 512, it was held that insurance obtained on mill property upon an application describing it as belonging to the assured was not valid where he held only one half of one third of the property under a lease for three lives renewable forever and one half of the other two thirds only as mortgagee while the other moiety was held under an unperformed contract which if completed would give title to two thirds of it only as mortgagee.

So in *Catron v. Tennessee Ins. Co.*, 6 Humph. 178, insurance on a furnace and forge was held invalid where it was granted on an application which did not disclose that the insured owned but one half of the property.

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property insured is the "absolute owner" of the property within the meaning of a question and answer as to such ownership in an application for insurance thereon.

2. The failure of an insurance agent to write upon a policy the permission which he has in the exercise of his authority granted to place incumbrances on the property will not defeat the permission especially where he took an active part in procuring the money for the in-

A transfer by the owner of real property which is insured on a one-third interest therein to another person was held to violate the whole policy where there was a provision against "sale, transfer, or change of title." *Western Massachusetts Ins. Co. v. Ricker*, 10 Mich. 279.

But these cases substantially conflict not only with the main case but with other cases below cited.

Thus in *Peck v. New London County Ins. Co.*, 23 Conn. 375, a policy to two persons jointly on a tannery and stock was held valid although one owned all the tannery and the other all the stock, where there was no misrepresentation in the application and it appeared that the facts were known to the insurance agent.

So a policy issued jointly to mother and son on a dwelling and personal property is valid in the absence of any requirement as to stating the exact state of the title where each owned part of the personal property and the mother had a life estate in the realty of which the son owned the fee. *Castner v. Farmers Mut. F. Ins. Co.* 46 Mich. 15.

And a representation by the assured that his title to a house on which a policy was issued was "complete" is not false so as to avoid the policy where the house and 200 acres of land on which it stood constituted his homestead, although the fee to an undivided half had vested on his wife's death in his children but no partition had ever been made and he was entitled to occupy it uncondi-

sured and gave assurances that the rights of the latter were fully protected.

3. The knowledge of an incumbrance on the part of an insurance agent who filled out an application and had the applicant sign it without reading, assuring her that it was all right and that she was fully protected under it, will prevent a forfeiture because of such incumbrance which is not stated in the application.

(December 2, 1892.)

ERROR to the Circuit Court for Livingston County to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due upon a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Mr. Thomas E. Barkworth for appellant.

Mr. Luke S. Montague for appellee.

Long, J., delivered the opinion of the court:

This action was brought upon two insurance policies. Plaintiff had judgment. Defendant brings error. The cause was tried before the court without a jury, and the court found substantially that the plaintiff was the owner in fee of a farm situate on sections 8 and 17, in the township of Putnam, Livingston county, the land being used together as one farm. On the day the policies were issued (June 30, 1890) there was situate upon that portion of the farm on section 8 a dwelling-house occupied by plaintiff as her

residence, a barn, storehouse, pigpen, corn house, crib, and wheat house; and upon that portion of the farm on section 17 another barn. These barns were within ten rods of each other, a highway running between them, and the other buildings were all within twelve rods of the barns; both barns and the other buildings being used for general farm purposes. The plaintiff kept upon the farm, stock, tools, and implements, and had crops and produce upon it. On the above day, the defendant issued its two policies,—the one, No. 1,440, covering barn No. 1, on section 17, to the amount of \$750, and barn No. 2, on section 8, at \$150; and the other policy, No. 1,441, made to the plaintiff and Mrs. Sophia Beebe, and covering dwelling-house No. 1, household furniture, barn No. 1, hay, grain, fodder, and seeds while therein, livestock while therein, and against lightning on the farm, storehouse, horse barn, hay, grain, and fodder while therein, livestock while therein, and against lightning on the farm, farming implements, wagons, carriages, and harness while in barns or barn insured, dwelling-house No. 2, household furniture and clothing while therein, barn No. 2, hay, grain, fodder, and seed while therein, pigpen, corn house, crib, wagon house, wagons, carriages, and farm tools while therein, and on the wheat house, in the total sum of \$4,700. A writing was indorsed on policy 1,441, that "it is understood that produce is covered in barns, in granary, in crib, and hay stacks, within twelve rods of the buildings." March 18, 1890, further

ally as long as he lived. *East Texas F. Ins. Co. v. Crawford (Tex.)* 21 Ins. L. J. 39.

Insurance of a vessel by a tenant in common is good as to his own interest although he has no right merely by virtue of his relation to his co-tenant to insure the share of the latter for him. *Foster v. United States Ins. Co.* 11 Pick. 85.

The sale by a tenant in common of his interest in the property to a co-tenant does not violate a provision of a policy against alienation "by sale or otherwise." *Lockwood v. Middlesex Mut. Assur. Co.* 47 Conn. 553.

Partnership interest.

By a large majority of the decisions it is held that the transfer by one partner of his interest in property insured to other members of the firm is not such a transfer of the property or change in the title thereto as will violate conditions in a policy against transfer, change, or alienation of the property or interests therein. *Virginia F. & M. Ins. Co. v. Vaughan*, 88 Va. 832; *New Orleans Ins. Assn. v. Holberg*, 64 Miss. 51; *Powers v. Guardian F. & L. Ins. Co.* 136 Mass. 108, 49 Am. Rep. 20; *Texas Bkg. & Ins. Co. v. Cohen*, 47 Tex. 406, 28 Am. Rep. 293; *West v. Citizens Ins. Co.* 27 Ohio St. 1, 22 Am. Rep. 294; *Pierce v. Nashua F. Ins. Co.* 50 N. H. 297, 9 Am. Rep. 233; *Derman v. New Orleans H. Mut. Ins. Co.* 28 La. Ann. 69, 21 Am. Rep. 544; *Hoffman v. Aetna F. Ins. Co.* 32 N. Y. 405, 88 Am. Dec. 337; *Wilson v. Genesee Mut. Ins. Co.* 16 Barb. 511; *Burnett v. Eufaula H. Ins. Co.* 46 Ala. 11, 7 Am. Rep. 551.

This rule is applied by the above cases to varying clauses prohibiting transfer or change as that the property shall not be "sold." *Powers v. Guardian F. & L. Ins. Co. supra.*

Or against "transfer by sale or otherwise." *Texas Bkg. & Ins. Co. v. Cohen, supra.*

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Or against any change "in the title or possession . . . by sale transfer or conveyance." *New Orleans Ins. Co. v. Holberg, supra.*

Or that the property shall not be "sold or conveyed." *Hoffman v. Aetna F. Ins. Co. supra.*

Or that it shall not be "sold or conveyed or the interest of the parties therein changed." *Burnett v. Eufaula H. Ins. Co. supra.*

Or that there shall not be "any alienation by sale or otherwise." *Pierce v. Nashua F. Ins. Co.* 50 N. H. 297, 9 Am. Rep. 235.

Or that the "policy or any interest therein" shall not be assigned. *West v. Citizens Ins. Co.* 27 Ohio St. 1, 22 Am. Rep. 294.

Or that there shall not be "any change in the title or interest of the assured." *Virginia F. & M. Ins. Co. v. Vaughan*, 88 Va. 832.

A sale by the owner of insured property to a firm of which he is a member is not an "alienation by sale or otherwise" within the meaning of a condition in the policy. *Cowan v. Iowa State Ins. Co.* 40 Iowa. 551, 20 Am. Dec. 533.

And the fact that the insured and his partner owned insured property in partnership does not make the insurance invalid. *Hartford Prot. Ins. Co. v. Harmer*, 2 Ohio St. 452.

And the fact that the insured does business in the name of his father and himself as a firm, although he actually owns the goods insured, does not make the insurance void. *Gould v. York County Mut. F. Ins. Co.* 47 Me. 403.

And a policy of insurance on "his stock" of goods sufficiently describes the interest of a cabinet maker in a stock of goods of which he was the substantial owner although he had a partner in the business who was interested in the profits but owned no part of the capital of the firm. *Irving v. Excelsior F. Ins. Co.* 1 Bosw. 507.

So a merchant's taking in a partner does not vio-

insurance to the sum of \$800 was placed in policy No. 1,441, on produce while in barn and sheds, the same being the barn south of the road on section 17, designated originally in policy No. 1,440 as "barn No. 1 and foundation." At the date the policies were issued, Gov. Felch held a mortgage of \$1,800, with accrued interest thereon of \$700, on twenty acres of land on section 17. One Thomas Burkett held a chattel mortgage for \$500, given by plaintiff upon fifty acres of beans then growing on the farm, the chattel mortgage being collateral and additional security for the same indebtedness covered by a real-estate mortgage held by Burkett. Permission was given upon the policies for the chattel mortgage of \$500, as additional security to be placed on produce. "Loss, if any, payable to Thomas Burkett, mortgagee, as his interest may appear;" and upon policy No. 1,441 was indorsed: "Loss, if any, on real estate payable to Thomas Burkett, mortgagee, as his interest may appear." Upon policy No. 1,440 was indorsed: "Loss, if any, on real estate payable to A. Felch, mortgagee, as his interest may appear." August 15, 1890, the defendant, through its agent, further indorsed upon the policy: "Further chattel mortgage for \$700 permitted, to put in and secure crops, but \$350 returned, and not used." At the date the policies were issued, John Dyer held a bill of sale given as security upon certain personal property owned by the plaintiff. This was dated June 26, 1890, to secure the sum of \$200. On the day the policies were issued,

Mr. Morris, the agent of the defendant company, dictated a new bill of sale to secure the payment of the same indebtedness to Mr. Dyer, to take the place of the one of June 26, 1890. This was delivered to Mr. Dyer and the old one taken up; also, on the date the policies were issued, Enoch Smith held a chattel mortgage given by the plaintiff to him to secure the payment of about \$200, just what personal property it covered is not shown. October 9, 1890, the plaintiff gave to Smith a new chattel mortgage to take the place of the one last mentioned, and to secure the same indebtedness; thereby mortgaging to him a horse, a piano, and 12 acres of growing wheat. The horse and piano were insured by policy No. 1,441; but the wheat was still growing on the farm at the time the fire occurred, and none of the property covered by this mortgage was destroyed by the fire. The bill of sale to Dyer and the mortgage to Smith, and the removal of the same, were known to defendant's agent, but no permissions were indorsed on the policies for the same. No steps were taken by the company to cancel the policies before the fire.

Each policy was preceded by a written application, which was made a part of the policy, and each recited: "This policy is based upon an application and survey of the property on file, which is hereby referred to as forming a part of this policy." It was also printed in and made a part of each policy that, "if the property, real or personal, covered by this policy, be or become incumbered by a mortgage, trust deed, judg-

late a provision in a policy against a sale or transfer of the goods insured. *Blackwell v. Miami Valley Ins. Co.* 14 L. R. A. 451, 48 Ohio St. 533.

And a sole owner of insured property by taking partners does not violate a clause making a policy void if the property is "sold or conveyed." *Scanlon v. Union F. Ins. Co.* 4 Biss. 511.

At least where he continues to be the real owner of all the property. *Malley v. Atlantic F. & M. Ins. Co.* 51 Conn. 222.

On the other hand, in *Drennen v. London Assur. Corp.* 20 Fed. Rep. 667, it was decided that the introduction of a new partner with the investiture of an interest in him which he did not have before avoids a policy containing a condition that it shall be void in case the property is "sold or transferred or any change in the title" made.

This case was reversed in *London Assur. Corp. v. Drennen*, 116 U. S. 451, 29 L. ed. 688, and in the United States Supreme Court it was decided merely that in that case there was no partnership and therefore the effect of a transfer to a partner was not passed upon.

But a few other cases have held that a transfer by one partner to another of his interest in the firm made a policy of insurance on the firm property void.

Thus in *Hartford F. Ins. Co. v. Ross*, 28 Ind. 179, 85 Am. Dec. 452, a transfer by one partner to another of his interest in the firm was held to defeat a policy containing a condition against a "sale, transfer, or change of title . . . or of any undivided interest therein."

The same decision was made in *Dix v. Mercantile Ins. Co.*, 22 Ill. 272.

The particular language of these policies, however, clearly distinguishes these cases from those above referred to by expressly prohibiting the transfer of "any undivided interest."

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In *Hathaway v. State Ins. Co.*, 64 Iowa, 239, 53 Am. Rep. 433, it was held that such a transfer by one partner to another was a "change of title" contrary to a provision in the policy.

And in *Keeler v. Niagara F. Ins. Co.*, 16 Wis. 523, 84 Am. Dec. 714, the same decision was made in respect to a policy with a condition that the property should not be "sold or conveyed."

And in *Finley v. Lycoming County Ins. Co.*, 30 Pa. 311, 72 Am. Dec. 705, it was held that a sale by one partner to the other on dissolution of the firm violated a provision in the policy against alienation by "sale or otherwise."

The court, however, in this state relied on *Tillon v. Kingston Mut. Ins. Co.*, 5 N. Y. 406, which is said by later New York cases not to support this doctrine when correctly understood.

And under the same circumstances as to the sale by one partner to another on dissolution the contrary decision was made in *Wilson v. Genesee Mut. Ins. Co.* 16 Barb. 511.

Again in *Biggs v. North Carolina H. Ins. Co.*, 88 N. C. 141, the taking of a partner by the insured was held to defeat a policy which provided that the property must not be "transferred or changed in any way other than by succession by reason of death."

A policy issued to a firm does not cover goods bought by the surviving partner on his own account after he had bought the firm property and begun to carry on the business alone. *Wood v. Rutland & A. Mut. F. Ins. Co.* 31 Vt. 552.

And a surviving partner has not the "unconditional and sole ownership of the property" of the firm within the meaning of those words in an insurance policy. *Crescent Ins. Co. v. Camp*, 71 Tex. 503.

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ment, or otherwise, this entire policy shall be void, unless otherwise provided by agreement, indorsed hereon or added hereto." It was also printed in the policy: "This policy shall be void if the insured has concealed or misrepresented in writing any material fact or circumstance concerning this insurance or the subject thereof, or if the interest of the insured in the property be not truly stated herein, or in case of any fraud or false swearing by the insured touching matters relating to this insurance, or the subject thereof, whether before or after the loss." And also: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the interest of the insured be other than unconditional and sole ownership, or the subject of insurance be personal property, and be or become incumbered by chattel mortgage." Also: "If the application, survey, plan, or description of the property be referred to in this policy, it shall be a part of this contract, and a warranty by the insured as to material facts." Also: "This policy is made and accepted subject to the foregoing stipulations and conditions together with such other provisions, agreements, and conditions as may be indorsed hereon or added hereto; and no officer, agent, or representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and, as to such provisions or conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting insurance under this policy exist or be claimed by the insured, unless so written or attached. In the written application for policy No. 1,440 occurred the question, "Is the property incumbered?" The written answer was, "Yes." Then in the application is the following question, "If so, what amount, and the value of the premises?" The written answer is, "\$1,800,—\$1,800." Each of the written applications contains this clause: "The applicant hereby warrants the above answers and statements are true, and that no statement contradictory to above was made to or by the agent of the company, and he agrees that this declaration shall be the basis or form part of the contract or policy between the assured and the company." January 17, 1890, a fire occurred without the fault of the plaintiff, which destroyed the barn mentioned in policy No. 1,440 as "Barn No. 1," and a large amount of insured personal property consisting of hay, corn stalks, oats cut and stored, harness, farming implements, 671 bushels of beans stored partly in stack within 12 feet of the barn, beanpods in barn and shed adjoining, and grain bags, making a total loss under both policies of \$2,843.19, for which plaintiff had judgment. The value of the barn was in excess of the insurance.

The objection to the proceeding relates entirely to the conclusions of law reached by 18 L. R. A.

the court below, upon the grounds: (1) Because the plaintiff could not bring suit on both policies, joining the same in one action and in her sole name; (2) that policy No. 1,440 was void, because the amount of the Felch mortgage was incorrectly stated in the application; (3) that the policies were void because the chattel mortgages were not permitted by writing indorsed upon them.

It appeared in the findings of the court that no part of the property belonging to Sophia Webb was destroyed by fire. The property covered by policy No. 1,441 belonged partly to the plaintiff and partly to Sophia Webb, each owning in severalty their respective shares, although the property thus secured was commingled and used in common by them for farming purposes. The only question in the application for that policy was addressed both to the plaintiff and Sophia Webb, as follows: "Are you the absolute owner of the personal property to be insured? Answer. Yes." It is evident that, if the property of both of the insured under this policy had been destroyed by fire, a joint action could have been brought by them, and the proceeds of the judgment afterwards apportioned between them according to their respective interests in the property. *Castnor v. Farmers' Mut. F. Ins. Co.* 46 Mich. 18. In the above case it was said: "When the entire property belongs to the persons insured, it can make no necessary difference to the insurer in what way their interests are apportioned. If they deem it material, they should inform the applicant before accepting his money." In the present case, much more clear is it that the insurer should not take advantage of this fact, for the reason that Mr. Morris, the agent, was fully informed where the title rested, and had assured the plaintiff that her interests were fully protected under the policies. Neither was the answer to the question in the application as to title of the personal property contrary to the true state of facts. Each owned in severalty, and they were the absolute owners of it.

It is contended: (1) That there was material misstatement as to the amount of incumbrance on the real property in policy No. 1,440; (2) that the placing of the chattel mortgages on the property, without the written permission of the company indorsed on the policy, worked a forfeiture.

It appears from the finding of the court below that Mr. Morris, the defendant's agent, was clothed with full power to issue policies. He took the applications, approved them, and without forwarding them to the company at once issued the policies, having been furnished with blanks for that purpose. Before the policies were made out, and at and before the applications were made, he knew of the Felch mortgage and the accumulated interest. In the presence of the insured he filled out the applications, and told them to sign, without reading the applications to them, or advising them of the contents. He knew all the facts in regard to the mortgage incumbrance, and the situation of the personal property with its incumbrances. After the applications were made,

he assured the parties that they were fully protected under the policies. He also knew of and permitted the additional mortgages to Smith and Dyer, and advised Mrs. Beebe in the execution of them. No part of the property covered by the Smith and the Dyer mortgages was destroyed. It is contended, however, that by the terms of the policies the plaintiff cannot be heard to say that this was done by and with the full knowledge of defendant, as by the terms of the policies no officer, agent, or other representative of the company had power to waive any provisions or conditions of them, except such as by the terms of the policies might be the subject of agreement indorsed on them, etc. The claim is made that this principle was decided in *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527. In that case the policy provided that the agent "had no authority to waive, modify, or strike from the policy any of its printed conditions; . . . nor, in case this policy shall become void by reason of the violation of any of the conditions thereof, has the agent the power to revive the same."

The question involved there was whether the taking of \$2,000 additional insurance in another company avoided the policy. Mr. Quinn was the agent of the company, and the plaintiff claimed to have spoken to him about the additional insurance, and after he received his additional policy he claims to have been told by Quinn that it was all right. It was said by this court that that was not a case where the insured had a right to rely upon the action of the agent, or to presume that his action was known to the company and ratified by it. But in the present case it appears that the agent stood in place of the company, with full power to issue policies without first referring the applications to the company; and the plaintiff relied upon, and had a right to rely upon, the agent, and to presume that the company had knowledge of his acts, and ratified them. If the *Cleaver Case*, *supra*, is to be construed as laying down such a doctrine as contended for here, it ought at once to be overruled. But we think the case is clearly distinguishable. The present case presents features by which, if that doctrine is applied, the grossest fraud is to be perpetrated upon the plaintiff. Morris, the agent, is an attorney at law, living near the plaintiff. He has been her legal adviser, and knew the situation and surroundings of her property as well as the plaintiff did. He filled out the applications, did not read them to the plaintiff, advised just what property each should cover, knew the amount of the Felch mortgage and interest accrued, knew the amount of each chattel mortgage, and in fact assisted the plaintiff in procuring the money on each. When all had been completed, he assured the plaintiff that the policies were all right, and that she was fully protected; and yet it is gravely contended here that she is not in a position to set up these facts because the policy contains a clause that "no officer, agent, or other representative of the company shall have power to waive any provision of the policy." If no officer, agent, or other representative of the company could waive

it, then there could be no waiver. It is like the case of *Westchester F. Ins. Co. v. Barla*, 88 Mich. 148. In that case the policy provided that there should be no waiver of any of the printed or written conditions, except in writing on the policy, and the court said: "The conditions, literally applied, would prevent any unindorsed consent by the company itself, by resolution of its board, or by acts of its officers, as effectually as by any one else; and the case seems to settle down to the simple question whether a person who has agreed that he will only contract by writing in a certain way precludes himself from making a parol bargain to change it."

In the present case it is attempted, as in the *Westchester F. Ins. Co. Case*, *supra*, to limit every one connected with the company either as officer, agent, or representative, to waive by parol the requirements of the policy. The agent had the right, under the policy, to grant permission to place other chattel mortgages upon the property, but was required to write such permission upon the policy. He granted the permission, took an active part in procuring the money upon the mortgages, advised in regard to it, and assured the plaintiff that she was protected, though he did not enter in writing upon the policy the permission to do so. With the power vested in him by the company to issue policies, we think it would be a gross fraud upon the insured to hold that this condition was not waived by the consent of the company. If the company itself could waive compliance with this condition, then it was waived, as held in the case above cited.

What we have said above applies equally to the contention about the Felch mortgage. It is said that inasmuch as the policy provided that, if the property was incumbered, it must be stated in the application, otherwise the policy was to become void, therefore the representation in the application that the incumbrance was \$1,800, when in fact it was \$2,000, was such a misstatement that the policy was void, and no recovery could be had for that reason. As is seen from the findings of the court below, the agent of the company knew just what the incumbrance was. He filled out the application, had plaintiff sign it without reading it to her, assured her it was all right, and that she was fully protected under it. She was not asked to state the amount of the incumbrance, and no fraud or deceit was practiced by her. She did not know the printed clause in the policy in reference to warranties, and the court found that she was not negligent or careless in failing to read the application, under the circumstances, and that she and Mrs. Webb both understood and believed from the conduct and acts of the defendants' agent that the application stated the facts. Under these circumstances, the defendant company is not in a position to insist upon the forfeiture of the policy. Instead of a fraud being practiced upon the company, they must be presumed to have the knowledge which their agent possessed; and it would be a gross fraud upon the plaintiff to permit the company to take advantage of such a misstatement in the application, and

hold the policy void by reason of it. The case falls clearly within the principle laid down in *Tubbs v. Duelling-House Ins. Co.* 84 Mich. 651; *Michigan Mut. L. Ins. Co. v. Reed*, 84 Mich. 581, and cases there cited; *Aetna, L. S. F. & T. Ins. Co. v. Olmstead*, 81 Mich. 252. In the last case it was said by Mr. Justice Cooley: "The general rule undoubtedly is that, in the absence of fraud, accident, or mistake, a party must be conclusively presumed to understand the force of his contracts, and to be bound by their terms. But it cannot be tolerated that one party shall draft the contract for the other, and receive the consideration, and then repudiate his obligation on the ground that he had induced the other party to sign an untrue representation, which was, by the very terms of the contract, to render it void."

We think the court below, under the evidence and facts shown, very properly ruled that the policy was not rendered void by the misstatement of the amount of the Felch mortgage in the application.

Some contention is made that the personal property destroyed was not covered by policy No. 1,441. We think the two policies, taken together, show what the intention of the parties was, and that the property so destroyed was covered by and included in the policy.

Judgment is affirmed, with costs.

Grant, J., did not sit. The other Justices concurred.

Phineas PIERCE *et al.*

v.

Peter JOHNSON *et al.*, *Piffs. in Err.*

(.....Mich.....)

1. It will be presumed that chattel mortgagees, who have taken possession of the mortgaged property and are proceeding to sell it, acted in accordance with the provisions of the mortgage where such provisions are not shown.
2. That only a few days elapsed between the execution of a chattel mortgage and the taking possession of the mortgaged property is not of itself a badge of fraud.
3. Attachment of the debtor's property to secure a debt not due is not authorized by Pub. Acts 1889, No. 149, where the facts alleged in the affidavit as a basis for the attachment are consistent with an honest purpose on the part of other creditors to secure their just claims.
4. The right of attachment debtors to move to quash the attachment is not waived by the fact that a bond was given to the sheriff for their retention by a stranger to the suit in whose possession they were.
5. A writ of error is the proper remedy

to review the overruling of a motion to quash an attachment after the entry of judgment in favor of the attachment creditor.

(October 4, 1892.)

ERROR to the Circuit Court for Gogebic County to review a judgment in favor of plaintiffs in an attachment proceeding brought to collect a claim against the copartnership of Peter Johnson & Co. *Reversed.*

Statement by Grant, J.:

This suit was commenced by attachment under Act No. 149 of the Public Acts of 1889. This Act authorizes the commencement of suit by attachment before the debt is due. The Act requires the affidavit to "show reasons for the immediate issuance of the writ to the satisfaction of the circuit judge." The affidavit was made by the attorney for the plaintiffs, and the only facts stated therein tending to show an exigency for the issuance of the writ are as follows: "That recently, and upon October 27, 1890, two certain chattel mortgages were executed and filed, covering the property of Peter Johnson and Sarah J. Healy, copartners; that the assignee of the mortgages has taken possession of the property therein described, and is now selling the same at retail, and at a rapid rate; that there has been placed on file in the office of the recorder of the city of Ironwood a bill of sale from Peter Johnson upon all his tangible personal property; and that the firm of Peter Johnson & Co. is wholly insolvent."

All other allegations in the affidavit are upon information and belief. The property seized was in the possession of a third party, who obtained a release of the property from the attachment by giving a bond conditioned for the payment of any judgment that might be recovered against the defendants Johnson and Healy. Neither of the defendants was a party to the bond. The defendant Healy appeared specially, and entered a motion to quash the affidavit and writ, for the reason, among other things, that the affidavit made no case to justify the issuance of the writ. This motion was overruled by the court. The defendants took no further steps, and judgment was entered against them upon default. Defendants bring error.

Messrs. Hammond & Kissane, with Mr. Edward Cahill, for appellants.
Mr. M. M. Riley for appellees.

Grant, J., delivered the opinion of the court:

It is not claimed that the chattel mortgages and bill of sale were not given to secure bona fide debts. The record does not contain either the mortgages or bill of sale. In the absence of any statement of the provisions of the mortgages, it must be presumed that the mortgages took possession and were proceeding to sell in

NOTE.—The only case we have been able to discover in which is considered the effect of a bond for dissolution of an attachment as an appearance in the action when the defendant is not a party to the bond is that of *Clark v. Bryan*, 16 Md. 171.

In that case it was decided, as in the above case,

that such bond did not subject the defendant to the jurisdiction of the court. The defendant in the Maryland Case being a nonresident and not personally served a personal judgment against him in the action was held to be rendered without jurisdiction

accordance with their terms. The law authorizes the debtor to give either or both to secure his creditors. The fact that the mortgagees took possession within a few days after the execution of the mortgages is not, of itself, a badge of fraud. Diligent and honest creditors may take this course to secure their debts. When the facts alleged in the affidavit are consistent with an honest purpose on the part of creditors to secure their just claims, no case is made to authorize the seizure of a debtor's property by attachment. The motion to quash should have been granted. The bond given by the party from whose possession the property was taken by the sheriff, and who was a

stranger to the suit, in no manner affected the rights of the defendants, and did not operate as a waiver of their right to move to quash. After judgment, the writ of error was the proper remedy for a review of the proceedings in this court. *Jewell v. Lamoreaux*, 80 Mich. 155; *Stall v. Diamond*, 87 Mich. 429; *Emerson v. McCormick Harvester Mach. Co.* 51 Mich. 5; *Warren v. Crane*, 50 Mich. 300. The defendants had done nothing to waive the defect in the affidavit, or to confer jurisdiction on the court.

Judgment must be reversed, and judgment entered in this court quashing the proceedings. The other Justices concurred.

ILLINOIS SUPREME COURT.

City of BLOOMINGTON, *Appt.*,

v.

Frances J. LATHAM *et al.*

(.....Ill.....)

1. Assessment by special taxation is not justified by section 53 of the Illinois City and Village Act providing that in condemnation proceedings on supplemental petition an assessment may be made to raise the amount necessary to pay the compensation and damages awarded.

2. The constitutional requirement of just compensation to the owner of a lot of which part is taken and the remainder damaged by opening an alley across it cannot be complied with by charging the owner with the amount as a special tax on that part of his lot which is not taken. Such assessment would amount practically to confiscation.

(*Craig, J., dissents.*)

(November 2, 1892.)

APPEAL by complainant from a judgment of the McLean County Court dismissing its petition for the assessment of special taxes for the purpose of opening an alley through defendants' lands. *Affirmed.*

The facts are stated in the opinion.

Mr. Sain Welty, for appellant:

The city of Bloomington has the power to open or otherwise improve its streets, avenues, lanes, and alleys.

Special Charter Act of Legislature, March 7, 1867.

Local improvements may be made by special assessment or special taxation or both of contiguous property, or general taxation as shall by ordinance be provided.

Ill. Const. art. 9, § 9; Ill. Stat. (Starr & Curtis) chap. 24, § 117.

To open, widen, and extend streets and alleys is a local improvement.

Digelow v. Chicago, 90 Ill. 49.

The appellant had a right to say how the

NOTE.—For an important case on the provisions of the Illinois Constitution as to special taxation and assessments, see *Kuehner v. Freeport* (Ill.) 17 L. R. A. 774.

As to protection of property rights, see *note to Forster v. Scott* (N. Y.) post, 543.

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local improvement in question should be paid for, and its discretion cannot be controlled by the courts.

People v. Hyde Park, 117 Ill. 462; *Sterling v. Galt*, 117 Ill. 17.

The making of local improvements by special taxation is constitutional.

Enos v. Springfield, 118 Ill. 65; *Green v. Springfield*, 130 Ill. 515.

Whether or not property receives benefits in special tax proceedings is not open for review.

White v. People, 94 Ill. 604; *Enos v. Springfield*, *supra*; *Galesburg v. Searles*, 114 Ill. 217; *Sterling v. Galt*, 117 Ill. 11; *Springfield v. Green*, 120 Ill. 269; *Green v. Springfield*, *supra*.

There is no connection between the city's right to levy a special tax and the payment to the objector of the amount of its condemnation judgment. Condemnation proceedings may follow as well as precede the levy and confirmation of the special taxes.

Hyde Park v. Borden, 94 Ill. 26; *Holmes v. Hyde Park*, 121 Ill. 128; *Hunerberg v. Hyde Park*, 180 Ill. 156; *Leman v. Lake View*, 181 Ill. 888.

Messrs. Benjamin & Morrissey, for appellees:

The ordinance and proceedings thereunder are contrary to the Constitutions of the state of Illinois, and of the United States, especially to that provision of the state Constitution which ordains that "private property shall not be taken or damaged for public use without just compensation."

Ill. Const. art. 2, §§ 1, 2, 18; U. S. Const. 14th Amendment; *Stuart v. Palmer*, 74 N. Y. 188, 30 Am. Rep. 289; *Harwood v. Bloomington*, 124 Ill. 48; *Hyslop v. Finch*, 99 Ill. 171; *Carpenter v. Jennings*, 77 Ill. 250.

The alley provided for by the ordinance would damage rather than benefit the property taxed. Special taxes for local improvements, like special assessments, are justified only on the ground that the subject of the tax receives an equivalent.

White v. People, 94 Ill. 617; *Craw v. Tolono*, 96 Ill. 261, 36 Am. Rep. 143; *Illinois Cent. R. Co. v. Decatur*, 1 L. R. A. 618, 126 Ill. 97; *Bloomington v. Chicago & A. R. Co.* 134 Ill. 451.

The proposed alley would not be a "local improvement" within the meaning of the Constitution.

Illinois Cent. R. Co. v. Decatur, supra.

It is essential to the validity of a municipal ordinance that it be reasonable; if arbitrary, unjust, and oppressive it is void. The ordinance in controversy is not only unreasonable, but unfair, if not fraudulent, and is confiscatory in its nature and operation.

Tugman v. Chicago, 78 Ill. 405; *Craw v. Tolono*, 96 Ill. 259, 36 Am. Rep. 148; *Bloomington v. Chicago & A. R. Co. supra*; 1 Dill. Mun. Corp. 4th ed. § 55 note.

Magruder, J., delivered the opinion of the court:

This is a petition filed in the county court of McLean county on November 19, 1891, by the city of Bloomington, for the appointment of commissioners to assess the special taxes to pay for the opening and extension of an alley in a block in that city, "including compensation for property taken or damaged, if any, or both, and the cost of an assessment of a special tax to pay therefor, and of the collection of the same, and of condemnation proceedings," etc. On the same day commissioners were appointed to assess the cost of said improvement in the manner prescribed by the ordinance hereinafter named, and the statutes, etc. On November 28, 1891, the commissioners took an oath to make a true and impartial assessment of the special taxes, and on December 4, 1891, made and returned their assessment roll. On December 16, Frances J. Latham, the owner of lot 1, hereinafter named, and Anna E. Loehr, owner of lot 2, hereinafter named, filed objections to the appointment of commissioners, to their report, to the confirmation of the same, and to the entry of judgment. On December 28, 1891, a hearing was had before the court on said objections, some of which were overruled and others sustained, and the petition of the city was dismissed. The orders sustaining the objections and dismissing the petition were excepted to. The present appeal is prosecuted from the judgment of the county court dismissing the city's petition.

The block above referred to lies between Front street on the north and Grove street on the south, and between Lee street on the east and Low street on the west. Lots 1 and 2, the former being east of the latter, run from Front street to Grove street; all the other lots in the block run to the middle of the block only. Before the passage of the ordinance hereinafter mentioned, an alley, 10 feet wide, ran from Lee street westward through the middle of the block to the east line of lot 1; and the lotowners west of lot 2 had conveyed to the city the ground for an alley 10 feet wide through the middle of the block eastward from Low street to the west side of lot 2. The object of the present proceeding is to connect the alley on the west with the alley on the east by extending them through lots 1 and 2, and by taking from the appellees for that purpose a strip of land 10 feet wide running through the middle of their lots. The petition recites that the city had adopted article 9 of the City and Village Act; that on July 31, 1891, it passed an ordinance for the opening and extension of said alley in said block, by which it is ordained, in section 1 thereof, that said alley

be opened and extended from the east end of the alley west of said lots to the west end of the alley east thereof; in section 2, that the cost of opening and extending said alley, including the cost of real estate taken or damaged for that purpose, or both, and expenses, etc., be paid for by special taxation, and a special tax equal to the whole cost of said improvement and of collecting said tax be assessed and collected upon and from each of the lots or parcels of land abutting upon said alley along the proposed line thereof, in proportion to the frontage thereof upon said alley; in section 3, that, upon the approval by the city council of the report of the committee provided for in section 4, the city attorney filed in the county court a petition asking that compensation be made and ascertained by jury for private property to be taken or damaged, or both, for said improvement, and also a petition for the appointment of commissioners to assess the special tax therein provided for, as required by law; and in section 4, that three persons be appointed commissioners to make an estimate of the cost of said improvement, including compensation for property taken or damaged, if any or both, and the cost of the assessment and collection of the special tax and of the condemnation proceedings and report the same to the counsel. The petition then proceeds to state that, on the same day, the persons so appointed made their report, estimating the cost of said improvement, including compensation for property taken or damaged, or both, at \$400, and the costs of assessing and collecting the special tax at \$60; that the city council instructed its attorney to file this petition. The petition closes with a prayer for the appointment of commissioners to assess the special tax, as above set forth. The assessment roll, so filed by the commissioners, recited that they assessed the whole cost of the improvement, amounting to \$1,375, against the property contiguous thereto, as provided by said ordinance, and that the amount of the special tax assessed against lot 1, owned by Frances J. Latham, was \$626, and the amount thereof assessed against lot 2, owned by Anna Loehr, was \$749. The petition for the assessment of the special tax, so filed on November 19, 1891, makes no reference to the proceedings taken under the petition filed for the condemnation of the property; but those proceedings were introduced in evidence upon the hearing of said objections, and show that, on August 6, 1891, the city filed a petition in said county court; containing copies of said ordinance and of the estimate of the cost of said improvement made by the committee appointed by the council, and stating that Frances J. and William A. Latham were owners of said lot 1, and Anna E. and Susan E. Loehr of said lot 2; that part of said lots would be taken or damaged for said improvement; that the city had been unable to agree with the owners as to compensation; that the council had instructed its attorney to petition for condemnation, and praying that just compensation for private property taken for or damaged by said improvement be ascertained by a jury; that the property owners were duly served with summons; that a jury was sworn and impaneled to ascertain and

report the compensation, both parties appearing by their attorneys; and that on August 18, 1891, a judgment was rendered, in which, after reciting the appearance of the parties, and the jury having heard the evidence and arguments of counsel and received the instructions of the court, had returned a verdict finding the just compensation to be as hereafter stated in the opinion; it was adjudged that the defendants Latham receive of the city the said sums so awarded them "as the just compensation for the taking and damaging such land, improvements, and property, to wit, lot 1," etc.; and that the defendant Loehr receive of the city the said sums of money awarded "as the just compensation for the taking and damaging said land and property, to wit, lot 2," etc.; and that the city pay the said several sums so awarded, with the costs, into this court, or to Frances J. and William A. Latham and Anna E. Loehr, or to the treasurer of McLean county; and that, upon such payment being made, the city should have the right at any time thereafter to enter upon and take possession of the said lands, improvements, and property. Upon the hearing of the objections it was admitted by the city that, upon the trial of the condemnation suit, the city introduced testimony to show whether or not the opening of the alley would benefit the portions of the lot not sought to be taken, and how much in dollars and cents such benefit would be. It is assigned as error that the county court sustained the objections to the confirmation of the assessment. One of the objections so sustained is that this proceeding is in violation of section 18 of article 2 of the Constitution. That section, which is a part of the Bill of Rights, provides that "private property shall not be taken or damaged for public use without just compensation." Section 2 of article 9 of the City and Village Act directs that, where the city or village provides by ordinance for the making of any local improvement, it shall by the same ordinance prescribe whether the same shall be made by special assessment, or by special taxation of contiguous property, or general taxation, or both. Sections from 8 to 15, inclusive, apply to cases where the local improvement named in the ordinance requires the taking or damaging of private property. The last-named sections specify the mode of proceeding to be adopted for making just compensation for the private property to be taken or damaged for said improvement. In pursuance of a petition to be filed by the city or village in a court of record, and after notice by service of process or publication upon the parties defendant, the compensation must be ascertained by a jury; and the final judgment rendered upon the finding of the jury is a lawful condemnation of the property to be taken, upon the payment of the amount of such finding in the manner therein provided. Section 53 of said article 9 provides that, in the same proceeding in which the judgment of condemnation is rendered, the city or village may file a supplemental petition praying that an assessment be made "for the purpose of raising the amount necessary to pay the compensation and damages which may be or shall have been awarded for the property taken or damaged, with the costs of the proceeding." In the case at bar the petition for

the assessment of the special tax does not purport to be a supplemental petition in the eminent domain proceeding, but it must be regarded as such because there is no other provision in the statute for making an assessment to raise the amount awarded as compensation for the property taken or damaged, except that which is embodied in said section 53. Does section 53 apply to such a case as is presented by this record?

The ordinance directs that the cost of the real estate taken or damaged, or both, be assessed upon and collected from each of the lots abutting upon the alley along the proposed line thereof in proportion to the frontage thereof upon said alley. This means that the judgment in the condemnation proceeding for the value of the land taken, and for damages to the land not taken, shall be assessed upon the lots abutting upon the proposed alley in proportion to the frontage thereon. The proposed alley is to be opened across two lots only. Those lots are owned by two persons only. It follows that the property abutting upon the proposed alley is the remainder of the two lots after taking out the land required for the alley, and that said remainder is the only property that is damaged by the opening of the alley. Therefore the judgment for the value of the land taken is assessed against the remainder of the lots from which the land is taken, and the judgment for damages is assessed against the land damaged. The consequence is that the owners of the two lots are compelled, either in whole or in part, to pay the condemnation judgments rendered in their own favor, as benefits are not offset against such judgments in an assessment by special taxation. For example, judgment was rendered in favor of Mrs. Loehr, the owner of lot 2, for \$365; \$265 for the value of the portion of the lot taken, and \$100 for damages to the part not taken; but this judgment is embraced in the amount of the special tax assessed against the part of her lot not taken, to wit, \$749; so that she not only gets no compensation for her land taken and no compensation for damages to her land not taken, but she is compelled to pay out \$384 in addition to her loss. The judgment in favor of Mrs. Latham, the owner of lot 1, was \$950, \$250 for the value of the portion of her lot taken, and \$700 for damages to the part not taken; but, as \$626 of this judgment is included in the amount of the special tax assessed against the portion of her lot not taken, she loses all of her judgment except \$324. Practically and in effect there is here a taking of private property for a supposedly public use without just compensation.

The general doctrine is that the constitutional prohibition against the taking of private property for public use without just compensation has reference to the exercise of the right of eminent domain, and not to the exercise of the taxing power. A strict application of this doctrine to the facts of the present case involves the following propositions: That the proceeding to condemn a part of the two lots for the opening of the alley is an exercise of the power of eminent domain; that in that proceeding the land condemned cannot be taken by the city without paying the condemnation judgment; that, on the other hand, the proceeding for an assessment of the special tax

upon the remainder of the lots is an exercise of the power of taxation; that the tax is imposed by the Legislature, or by a municipality authorized by the Legislature to impose it, for the purpose of raising money; that, as the imposition and collection of the tax do not require the exercise of the right of eminent domain, the constitutional prohibition has no application. Money is property, but where the Legislature, or a municipality acting under its authority, imposes a tax, many cases hold that the money raised by that tax—no matter how unjust the tax may be—is not private property taken for a public purpose without just compensation, within the meaning of the Constitution. The objection here, however, is not that the levy and collection of a special tax of \$1,875 upon the lot is the taking of \$1,875 in money from the taxpayers without any just compensation, either in the protection to be received from the government, or in the benefits to be conferred upon the residue of the property; but, on the contrary the objection is that, in the condemnation proceeding itself, a part of the lots was condemned and damage was inflicted upon the remainder without paying for the property so condemned and damaged, and without resorting to suitable means for the purpose of raising money to make such payment.

It has been held that a provision for compensation is an indispensable attendant upon the due and constitutional exercise of the power of depriving an individual of his property under the right of eminent domain. *Sage v. Brooklyn*, 89 N. Y. 189. *Chancellor Kent* has said that, to render valid the exercise of the power to take private property for public purposes, "a fair compensation must, in all cases, be previously made to the individuals affected, under some equitable assessment to be provided by law." *Gardner v. Newburgh*, 2 Johns. Ch. 162, 1 L. ed. 832, 7 Am. Dec. 826. Means must be provided whereby compensation can be obtained. *Chapman v. Gates*, 54 N. Y. 132. "Although it may not be necessary, within the constitutional provision, that the amount of compensation should be actually ascertained and paid before property is thus taken, it is . . . the settled doctrine . . . that, at least, certain and ample provision must be first made by law . . . so that the owner can coerce payment, through the judicial tribunals or otherwise, without any unreasonable or unnecessary delay." *People v. Hayden*, 6 Hill, 359. It is necessary that the Legislature, by some enactment, "make certain and adequate provision by which the owner can coerce compensation." 2 Dill. Mun. Corp. 4th ed. § 615. Some cases have gone so far as to hold that the remedy must be one to which the party can resort on his own motion, and that, if the provision be such that only the public authorities appropriating the land are authorized to take proceedings for the assessment, it must be held to be void. *Cooley, Const. Lim.* 6th ed. p. 693, and cases in note 1.

In recognition of the doctrine that proceedings for condemnation of private property for public purposes, under the right of eminent domain, must be attended by legislative provision for making compensation, the General Assembly passed section 53 of article 9. Under 18 L. R. A.

that section it has become the practice in this state to institute proceedings in accordance with sections from 18 to 51, inclusive, of article 9, for the making of special assessments upon the property specially benefited by the improvement, in order to raise the amount necessary to pay the compensation for property taken. The special assessment proceeding does not secure a complete compensation in money, but it results in the payment of the condemnation judgment, either in whole or in part, by offsetting against it the special benefits received by the property from the improvement. In the recent case of *Goodwillie v. Lake View*, 187 Ill. 51, the compensation awarded to one of the property owners in the condemnation proceeding exceeded the amount assessed as special benefits in the special assessment proceeding, and it was there held that the property was properly assessed for the amount of the benefits received, but that the balance of the award should be paid by the city from its corporate funds. In other words, where the proceeding instituted under section 53 is by special assessment, the property owner is compensated for the taking of his property, either in special benefits alone, or in special benefits and money. If, therefore, section 53 is so construed as to authorize a proceeding by special assessment, we are not prepared to say that it does not make such provision for compensation as will satisfy the requirement of the Constitution. But we do not think that section 53 should be so interpreted as to justify a resort to assessment by special taxation. Special taxation does not proceed upon the theory that the assessment must not exceed the special benefits received from the improvement. Where there is an award of compensation for land taken, an assessment by special taxation of the amount of the award upon the land not taken is not an adequate provision for compensation, because it compels the property owner to pay for his own land. This is especially true, where, as here, the condemnation judgment is for damages to the land not taken, as well as for the value of the land taken. In such case the special tax, imposed, as it is, upon the abutting residue in proportion to its frontage, falls upon property which has been judicially determined to be damaged. The owner cannot offset benefits against the tax, and consequently the assessment is not equitable.

It is said that the power of taxation vested in the Legislature is practically absolute, but this is only true where such power is not restrained by constitutional limitations. While the Constitution authorizes cities to make local improvements by special taxation, it at the same time forbids the taking of private property for public purposes without just compensation. The two provisions must be construed together, and neither must be so construed as to nullify the other. We have seen that the constitutional prohibition against the taking of private property without just compensation involves and requires some provision, which shall be ample and equitable, for raising money to pay such compensation. Where the provision so made is the levy of a tax, such tax levy is the mode of obtaining the compensation which is required to be made. Thus the power of taxation and the right of eminent do-

main are made to go hand in hand. The one aids the other. The constitutional exercise of the right of eminent domain necessitates a resort to the power of taxation. The power of taxation, when thus invoked as a means of providing compensation for the taking of private property, is necessarily restricted by the constitutional requirement in regard to such taking. The taxing power must be so exercised as to give to the property owner a just compensation, and hence cannot be exercised arbitrarily. In this way, the constitutional prohibition against taking private property without just compensation, though strictly applicable only to a taking under the right of eminent domain, operates as a limitation upon the power of taxation. The prohibition requires just compensation, and therefore the assessment, which is made to effectuate the prohibition, must be so made as to realize a just compensation. Where a part of a man's lot is taken for an alley, and the balance of the lot is damaged by opening the alley, special taxation of the part of the lot not taken, in proportion to its frontage as it abuts upon the alley, affords no just compensation for the loss. We are therefore of the opinion that section 58 does not authorize assessments by special taxation. The section is correctly entitled in the Revised Statutes of 1874 as follows: "Supplemental petition to assess benefits in condemnation case." Hurd, Rev. Stat. 1874, chap. 24, § 167; Id. § 53, art. 9; Id. p. 240.

The views here expressed do not materially conflict with any decision heretofore made by this court upon the subject of special taxation. The cases to which we have been referred are those where the improvements sought to be made by special taxation have been such improvements as did not require the actual taking and damaging of the property. We have sustained special taxation as a mode of raising money to build sidewalks, to grade and pave streets, to lay sewers, etc., but we know of no case where a judgment in condemnation for land taken has been assessed back by special taxation upon abutting property in proportion to frontage. An ordinance which requires such a proceeding is an unreasonable ordinance, and it is well settled that city ordinances must be reasonable and not oppressive. *Bloomington v. Chicago & A. R. Co.* 134 Ill. 451; *Hyde Park v. Carton*, 132 Ill. 100; *Tugman v. Chicago*, 78 Ill. 405; *Craw v. Tolono*, 96 Ill. 255, 36 Am. Rep. 148; 1 Dill. Mun. Corp. 4th ed. §§ 819, 821.

In *White v. People*, 94 Ill. 604, this court

sustained the power of the Legislature to provide for the construction of sidewalks in cities and villages by special tax upon the adjoining lots according to their respective frontage upon such sidewalks. But there the sidewalk was part of an existing street, and was unquestionably a benefit to the property of the owner in front of whose lot it was built; nor did its construction require the taking of any part of said lot. In *Craw v. Tolono*, *supra*, where it was held that there was no personal liability upon the owner of such adjoining lot to pay the special tax so levied for building a sidewalk, the majority opinion used the following language: "Serious apprehensions are expressed lest, under the power to enforce special taxation upon contiguous property for local improvements, cities may, in case of very expensive improvements, abuse the power, and, under the form of its exercise, practically confiscate private property to public use. So long as it is confined to sidewalks, there is little cause for such apprehension. It will be time enough to consider the question when a case of oppression occurs." The present record reveals just such a case of oppression as is referred to in the *Craw Case*. In *Allen v. Drew*, 44 Vt. 174, the Supreme Court of Vermont, speaking through Mr. Justice Redfield, said: "We have no doubt that a local assessment may so transcend the limits of equality and reason that its exaction would cease to be a tax, or contribution to a common burden, and become extortion and confiscation. In that case it would be the duty of the court to protect the citizen from robbery, under color of a better name." If the assessment in the case at bar is confirmed, it will amount practically and in effect, to a confiscation of the property of the appellees. We are therefore of the opinion that the county court committed no error in sustaining the objections and dismissing the petition. *Barnes v. Dyer*, 56 Vt. 469; *Washington Ave.* 69 Pa. 352, 8 Am. Rep. 255; *People v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 286; *Louise v. Newark*, 88 N. J. L. 151; *Harwood v. Bloomington*, 124 Ill. 48; *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451; *State v. Perth Amboy*, 52 N. J. L. 133; *State v. Ramsey County Dist. Ct.* 29 Minn. 62; *Genet v. Brooklyn*, 99 N. Y. 296.

The judgment of the County Court is affirmed.

Craig, J.:

I think this opinion in conflict with former decrees of the court, and I do not concur in the judgment.

INDIANA SUPREME COURT.

James B. HEYWOOD, Trustee, etc.,
Appl.,
v.

Leander A. FULMER *et al.*

(.....Ind.....)

A lease and not a mere license is made

NOTE.—*Distinction between a lease and a license.*
The above case presents with unusual clearness the distinction between a license and a lease of land.

18 L. R. A.

by a writing acknowledging the receipt of a specified amount of money in payment of a certain described sand-bar for one year with "the exclusive right to all gravel and sand for the year above named and excluding all other parties from said premises."

(November 17, 1892.)

In *Druze v. Wheeler*, 23 Mich. 489, the privilege given to certain persons to enter upon premises and shelter their teams whenever they attend a neighboring church was held not a lease but a mere li-

APPEAL by complainant from a judgment of the Circuit Court for Marion County in favor of defendants in a proceeding brought to enjoin them from entering on certain land and removing sand therefrom. *Affirmed.*

The facts are stated in the opinion.

Messrs. Upton J. Hammond and Edwin St. G. Rogers, for appellant:

When the owner of land enters into an agreement, upon a sufficient consideration, subjecting it to an easement, or servitude, or *profit a prendre*, and the land is afterwards sold and conveyed to one who has actual or constructive notice of the agreement, the purchaser and grantee will take the land bound by the agreement, and will be restrained from violating it, whether the agreement is, or is not, one which in law runs with the land.

Tulk v. Moxhay, 2 Phil. 774; *Parker v. Nightingale*, 6 Allen, 841, 88 Am. Dec. 632; *Whitney v. Union R. Co.* 11 Gray, 359, 71 Am. Dec. 715.

But it is not the consideration in which the agreement had, as between the parties to it, its support, that makes the agreement affect and subordinate the land when afterwards sold and conveyed to some third person for value; but it is the actual or constructive notice which such third person has of the agreement when becoming the purchaser and grantee of the land, which essentially achieves that result.

Paul v. Connersville & N. J. R. Co. 51 Ind. 527; *Davies v. Bear*, L. R. 7 Eq. 427; *Morland v. Cook*, L. R. 6 Eq. 252; *Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. 468.

Hence, the force of that class of cases where specific performance of a contract has been enforced against a vendee where the vendee, being familiar with the land, or having seen it shortly before becoming its purchaser and grantee, is held charged with constructive notice of the easement, or other similar right, to which the contract relates.

Shackleton v. Sutcliffe, 1 DeG. & S. 609;

cence where no continuous possession was contemplated.

An agreement by the lessee of a building to permit a third person to place a sign on the outside wall at a certain annual compensation is a mere license and not a lease within a covenant against underletting. *Lowell v. Strahan*, 145 Mass. 1.

The privilege of reasonable storage room in the basement of a building given to a tenant of upper rooms is a license and not a lease of any part of the building. *Cluett v. Sheppard*, 181 Ill. 636.

An agreement to let millowners have two acres of ground to hold and use as their own as long as they keep the mill upon it and keep the same in running order, there being no words of grant or conveyance of any description whatever, is a mere license. *Malott v. Price*, 109 Ind. 22.

A grant by a sealed instrument upon a consideration of the liberty of flowing land for twelve years without restriction and for eighty years during the winter half of the year between November 15 and May 15 is a lease. *Smith v. Simons*, 1 Root, 818, 1 Am. Dec. 48.

One having board and lodging at a certain place in which particular rooms are designated for his occupation does not thereby become a tenant. *White v. Maynard*, 111 Mass. 260, 15 Am. Rep. 28; *Wilson v. Martin*, 1 Denio, 602.

But the mere furnishing of a private table and similar accommodations to a tenant of certain rooms in a building does not prevent his occupancy from being that of a tenant. *Porter v. Merrill*, 124 Mass. 534.

An agreement for the use of gardens and a music hall on four days for a series of four grand concerts at a specified sum per day was declared not to be a lease although the question was not strictly decided in the case. *Taylor v. Caldwell*, 8 Best & S. 826.

No demise of a room is made by merely letting standing room for machines and furnishing power to run them. *Hancock v. Austin*, 14 C. B. N. S. 634.

Permission for a monthly rent to use a stable for horses subject to by-laws, rules, and regulations of a railroad company which owns the stables was held not to defeat the occupation of the railroad company for the purpose of taxation. *London & N. W. R. Co. v. Buckmaster*, L. R. 10 Q. B. 70.

And a grant of liberty and license until either party gives one month's notice to fasten a coal bulk to moorings placed in a river for a certain annual payment was held not a demise for the purpose of taxation but only a license. *Watkins v. Milton-Next-Gravesend Overseers*, L. R. 3 Q. B. 350. 18 L. R. A.

As to minerals.

In *Mountjoy's Case*, And. 807, Godb. 17, 4 Leon. 147, it was decided that a grant of the right for a term of years to take from certain premises sufficient ore for a specified purpose did not exclude the right of the grantor.

And again in a later case it was held that a leave for a term of years to take ore from land at a yearly sum is a license and not a lease of the land. *Ward v. Day*, 4 Best & S. 387.

So the mere liberty of digging for coal in another's lands does not give an exclusive right to the coal. *Chetham v. Williamson*, 4 East, 487.

And the grant of liberty to dig, work, and mine minerals through all parts of a tract of land, to take and dispose of the same, is only a license and not a lease. *Doe v. Wood*, 2 Barn. & Ald. 724.

A grant of a right for a term of years to dig fire coal from under certain lands is merely a license which does not preclude the granting of a similar right to another person. *Carr v. Benson*, L. R. 3 Ch. App. 524.

So in *Silsby v. Trotter*, 20 N. J. Eq. 228, a contract simply giving a right to take a definite quantity of ore at a specified price within a certain time did not exclude the grantor's occupancy of the mine.

And in *Grubb v. Bayard*, 2 Wall. Jr. 81, a grant of the right to dig and carry away all the iron ore in a certain tract of land at a specified rate per ton was held not to be a grant of the ore but merely an irrevocable license.

An oral agreement that another may enter on one's lands to dig for ore and put buildings thereon for that purpose paying a specified sum per ton for the ore was held in *Moore v. Miller*, 8 Pa. 272, to be a lease and that it was a question for the jury on conflicting evidence whether the lease was for a year or at will. It does not appear in this case that the technical distinction between a lease and license was particularly considered, but the chief question was as to the substantial property right of the co-called lessee to continue his mining operations for the time agreed.

A grant of the right to take ore at a specified price per ton does not exclude the grantor but is something more than a mere revocable license and amounts to an incorporeal hereditament. *Johnstown Iron Co. v. Cambria Iron Co.* 82 Pa. 241, 73 Am. Dec. 783. In this case also the main question was as to the exclusiveness of the grantee's right in the mine.

A grant or lease of the right and privilege to mine coal for a term of years at a specified price per ton was said in *Harlan v. Lehigh Coal & Nav.*

Grant v. Munt, Coop. 173; *Pope v. Garland*, 4 Younge & C. 394; *Bowles v. Round*, 5 Ves. Jr. 508; *Dyer v. Hargrave*, 10 Ves. Jr. 506; 2 Pom. Eq. Jur. § 611; *Spath v. Hankins*, 55 Ind. 155.

A parol license by the grantor to the grantee of land for the use of a way along the margin thereof, over other land of the grantor, does not create a right to the grantee which will fix a servitude upon the adjoining land after it has passed to a purchaser who had no notice of the supposed right.

Cox v. Leviston, 63 N. H. 288.

What the writing, and all that the writing, evinces in the way of intention in the direction of any sale and purchase of, or grant of, the sand bar, is no more nor less than an exclusive right, during the year 1890, of severing and removing gravel and sand from it.

Any lease that can be said to effect any transfer of any use or possession of land, as land, must first fulfill the condition of transferring some interest in land, as land.

Whether the writing be a lease is logically

determinable by the distinction made in adjudged cases between a contract for the sale of so much gravel and sand from a sand-bar, or land, as the vendee may see fit, during a designated length of time, to enter the sand-bar, or land, and sever and remove, and a contract for the sale of the use or possession of the sand-bar, or land, during a designated length of time, in the sense of an immediate transfer to the vendee of the property in its contents of gravel and sand, before and independently of any severance of such sand and gravel by the vendee from the sand-bar, or land.

See *Smith v. Simons*, 1 Root, 818, 1 Am. Dec. 48; *Owens v. Lewis*, 46 Ind. 488, 15 Am. Rep. 295; *Knight v. Indiana Coal & Iron Co.* 47 Ind. 105, 17 Am. Rep. 692; *Rogers v. Cox*, 96 Ind. 157, 49 Am. Rep. 152; *Martin v. Brewster Iron Min. Co.* 55 N. Y. 538, 14 Am. Rep. 322; *Moore v. Miller*, 8 Pa. 272; *Williams v. Gibson*, 84 Ala. 228, 5 Am. St. Rep. 868; *Fairchild v. Dunbar Furnace Co.* 128 Pa. 465; *Masot v. Moses*, 8 S. C. 168, 16 Am. Rep. 697.

Each of the above cases is a case where some

Co., 35 Pa. 287, to grant an interest in the land and not a mere license, but the only question actually decided in that case was that there was no implied warranty of the existence of coal on the land.

In the later case of *Funk v. Haldeman*, 58 Pa. 229, the distinction between a lease and a license was distinctly taken and it was decided that a deed for a present consideration and also for a share of the minerals that might be found giving a right to bore and excavate for oil and other minerals and with the exclusive use of one acre of land around each well or tip and certain other privileges conveyed an incorporeal hereditament, but that it was a license coupled with an interest and not a lease.

Substantially the same decision was made in *Gloninger v. Franklin Coal Co.*, 55 Pa. 9, 93 Am. Dec. 720, in respect to a grant of the "free right to dig coal" at a certain coal-bed.

So in *Dark v. Johnston*, 55 Pa. 164, 98 Am. Dec. 732, a contract for a present consideration and also for a share of the oil that might be found giving an exclusive right for ten years to sink and operate oil wells on certain lands was a mere license but not a revocable one.

Again in *Union Petroleum Co. v. Bliven Petroleum Co.*, 72 Pa. 173, the exclusive right and privilege of boring for salt, oil, or minerals granted for a cash consideration and a share of the proceeds of the work to continue until a mutual agreement to annul it was held to be an incorporeal hereditament but without especially distinguishing between a lease and license.

In *Shepherd v. McCalmont Oil Co.*, 38 Hun, 37, a grant of the right to bore for and take oil or other minerals, but not to hold possession of any part of the land for any other purpose, was held to be a license merely and not a grant of oil under the surface.

But the cases above are to be clearly distinguished from those in which all the minerals within certain land are expressly conveyed; such a conveyance grants an interest in the land and excludes the grantor from the mine. *Hope's Appeal* (Pa.) Jan. 4, 1888; *Caldwell v. Fulton*, 81 Pa. 475, 72 Am. Dec. 760; *Mosot v. Moses*, 8 S. C. 168, 16 Am. Rep. 697; *Knight v. Indiana Coal & Iron Co.* 47 Ind. 105, 17 Am. Rep. 692.

Thus the grant of minerals in and under land with a right to go upon the land and remove them and to occupy it with such constructions and buildings as may be necessary for the full enjoyment of the grant although reserving to the lessee

the right at any time to abandon the land and mining was held a lease and not a license. *Knight v. Indiana Coal & Iron Co.* *supra*.

So a grant of the right for ten years to enter all or any part of a tract to dig and take away minerals "that may be found on, by any person or persons, or contained in any part" of all that tract, but not to work at any time more than one third of the land, was held a demise of the minerals for ten years, because it was held to show an intent to exclude the grantor. *Masot v. Moses*, *supra*.

The same was held of a conveyance of the full right, title, and privilege of digging and taking away coal to any extent the grantee might think proper. *Caldwell v. Fulton*, *supra*.

So a contract purporting to be a license from the superintendent of the United States lead mines for smelting lead ore for the period of one year at a specified rent was held to be a lease as it called for possession of the land. *United States v. Gratiot*, 39 U. S. 14 Pet. 523, 10 L. ed. 673.

A conveyance of land reserving a specified quantity of ore at a certain price reserves a mere license. *Stockbridge Iron Co. v. Hudson Iron Co.* 107 Mass. 290.

In *Grubb v. Bayard*, *supra*, although the grant was of all the iron ore in the tract, the court regarded the fact that there was no obligation on the part of the grantee to mine any quantity as sufficient to prevent it from being anything more than a license as he was to pay only for what was mined.

Nothing more than a right or license or privilege to search and get the minerals is imported by the words "bargain and sell the right of digging for lead ore," which right is given for a specified gross sum. *Gillett v. Treganza*, 6 Wis. 842.

A license to work mines is necessarily an interest in lands, tenements, and hereditaments, which is within the Statute of Frauds, and possession under such a license created orally was held to be merely an estate at will. *Dealoge v. Pearce*, 38 Mo. 538.

In this case a six months' notice was held to terminate the right.

The right to dig and carry away ore in consideration of 1000 pounds of iron to be given from time to time is an incorporeal hereditament, and an oral agreement therefor is not valid but is good only as a license revocable at will. *Riddle v. Brown*, 20 Ala. 412, 56 Am. Dec. 202.

An oral contract for working a mine is a mere license and not a valid lease. *Wheeler v. West*, 71 Cal. 123.

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fixed and determinate part of the land became, by grant, separated in point of proprietorship, temporary or absolute, from the remaining part, being a proprietorship in some fixed and determinate part of the soil as such, as distinguished from proprietorship in a mere incorporeal right to enter on the soil to which the right generally extends and sever and remove from within its boundaries some unfixed and indeterminate portion of one or more of its component parts, to which the right specially relates.

In this case the right is to sever and remove gravel and sand from within the named boundaries of the "sand-bar" to the exclusion of any participant in such right, during the year 1890, as contradistinguished from the right or title to, or property in, all the gravel and sand within said named boundaries, and while and as part and parcel of and contained within the soil having such boundaries, and this forms the border line between the above cases, to which may be added:

Caldwell v. Fulton, 81 Pa. 475, 72 Am. Dec. 760; *Harlan v. Lehigh Coal Nav. Co.* 85 Pa. 287; *Stewart v. Chadwick*, 8 Iowa, 463; *Caldwell v. Copeland*, 87 Pa. 427, 78 Am. Dec. 436; *Kier v. Peterson*, 41 Pa. 357; *Armstrong v. Caldwell*, 53 Pa. 284; *Pennsylvania Salt Mfg. Co. v. Neel*, 54 Pa. 9,—and the cases of *Gloninger v. Franklin Coal Co.* 55 Pa. 9; *Rutland Marble Co. v. Ripley*, 77 U. S. 10 Wall. 339, 19 L. ed. 955; *Grove v. Hodges*, 55 Pa. 504; *Carnahan v. Brown*, 60 Pa. 23; *Punk v. Haldeman*, 53 Pa. 229; *Dark v. Johnston*, 55 Pa. 164, 93 Am. Dec. 732; *Arnold v. Stevens*, 24 Pick. 106, 35 Am. Dec. 805; *Grubb v. Bayard*, 2 Wall. Jr. 81; *Riddle v. Brown*, 20 Ala. 412, 56 Am. Dec. 202; *Desloge v. Pearce*, 38 Mo. 588; *Gillett v. Treganza*, 6 Wis. 343; *Union Petroleum Co. v. Bliven Petroleum Co.* 73 Pa. 173,—all of these being cases which proceed upon the ground of no title of any specific part of the land severed from the title of the land in general—an incorporeal hereditament.

The writing evinces a contract for the mere privilege, for the year 1890, of severing and removing such gravel and sand from the "sand-bar" as may be severed and removed at all during such year; so long as gravel and sand continue in their natural condition, and no act is done by the appellees towards their separation from the land, no property or title passes to the vendee. Had the appellant's vendor refused to permit the appellees, as vendees of such privilege, to enter on the land for the purpose of severing and removing from the freehold gravel and sand, as it was agreed they should be privileged to do, his refusal would have been only a breach of contract, remediable in an action for damages.

Drake v. Wells, 11 Allen, 141; *Giles v. Simonds*, 15 Gray, 444, 77 Am. Dec. 878; *Whitmarsh v. Walker*, 1 Met. 316; *Owens v. Lewis*, 46 Ind. 488, 15 Am. Rep. 295.

A purchaser of the land—one, at least, without actual or constructive notice of the contract—would not take the land affected by the obligation of the contract.

Boone v. Stover, 66 Mo. 430; *Cook v. Stearns*, 11 Mass. 533; *Coleman v. Foster*, 1 Hurst. & N. 37; *Wallis v. Harrison*, 4 Mees. & W. 538; *Kamphouse v. Gaffner*, 73 Ill. 453; *Wood v. 18 L. R. A.*

Leadbitter, 13 Mees. & W. 334; *Greeley v. Stilson*, 27 Mich. 153; *Bridges v. Purcell*, 18 N. C. 492; *Perry v. Fitzhove*, 8 Q. B. 757; *Carter v. Harlan*, 6 Md. 20; *Coleman v. Foster*, 37 Eng. L. & Eq. 489; *Shepherd v. McCalmont Oil Co.* 38 Hun, 37; *Williams v. Morrison*, 32 Fed. Rep. 177; *Punk v. Haldeman*, 53 Pa. 229.

More occasional entries on the land, as for the purpose of severing and removing gravel and sand, did not amount to a possession sufficiently clear, open, notorious, and unequivocal to be equivalent to constructive notice to a purchaser of the land.

Meehan v. Williams, 48 Pa. 238; *Brown v. Volkening*, 84 N. Y. 76; *Loughridge v. Bowland*, 52 Miss. 546; *Glidewell v. Spaugh*, 26 Ind. 819. *Messrs. C. S. Denny and W. F. Elliott*, for appellees:

Injunction will not lie for taking away rocks and minerals from mines and quarries, nor for cutting timber.

Hoch v. Bass, 133 Pa. 828; *Leininger's App.* 106 Pa. 393; *Sandys v. Murray*, 1 Ir. Eq. Rep. 29; *Thornton v. Roll*, 118 Ill. 850; *McMillan v. Ferrell*, 7 W. Va. 223; *Hatcher v. Hampton*, 7 Ga. 49; *Jerome v. Ross*, 7 Johns. Ch. 315, 2 L. ed. 805, 11 Am. Dec. 494.

The writing set forth in the complaint is a lease and not a mere revocable license.

12 Am. & Eng. Encyclop. Law, title *Lease*; *Jackson v. Harsen*, 7 Cow. 823, 17 Am. Dec. 517; *State v. Page*, 1 Speer's L. 408, 40 Am. Dec. 608.

No precise form of words is necessary to make a lease.

Alcorn v. Morgan, 77 Ind. 184; *Munson v. Wray*, 7 Blackf. 403.

An instrument conveying an estate in land, subordinate to that of the grantor, to a grantee, upon a valid consideration, and for a definite term, is a lease and not a license.

New York, C. & St. L. R. Co. v. Randall, 102 Ind. 453; *Smith v. Simons*, 1 Root, 318, 1 Am. Dec. 48; *Knight v. Indiana Coal & Iron Co.* 47 Ind. 105, 17 Am. Rep. 692; *Moore v. Miller*, 8 Pa. 272.

This case is ruled by *Massot v. Moses*, 3 S. C. 168, 16 Am. Rep. 697, where it was held that a grant, for a term of years, of the exclusive right to search for, take, and dispose of all phosphates found during the term in a designated tract of land was a demise of the beds or veins of phosphates contained in such land.

See also *Knight v. Indiana Coal & Iron Co. supra*; *Fairchild v. Dunbar Furnace Co.* 128 Pa. 485; *Moore v. Miller, supra*.

The right to get to the sand and haul it off would pass as a necessary incident to the grant even if the use of the premises were not given to the appellees.

See *Martin v. Brewster Iron Min. Co.* 55 N. Y. 538; *Williams v. Gideon*, 84 Ala. 228, 5 Am. St. Rep. 368; *Shep. Touch. 59*; *Rogers v. Coz*, 96 Ind. 157, 49 Am. Rep. 152.

McBride, Ch. J., delivered the opinion of the court:

A construction of the following writing will determine every question presented by the record in this case:

"Indianapolis, Ind., April 21, 1890. Received of Fulmer, Cooper & Co. one hundred and seventy-five dollars, in payment

of sand-bar on Fall creek, between Central avenue and Meridian street, and adjoining the land of F. W. Morrison on the south, and W. O. Patterson on the north, side of said creek for the year 1890. This is for the exclusive right to all gravel and sand for the year above named, and excluding all other parties from said premises. [Signed] W. O. Patterson."

When the writing was executed, W. O. Patterson, by whom it was executed, was owner in fee of the land on which the sand-bar referred to was located. On the 28th day of May following, he, with his wife, conveyed the land by warranty deed to the appellant, as trustee for himself (Heywood) and two other parties. This suit was brought to enjoin the appellees from entering upon the premises, and hauling away sand and gravel from the sand-bar in question. It is averred in the complaint that the appellees claim the right so to do by virtue of the foregoing writing. It is also alleged, in substance, that neither the appellant nor either of those united in interest with him had any knowledge of the existence of the writing in question at or before the execution of the deed to them, or any knowledge or notice that they had or claimed any such right to or interest in the land. The presentation of the question by both sides is able. The argument of counsel for the appellant is especially skillful and forceful. In deciding the case we will confine ourselves to the sole question discussed by the appellant. The determination of this question depends upon whether the writing above quoted is a lease, as the appellees contend, or is a mere license, under which, as against Patterson and others having notice of its existence, the appellees might enter upon the premises during the time limited, and remove an indeterminate quantity of sand and gravel, but which gives no interest in land itself, which is, we think, a fair statement of the appellant's contention. Among many definitions of a "lease" found in the books are the following: "A lease is a contract by which one person divests himself of, and another takes the possession of, lands or chattels for a term, whether long or short." Wood, Land, & T. § 208. "A lease at the common law is a grant or assurance of a present or future interest for life or for years, or at will, in lands or other property of a demisable nature, a reversion being left in the party from whom the grant or assurance proceeds." Platt, Leases, 1. "A lease is a species of contract for the possession and profits of lands and tenements, either for life or a certain term of years, or during the pleasure of the parties." 12 Am. & Eng. Encyclop. Law, title, *Lease*, 976. "No particular form of expression or technical words are necessary to constitute a lease, but whatever expressions explain the intention of the parties to be, that one shall divest himself of the possession of his property, and the other shall take it for a certain space of time, are sufficient and will amount to a lease for years as effectually as if the most proper and permanent form of words had been made use of for that purpose." 12 Am. & Eng. Encyclop. Law, 977. "No precise form of words is 18 L. R. A.

necessary to make a lease. Any written instrument expressing the agreement of the parties, signed by one and accepted and acted upon by the other, will be obligatory upon both." *Alcorn v. Morgan*, 77 Ind. 184. In the case from which we quote the foregoing, the written instrument which the court there held to be a written lease was in form a receipt, but also contained independent stipulations sufficient, in the opinion of the court, to make it also a contract. A lease may not only confer upon the lessee the right to the occupancy of the leased premises, either generally for the time limited, or for some specific purpose or in some specific manner, or the right to occupy and cultivate and to remove the products of cultivation; but it may confer upon him the power to occupy and remove a portion of that which constitutes the land itself. Familiar and common examples of such leases are those authorizing the lessee to quarry and remove stone, to open mines and remove ores, minerals, mineral coal, etc., or to sink wells for procuring and removing petroleum and natural gas. The power to execute leases for such purposes, and the fact that the instrument by which such interest in land is granted may be in all essential particulars a lease, will not be questioned. *Knight v. Indiana Coal & Iron Co.* 47 Ind. 105, 17 Am. Rep. 692. Manifestly, there can be no valid reason why a lease may not confer upon the lessee the right to remove a portion of the soil, or of sand and gravel found upon the surface of the land leased, as well as to remove stone or iron ore or mineral coal, found either upon the surface or beneath it. In our opinion, the writing in question contains all of the essential elements of a valid lease. Like the writing referred to in *Alcorn v. Morgan*, *supra*, it is in form a receipt. Like that writing, also, it contains additional independent stipulations sufficient to make it a contract. Apply to it the definitions of a "lease" above quoted. It will be found that by its terms the lessor divests himself of and confers upon the lessee the possession of the land for a definite period. The language used, "This is for the exclusive right to all gravel and sand for the year above named, and excluding all other parties from said premises," is sufficient to exclude even the lessor himself from the premises during the year 1890, and to give to the lessee during that time the exclusive right to enter. Nor can it be said that the right to remove gravel and sand is the right to remove an uncertain and indeterminate quantity. The court has no means of knowing what quantity of gravel and sand may be on the premises. But, during the year 1890, the lessees have the exclusive right to all that may be thereon. If possible for them to remove all of it within the time limited, they have the right to do so. If any remained at the expiration of the term, it would, without doubt, revert to the lessor, but during the existence of the term the right to all is absolute. Our construction of the writing leads to an affirmance of the judgment. *Judgment affirmed, with costs.*

Elliott, J., took no part in the consideration or decision of this case.

RHODE ISLAND SUPREME COURT.

Thomas D. REED

v.

EQUITABLE FIRE & MARINE INSURANCE CO.

(.....R. L.....)

1. Notice to an insurance company at the time of the issuance of a policy that there is prior insurance will estop it from asserting that the policy is void under a condition against other insurance.
2. A policy of insurance conditioned against other insurance is avoided by the existence of other insurance at the time of its issuance although such other insurance is not in effect at the time of the loss.
3. Avoidance of an insurance policy for breach of a condition against other insurance by the existence of a prior policy is not prevented by the fact that the latter contains a like condition, although a void policy is not a breach of such a condition.
4. A condition against other insurance contained in a policy of insurance is not waived by the issuance of the policy after notice to a mere soliciting agent of the existence of additional insurance.

(July 16, 1902.)

ON DEMURRER to replication in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Overruled as to the first point and sustained as to the others.*

The facts are stated in the opinion.

Messrs. Simon S. Lapham and John W. Hogan, for plaintiff:

The requirement for written assent to prior insurance may be waived by an insurance company and such waiver may be shown by acts and representations of its agents at the time of obtaining the policy as well as by conduct of the company.

Kenton Ins. Co. v. Shea, 6 Bush, 174, 99 Am. Dec. 676, and *note*; *German Ins. Co. v. Gray*, 8 L. R. A. 70, 48 Kan. 497, 19 Am. St. Rep. 150; *Bartlett v. Fireman's Fund Ins. Co.* 77 Iowa, 155; *American Ins. Co. v. Gallatin*, 48 Wis. 86; *Key v. Des Moines Ins. Co.* 77 Iowa, 174; *Sweetser v. Odd Fellows Mut. Aid Assn.* 117 Ind. 97; *Hough v. City F. Ins. Co.* 29 Conn. 10, 76 Am. Dec. 531; *Farnum v. Phoenix Ins. Co.* 88 Cal. 246; *Russell v. Detroit Mut. F. Ins. Co.* 80 Mich. 408; *Hoge v. Dwelling-House Ins. Co.* 138 Pa. 66; 2 Wood, Fire Ins. §§ 422-525; *Union Mut. L. Ins. Co. v. Wilkinson*, 80 U. S. 18 Wall. 222, 20 L. ed. 617; *Eames v. Home Ins. Co. of N. Y.* 94 U. S. 621, 24 L. ed. 298.

Notice to the agent is notice to the company. The only proper way to give notice to a corporation is to notify an agent of it, as corporations can act only by and through agents.

Hayward v. National Ins. Co. 52 Mo. 181, 14 Am. Rep. 400; *Kistler v. Lebanon Mut. Ins.*

Co. 5 L. R. A. 646, 128 Pa. 558; 2 Wood, Fire Ins. §§ 387-418, 423.

Where there are two policies of insurance upon the same property and the second contains a provision against prior insurance without assent, the second insurer cannot set up the prior policy in defense to a suit upon its policy, where the first policy had expired at the time of the loss. *New England F. & M. Ins. Co. v. Schettler*, 88 Ill. 166, and cases cited.

A second policy of insurance avoids a prior policy upon the same property, where the first policy contains a provision for forfeiture in case of subsequent insurance without assent of company.

Carpenter v. Providence Washington Ins. Co. 41 U. S. 16 Pet. 495, 10 L. ed. 1044; *Funk v. Minnesota Farmers Mut. F. Ins. Assn.* 29 Minn. 347, 48 Am. Rep. 216, and cases cited; May, Ins. §46.

If the agent solicited the insurance from the plaintiff and was the sole representative of the defendant company with whom the plaintiff dealt, throughout the entire transaction, taking his application, examining the property, receiving the premium and delivering the policy as alleged in this replication, then the plaintiff was warranted in relying upon the representations of the agent as to the assent of the company to prior insurance as he alleges.

Minnock v. Eureka F. & M. Ins. Co. 90 Mich. 288; *National Fire Ins. Co. v. Crane*, 16 Md. 260, 77 Am. Dec. 269, and cases cited in *note*; *Jennings v. Metropolitan L. Ins. Co.* 148 Mass. 61.

Even if the agent's representations are not effectual to estop the company from setting up the requirement for written assent as to prior insurance, the delivery of the policy itself after full notice constitutes in itself a written assent to such prior insurance, without the unnecessary ceremony of expressly assenting thereto by another writing.

Kenton Ins. Co. v. Shea, 6 Bush, 174, 99 Am. Dec. 676; *National Fire Ins. Co. v. Crane*, *supra*; *Rory v. American Cent. Ins. Co.* 182 N. Y. 49; *Gristock v. Royal Ins. Co.* 84 Mich. 161.

Conditions which enter into the validity of a contract of insurance at its inception may be waived by its agents although they remain in the policy when delivered.

Berry v. American Cent. Ins. Co. *supra*, and cases cited; *Oross v. National Fire Ins. Co.* 182 N. Y. 188; *Minnock v. Eureka F. & M. Ins. Co.* and *Gristock v. Royal Ins. Co.* *supra*; *McCabe v. Farm Buildings F. Ins. Co.* 14 Hun. 603.

An insurance company cannot be allowed to avoid its contract by setting up a cause of forfeiture which its own agent has been instrumental in producing.

Wilson v. Conway F. Ins. Co. 4 R. L. 141; *Greene v. Equitable F. & M. Ins. Co.* 11 R. L. 434.

Mr. Charles P. Robinson for defendant.

NOTE.—The state of the authorities and the conflict therein on the question of the waiver of a condition in an insurance policy by its issuance 18 L. R. A.

after notice to the insurance agent of the facts to which the condition applies are clearly shown by the opinion of the court.

Stiness, J., delivered the opinion of the court:

The plaintiff sues upon a fire insurance policy dated January 10, 1891, for the sum of \$1,800. The house and barn covered by the policy were totally destroyed by fire, November 5, 1891. The defendant's second plea sets up a condition that the policy should be void, except as to the interest of the mortgagee of the premises, in case the insured had or should afterwards have other insurance on said property without the assent of the defendant company in writing or in print, and avers that there was other insurance on said property, at the date of the policy, in the Attleboro Mutual Fire Insurance Company, without such assent, whereby the policy became void. To this plea the plaintiff replies—*First*, that the defendant had notice of the prior insurance at the time of making the contract; *second*, that there was no other insurance at the time of the loss; *third*, that as the Attleboro Company's policy had the same provision it became void upon the procurement of the policy in suit; and, *fourth*, that the plaintiff, before the issuing of the policy, informed the agent of the defendant company that the property was already insured in the Attleboro Company, as alleged in the plea. The defendant moved to strike out the first and fourth replications for certain technical defects, but these having been amended, the case now stands on demurrer to all the replications.

The first question is whether the defendant company is estopped from setting up the clause in question by notice to itself of the prior insurance at the time the policy was issued. The notice is not pleaded strictly as an estoppel, but, since the facts set forth can be shown on trial without special pleading, we see no reason why it may not be set up in the replication with the same legal effect that the fact would have in evidence. The same question was decided in *Greene v. Equitable F. & M. Ins. Co.*, 11 R. I. 434, where it was held that a mistake in a policy, limiting the amount of insurance after due notice to the company of a larger amount, might be shown in evidence by way of estoppel. The ground of the decision was that it would be a kind of fraud for the insurer to insist upon a forfeiture for which they were more blamable than the insured. It would be taking advantage of one's own wrong. We see no reason to question that decision, and following it we must hold the first replication to be good.

As to the second replication, we think it is clear that, as the condition in question relates to the validity of the contract at its inception, it is immaterial what the facts were at the time of the loss. If the policy was invalid at its issue, for want of consent for other insurance, it was invalid altogether. If it was not invalid, then it does not appear to be void at all, and hence it is of no consequence what the fact was at the time of the loss.

To sustain the third replication, we think it must appear that "other insurance," in the sense of the policy, is valid insurance. It has been held that when a policy is void by its own terms it is no insurance and no breach of the condition relating to other insurance. See *May, Ins. 2d ed. § 965*, and cases cited.

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The first policy in this case was valid prior to the date of the policy in suit. If the last policy was invalid, and there has been no subsequent insurance, it is difficult to see upon what ground the first policy is avoided, and the second held, as set up in the replication. With precisely the same clause in each policy the principle is not plain which would select the second as the subsisting policy and avoid the first. There may be good reason for saying that both should be avoided, as a guard against temptation on the part of the insured to obtain what he may suppose to be other good insurance; but we see no good reason for holding that the operation of the clause avoids the first policy and holds the second. In *New England F. & M. Ins. Co. v. Schettler*, 38 Ill. 166, cited by the plaintiff, it was held that other insurance on the property became void by a removal of the store insured from one lot to another, which was expressly assented to by the plaintiff in error, and hence there was no other insurance on the property to which the policy in suit attached after such consent, which was given upon the payment of a new consideration and increase of rate. The case is therefore quite distinguishable from the case at bar, and its syllabus seems to go beyond the decision. The cases of *Carpenter v. Providence Wash. Ins. Co.*, 41 U. S. 16 Pet. 495, 10 L. ed. 1044, and *Punko v. Minnesota Farmers Mut. F. Ins. Assn.*, 29 Minn. 347, 48 Am. Rep. 216, do indeed support the plaintiff's contention that the first policy was avoided by the issuing of the second, but upon the ground, which would be fatal to the replication, that both policies were avoided. We do not need to pass upon that question in this case, since under neither class of the cases referred to would the replication be good. If both policies are avoided by the operation of the clause in question, it is no answer to the plea to say that the first is void. If the other insurance must be valid insurance, the replication is not well founded in law, since under such a rule the first policy would not be avoided because of the invalidity of the second.

The fourth replication raises a question of greater difficulty, whether the fact that the plaintiff informed the agent of the defendant company, who procured the insurance, of the existence of other insurance, is a sufficient answer to the plea setting up the clause of the policy as to other insurance, and alleging the breach of it. Upon this point we think the tendency and weight of modern decisions are in favor of the plaintiff. In some of these cases, however, it is to be observed that the agents were general agents of the company, having full authority to make contracts of insurance and to issue policies, and consequently standing in the place of the company itself. See *German Ins. Co. v. Gray*, 43 Kan. 497, 8 L. R. A. 70, 19 Am. St. Rep. 150; *American Ins. Co. v. Gallatin*, 48 Wis. 36; *Berry v. American Cent. Ins. Co.* 182 N. Y. 49; *Cross v. National F. Ins. Co.* 132 N. Y. 133; *Minnock v. Eureka F. & M. Ins. Co.* 90 Mich. 236,—which were cases of general agents; *Hayward v. National F. Ins. Co.* 52 Mo. 181, 14 Am. Rep. 400, where the notice was given to the vice president of the company; and *National F. Ins. Co. v. Crane*, 16 Md. 260, 77 Am. Dec.

289, where the notice was given to the president of the company. Other cases hold that an agent to procure applications for insurance, and to forward them to the company, is an agent of the company who may waive the condition of the policy. *Key v. Des Moines Ins. Co.* 77 Iowa, 174; *Kistler v. Lebanon Mut. Ins. Co.* 128 Pa. 558, 5 L. R. A. 646; *Farnum v. Phœnix Ins. Co.* 88 Cal. 246; *Union Mut. L. Ins. Co. v. Wilkinson*, 80 U. S. 13 Wall. 222, 20 L. ed. 617; *Eames v. Home Ins. Co.* 94 U. S. 621, 24 L. ed. 298; *Russell v. Detroit Mut. F. Ins. Co.* 80 Mich. 407.

Most of the decisions of this class are based upon considerations of public policy; that the insured generally looks upon the agent of the company as its full and complete representative, and, in view of the apparent authority with which he is clothed, he must be so regarded, in order to protect the insured from an unconscionable advantage which the company may take from some provision of the policy. Doubtless there have been cases where the insurance companies have taken such advantage of the insured, but, doubtless, too, there have been quite as many cases where the insured have practiced imposition and fraud upon the company. The contract of insurance requires good faith on both sides. If a company cannot protect itself from fraudulent claims, either innocent stockholders must suffer, or all who have property to insure must contribute to such claims by the payment of rates sufficiently high to allow for the chances. There is much room for doubt, therefore, whether public policy requires the adoption of a rule which treats a contract of insurance differently from any other contract in writing. But, however this may be, we recognize the tendency of decision in favor of the insured, and, if this were a new question in this state, we might feel compelled to yield to the weight of authority. Opposed to this line of decisions,

Massachusetts has stood almost alone, with a sturdiness characteristic of the commonwealth, and the decision of this court in *Wilson v. Conway F. Ins. Co.*, 4 R. I. 141, was in harmony with the Massachusetts cases. In that case it was held that an agent who is empowered merely to receive applications to transmit to the company, and, if they chose to take the risk, to receive the policy and to issue to the applicant on payment of the premium, is not the agent of the company for the making of applications; that if he is employed by the applicant, or acts for him in drawing up the application, he is the applicant's agent, for whose mistakes the applicant is responsible; and that the company cannot be affected with notice by verbal communications made by an applicant to an agent so authorized. Stability of decision is very important in the administration of the law, and as this doctrine has stood so long in this state, apparently without question, and as it rests upon good reason, and is, moreover, in line with the rule of the state under whose law both these policies were issued, we see no sufficient ground to depart from it. See *Batchelder v. Queen Ins. Co.* 185 Mass. 449; *Lohnes v. Insurance Co. of N. A.* 121 Mass. 439. In Massachusetts general agents and officers of a company have authority to waive conditions in a policy. *Little v. Phœnix Ins. Co.* 123 Mass. 380, 25 Am. Rep. 96; *Shawmut Sugar Ref. Co. v. People's Mut. F. Ins. Co.* 12 Gray, 535; *Priest v. Citizens' Mut. F. Ins. Co.* 3 Allen, 602.

The replication in this case simply sets out that the plaintiff informed the agent of the company who applied to him for insurance of the existence of the prior policy. In our opinion, this is not sufficient to amount to a waiver.

The demurrer to the first replication to the second plea must be overruled, and the other demurrers sustained.

MINNESOTA SUPREME COURT.

SAVINGS BANK OF ST. PAUL, *Appt.*,

v.

Danet AUTHIER *et al.*, and E. J. Daly, *Respt.*

(.....Minn.....)

*A summons directed to the defendant was served upon another person. The latter mailed to the defendant the copy served upon him, and the defendant received it by mail. Held, no service, and judgment having been entered on default, the defendant was entitled to have it set aside as void on motion, without showing a meritorious defense.

(December 27, 1892.)

APPEAL by complainant from an order of the District Court for Ramsey County setting aside a judgment in its favor in an

*Headnote by DICKINSON, J.

action brought upon a bond conditioned to save it harmless and free from all loss by reason of the filing of mechanics' liens against certain real estate. *Affirmed.*

Daly was a surety upon the bond of which Authier was principal. The summons seems to have been regularly served upon Authier, and on November 19, 1891, a deputy sheriff of Ramsey county approached one, John E. Dailey, and asked him if his name was Daly. Upon receiving an affirmative reply the deputy handed him a copy of the summons and complaint. Dailey afterward discovered, upon reading the papers, that he was evidently not the person intended to be served, and he thereupon enclosed the summons and complaint in an envelope directed to E. J. Daley, St. Paul, Minnesota, and deposited the same in a letter box. This letter was received by E. J. Daly on December 4, 1891.

NOTE.—This brief case, although it may seem to be too plain for dispute, is reported in connection with the one following to illustrate the subject 18 L. R. A.

of personal service, as to which, see also *Wilson v. Trenton*, 16 L. R. A. 200, 53 N. J. L. 645.

Further facts appear in the opinion.

Mr. O. H. Comfort, for appellant:

Minn. Gen. Stat., chap. 66, § 59, provides that the summons shall be served "by delivering a copy."

This was done, at the latest, on December 4, 1891. It was then the mail carrier delivered it to him under circumstances sufficient to notify him that "service" was intended.

Under chap. 66, § 74, a "summons," which is not "process," but "notice," may be served by mail.

It is "the fact of service which gives jurisdiction and not the evidence of it."

Skillman v. Greenwood, 15 Minn. 102; *Mills Lacs County Comrs. v. Morrison*, 22 Minn. 179.

The court had jurisdiction of the action and of the parties, including this defendant, at the time the judgment was entered. Such a judgment may be "voidable, but is never void," and this principle needs no citation of authorities in this state.

By continuation of the act of the officer, by J. E. Dailey, the service upon him became service upon this defendant, being coupled with the notice (letter) stating these papers had been served, were intended for defendant, he hoped he would get them, etc.

Defendant consented to this and accepted such service as such continuation, and did not object to or return the papers to any one.

Defendant's neglect to at least attempt return of these papers estops him to say they were not served.

Frear v. Heichert, 34 Minn. 96.

Messrs. Williams & Schoonmaker, for respondent:

"The summons shall be served by delivering a copy thereof to the defendant personally."

Minn. Gen. Stat. 1878, § 59.

Some person must deliver to the defendant personally a copy of the summons, knowing that the paper so delivered is a copy of a summons, and intending to serve the same on the defendant for the purpose of commencing an action against him.

The person making the service must have authority from the plaintiff to make such service, otherwise there is no authority or intent to commence an action, and hence no service.

See *Bardwell v. Collins*, 9 L. R. A. 152, 44 Minn. 97.

The recognized way of serving process, in the absence of statutory provision, is by delivering a copy and showing to the defendant, if he desires it, the original.

Smith v. Kerr, 49 Hun. 29; *Williams v. Von Valkenburg*, 16 How. Pr. 153; *Goggs v. Huntington*, 12 Mees. & W. 503.

The mode of serving prescribed by statute must be strictly followed.

Haffner v. Gunz, 29 Minn. 108.

Even if the judgment be considered only voidable and not absolutely void, still the court was justified in vacating it.

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Covert v. Clark, 23 Minn. 539.

Every defendant may insist that legal proceedings against him shall be conducted regularly and according to the law and practice of the courts, as well where he has a defense upon the merits as where he suffers a default to pass against him, and he is never obliged to disclose merits, or allege excuses (except, perhaps, unreasonable delay) when he assails his adversary's proceedings for irregularity or informality.

Mackubin v. Smith, 5 Minn. 367.

Dickinson, J., delivered the opinion of the court:

This is an appeal from an order setting aside a judgment entered upon default against the above-named respondent with another in the district court. The court was right in setting aside the judgment, for no jurisdiction over the defendant had been acquired by a service of the summons upon him. It was shown so as to leave no room for doubt that the service, upon proof of which the judgment was entered, was really made upon another person,—one John E. Dailey. The latter, discovering the mistake, mailed to the defendant the copy of the summons served upon him, with a letter explaining the matter. The copy so sent by mail was received by the defendant before the entry of the judgment. Within a few days after the entry of the judgment the application was made to set it aside. The facts as to the service being as above stated, it is perfectly useless to try to sustain the judgment, or to oppose the order setting it aside. The transmission of the summons by mail was wholly unauthorized by law as a mode of service, and of no more effect, although the defendant received it, than would have been his finding it in the street if it had been lost. The statute not only prescribes that service shall be made by delivering a copy thereof to the defendant personally, (special provision being, however, made for a different mode of service at the house of his usual abode,) but it in terms declares that the provision with reference to the service by mail of notices and other papers in actions shall not apply to the service of a summons. Gen. Stat. 1878, chap. 66, §§ 59, 78.

The judgment being void for want of jurisdiction, the appellant was entitled to have it set aside, even though he made no showing of a meritorious defense. *Haffner v. Gunz*, 29 Minn. 108.

As the judgment might properly have been set aside without condition, the appellant has no reason to complain that conditions were imposed upon the respondent not prejudicial to the appellant. He cannot complain that the respondent was allowed to answer, interposing any defense which he might then have.

Order affirmed.

ILLINOIS APPELLATE COURT.

J. Fred TREFTZ, *Appt.*,

v.

Edward L. STAHL.

(.....Ill. App.)

1. An affidavit is not sufficient as a basis for setting aside of a judgment entered after trial *ex parte* which states simply that defendant "has fully stated his case to his attorney, who has advised him that he has a good defense on the merits to plaintiff's action."
2. That service of notice of a motion to place a case on the short-cause calendar is defective because the copy was left only with one who merely has desk room in the office which defendant's attorney occupies is waived if such attorney acquires knowledge of the attempted service and with reason to believe that plaintiff's attorney is relying on such service suffers the case to be placed upon such calendar and tried without objection.
3. Knowledge on the part of defendant's attorney of an attempted service upon him of a notice of motion to place a case upon the short-cause calendar by leaving a copy with a co-occupant of the same office will be assumed where it is not positively denied but the affidavits of denial merely deny facts the nonexistence of which is perfectly consistent with such knowledge.

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A PPEAL by defendant from a judgment of the Circuit Court for Cook County refusing to set aside a judgment rendered after an *ex parte* hearing in favor of plaintiff in an action appealed from a Justice's Court. *Affirmed.*

The Illinois Practice Act requires every case to be placed on the docket in the order of its commencement, and to be called and tried in its order on the docket.

As constituting an exception in certain cases to the provisions of the above Act the Legislature passed the following Act:

Be it enacted by the People of the State of Illinois, represented in the General Assembly: That it shall be the duty of the clerk of each court of record, in this state, to prepare a trial calendar, in addition to the regular trial calendar, of each court, to be known as the "Short-cause Calendar." Upon the plaintiff, his agent or attorney, in any suit at law pending in any court of record, filing an affidavit that he verily believes the trial of said suit will not occupy more than one hour's time, and upon ten days' previous notice to the defendant, his agent or attorney, said suit shall be placed by the clerk upon said "Short-cause Calendar."

NOTE.—The practical importance of the question involved in the above case as to the waiver of defective service of motion papers and the fact that such questions rarely reach courts of last resort, furnish good reason for reporting the above case in this series. In addition to this the decision seems to be quite unusual. The general rule is that service must be personal in the absence of any specified provision as to the mode, and in this 18 L. R. A.

On February 11, 1892, one of the attorneys for plaintiff in this case filed an affidavit stating that he verily believed that the trial of the suit would not occupy more than one hour's time. On the same day a notice was drawn informing defendant's attorney that such affidavit had been filed and that the clerk of court would place the suit on the short-cause calendar for trial as the statute provided. On February 13, 1892, one A. N. Eastman made affidavit that he served the notice by leaving a true copy on February 11, 1892, with a person giving his name as Burdett, in charge of the office of said defendant's attorney. On March 7, 1892, and in the absence of defendant or any attorney representing him, the cause was reached on the short-cause calendar and called for trial, and judgment was entered against defendant.

Subsequently a motion was made by defendant to set aside the verdict and judgment and grant a new trial upon the ground that neither defendant nor his attorney were ever directly or indirectly notified that said cause had been placed on the short-cause calendar for trial, and that the same was improperly and irregularly placed thereon.

In support of said motion an affidavit was filed by defendant in which he stated that he had fully stated his case to his attorney who had advised him that he had a good defense on the merits to the plaintiff's action. That no notice that said cause was to be placed on the short-cause calendar had ever been served on the defendant and that he had no knowledge that said cause had been placed on said calendar or was to be tried at the present term until after it had been called and disposed of by the court.

Also an affidavit of William F. Bigelow, defendant's attorney, stating that deponent had no notice that said cause had been placed on the short-cause calendar and was to be brought to trial at the present term of court. That "he has not now and never has had any business relations with John B. Burdett who has desk room" in the same office with deponent, "but never has been in charge of said office." That both Burdett and deponent "are now and for several months prior hereto have been subtenants, having only desk room in the said room; that deponent never at any time authorized nor requested Burdett to accept service of papers for deponent; that he had no knowledge that said cause had been placed on the short-cause calendar and was to be tried at the present term of court until after it had been called and disposed of."

Also an affidavit of John B. Burdett to the effect that he was a subtenant and had desk

case it seems that no mode of service was specified; but service not personal is upheld on the ground that the defect was waived by mere failure to object to its sufficiency.

For the general rule as to what constitutes personal service, see the preceding case of *St. Paul Sav. Bank v. Arthur* (Minn.), ante, 498; *Wilson v. Trenton*, 16 L. R. A. 200, and note, 53 N. J. L. 645, reviewing the authorities on the subject.

room in the same office with defendant's attorney; that he had never been connected as an employé or otherwise with such attorney; that he was never authorized nor requested to receive papers or accept service of same for said attorney; that he never had charge of said attorney's office. That "on February 11, a person to deponent unknown, handed deponent the paper (the above-mentioned notice) and at the same time requested deponent to give it to Bigelow. That deponent did not then know or learn the contents of said paper. That he forgot to give the paper to Bigelow or to notify him of its existence, or that he had same in his possession, until about three o'clock on the afternoon of March 7, when he was asked by Bigelow if he had ever received such paper. Also another affidavit by Burdett to the effect that he had desk room in the same room as Bigelow, that he was not an attorney, or engaged in the practice of law, but was a dealer in patented inventions. That he never had charge of Bigelow's office, nor represented to Eastman or any other person that he did have such charge. That he is a total stranger to defendant and is not and never was his agent or attorney.

The motion was overruled and the defendant took this appeal.

Messrs. William F. Bigelow and George A. Gary, for appellant:

To authorize the placing of a case on the short-cause calendar, the statute requires ten days' previous notice to the defendant, his agent or attorney.

8 Ill. Stat. (Starr & C.) p. 1000.

The statute does not specify the mode of service. In such a case the service must be personal.

Chicago & A. R. Co. v. Smith, 78 Ill. 97; *St. Louis v. Goebel*, 82 Mo. 295; *Doulin v. Hettlinger*, 57 Ill. 348.

In this case there was no pretense of any personal service on the defendant, his agent or attorney.

There was no authority conferred on the court below, nor on its officials, to place this cause on the short-cause calendar, and that court had no jurisdiction to try the case when reached thereon.

O'Conner v. Mullen, 11 Ill. 60; *Chase v. Hathaway*, 14 Mass. 222; *Keech v. People*, 23 Ill. 478; *Long v. Thompson*, 60 Ill. 27; *Gavin v. Wells County Comrs.* 104 Ind. 201.

By trying the case without the notice to defendant required by statute, and without his knowledge, he was deprived of his day in court. To this he was entitled, and it means "the day on which the cause is reached for trial in pursuance of the forms and methods prescribed by law."

Ketchum v. Breed, 66 Wis. 92; *Ogden v. Davidson*, 81 Va. 759.

In trying the case and entering judgment at the time it did the court below itself violated the express provisions of the Practice Act, and its judgment must be void.

Practice Act, chap. 110; Rev. Stat. §§ 15, 17; *Clapp v. Rauch*, 90 Ill. 468.

How was the circuit court on March 7 last, or how is this court even now, to know that the former on that date had authority, by 18 L. R. A.

virtue of any fortuitous cognition of the notice by Bigelow to then try the case?

Allen v. Strickland, 100 N. C. 225.

The court then knew from Eastman's affidavit that no legal service on defendant, his agent or his attorney, had been made, and that the foundation of its jurisdiction had not been laid.

Authority is jurisdiction.

Anderson, Law Dict. def. *Jurisdiction*, p. 580.

A judgment rendered without jurisdiction to enter it at the time of its entry is not merely irregular or voidable, but it is void.

Ferguson v. Jones, 8 L. R. A. 620, 17 Or. 204; *Alderson v. Marshall*, 7 Mont. 288; *Davidson v. Clark*, Id. 100.

It is clearly established that the copy of the notice left with Burdett did not reach Bigelow until after trial; nor till then did knowledge of its existence reach him through Burdett. This court's theory, therefore, must be that notice in writing or by copy is not necessary.

Allen v. Strickland, *supra*.

If staying out of court and suffering the case to go on is a waiver, of what use is service of process in any case?

The objection cannot be overcome by the claim that this was not process, but only notice.

Hollingsworth v. Barbour, 29 U. S. 4 Pet. 472, 7 L. ed. 924.

If this court insists upon ruling that, in the absence of an express statutory provision therefor, service upon a stranger, or leaving with a stranger for delivery to the real party, a writ or notice, constitutes service of any kind upon such party, the assertion is respectfully ventured that in such a holding it will enjoy the unique distinction of standing alone among courts.

Fowler v. Mosher, 85 Va. 421; *McConkey v. McCraney*, 71 Wis. 576; *Watertown v. Robinson*, 69 Wis. 290; *Witt v. Meyer*, Id. 598.

Where a statute provides for service but is silent as to the method, personal service is required.

McDermott v. Board of Police for Metropolitan Police Dist. 25 Barb. 686; *Rathbun v. Acker*, 18 Barb. 898; *People v. Lockport & B. R. Co.* 13 Hun. 211; *St. Louis v. Goebel*, 82 Mo. 295; *Chicago & A. R. Co. v. Smith*, 78 Ill. 97.

Even if the notice had been turned over by Burdett to Bigelow on the day of its delivery, the service would have been void and no authority conferred on the circuit court to act.

Harrell v. Mexico Cattle Co. 78 Tex. 612; *Ferguson v. Jones*, 8 L. R. A. 620, 17 Or. 204; *Alderson v. Marshall*, 7 Mont. 288; *Davidson v. Clark*, Id. 100.

The statute does not contemplate and never intended service by proxy and at random, and no advantage whatever can inure to the plaintiff by reason of such service.

Watertown v. Robinson, 69 Wis. 280.

Because of failure of legal service the judgment was and is void.

Windsor v. McVeigh, 98 U. S. 274, 28 L. ed. 914; *Smith v. Woolfolk*, 115 U. S. 148, 29 L. ed. 857; *Ferguson v. Jones*, *supra*; *Clapp v. Rauch*, 90 Ill. 468; *Fisher v. National Bank of*

Commerce, 78 Ill. 34; *Angel v. Plume & A. Mfg. Co.* 78 Ill. 412; *Grinwald v. Shaw*, 79 Ill. 449.

Messrs. Weigley, Bulkley & Gray, for appellee:

Assuming that the service of this notice upon Burdett, a regular occupant of the office with Bigelow, is not a compliance with the statute, the placing of said case upon the short-cause calendar and proceeding with the trial of the same when reached upon said calendar does not make the judgment rendered in the cause a void judgment.

The circuit court had jurisdiction of the parties and the subject-matter in controversy, and having jurisdiction the judgment entered would not be void, however irregular.

Stempel v. Thomas, 89 Ill. 147; *Graceland Cemetery v. People*, 92 Ill. 619.

Gary, P. J., delivered the opinion of the court:

There is no indication of any merit in the case of the appellant. His affidavit filed to set aside proceedings only states "that he has fully stated his case to his attorney, who has advised him that he has a good defense on the merits to plaintiff's action." Who was the attorney, or what was the statement on which he advised, does not appear. The affidavit should have stated the facts on which he rests a defense. *Roberts v. Corby*, 86 Ill. 182.

The case was tried *ex parte* on the short-cause calendar. The service of a copy of the affidavit and notice necessary to get the case upon that calendar may be admitted to be defective, but the indications are strong that the appellant's attorney had knowledge that such service had been made upon a co-occupant of his office.

These indications are in the care with which the attorney swears that he had no notice that the case "had been placed on the short-cause calendar and was to be heard at the then term of court."

If, having the notice and affidavit before him, he kept still, he would not have the notice which he denies, nor is his own affidavit helped out by that of his office companion "that he forgot to give (the paper to the attorney) or to notify him of its existence, or that he had same in his possession," etc.

Notwithstanding all of these denials, the attorney of the appellant may have been fully aware that the affidavit and notice had been left for him at his office, and had good reason to believe that the attorneys of the appellees were relying upon the services as sufficient, and about to proceed in conformity to the notice.

With such knowledge and reason to believe, if the attorney of appellant laid by and suffered the case to go on upon the short-cause calendar without objection, the irregularity of the service was waived. "The rule in cases of mere irregularity requires the party to move at the first opportunity, or show an excuse for not doing so. Where the merits are involved, the rule is not applied with so much rigor." *Lawrence v. Jones*, 15 Abb. Pr. 110.

Here, as before said, there is no indication of any merit with the appellant.

This view of the case renders it unnecessary to consider whether the motion to set aside the verdict and judgment, actually filed, but not called to the attention of the court during the term at which the case was disposed of, could be granted by the court at a subsequent term. See *Prall v. Hunt*, 41 Ill. App. 140.

The judgment is affirmed.

Rehearing denied.

INDIANA SUPREME COURT.

STATE of Indiana, *Appl.*,

v.

INDIANA & ILLINOIS SOUTHERN
R. CO.

(.....Ind.....)

1. The rule that penal statutes are to receive a strict construction is not violated by taking the common-sense view of the statute as a whole and giving effect to the object of the Legislature if a reasonable construction of the words permits it.
2. A statute providing that a "corporation, company, or person" operating a railroad shall place in the passenger depot of such "company" a blackboard upon which such "company or person" shall cause to be written the fact as to whether trains are on time is clearly intended to apply to corporations as well as natural persons although the word "corporation" is not repeated in each clause.
3. The words "each passenger depot . . . located at any station . . . at which there is a telegraph office" at

which a railroad company is required by the Indiana Act of 1889 to provide a blackboard on which shall be stated whether a train is on time or not, do not mean merely the station house for passengers but include every station where a train stops if there is a telegraph office at such point at which information is received as to the arrival of trains at such stopping place.

4. What constitutes a passenger depot or a station at a particular place is a question of fact.
5. The penalty for failure to report on a blackboard the time of the arrival of trains provided by Act 1889, § 2, cannot be avoided by the failure to provide a blackboard, which is expressly required to be done by § 1 of the Act.
6. A statute requiring a report on a blackboard as to whether trains are on time at every station where there is a telegraph office is not unconstitutional as class legislation where it applies uniformly to all persons operating railroads and to the same class of stations.
7. A court judicially knows that telegraph lines are maintained, operated,

NOTE.—No similar statute seems to have been adjudicated prior to the above decision upon the 18 L. R. A.

Indiana statute to compel railroad companies to furnish blackboard notices of the time of trains.

and used in connection with railroads, and are necessary to their proper operation.

8. A penalty recoverable by a civil action although called a fine in the statute providing for it is not a fine within the meaning of the Indiana Constitution, art. 8, § 2, providing that "fines assessed for breaches of the penal law of the state" shall go to the common school fund.

9. Giving a prosecuting attorney an interest in a penalty does not prevent due process of law.

10. More than one penalty can be incurred by violating the Indiana Act of 1889, which requires a report at each railroad station at which there is a telegraph office as to whether trains are on time and that "for each violation" in failing to report or making a false report a penalty may be recovered, but there can only be one forfeiture as to one train at any particular station on the same trip.

11. A state statute requiring railroad companies to report at each station at which there is a telegraph office whether trains are on time or not is not a regulation of interstate commerce, although the information to be noted must be received from an agent in another state through the agency of a telegraph company engaged in interstate commerce.

(December 13, 1892.)

A PPEAL by the state from a judgment of the Circuit Court for Greene County in favor of defendant in a proceeding brought to enforce the statutory penalties for defendant's failure to provide blackboards and note thereon information as to the movements of trains. *Reversed.*

The facts are stated in the opinion.

Messrs. W. C. Hults, O. B. Harris, John C. McNutt, A. F. Wray, Thomas B. Adams and Isaac Carter for appellant.

Messrs. John T. Hays, H. J. Hays and P. H. Blue, for appellee:

The rules of strict construction control. A court cannot create a penalty by construction, but must avoid it by construction, unless it is brought within the letter and the necessary meaning of the Act creating it.

Burgh v. State, 108 Ind. 132; *Western U. Teleg. Co. v. Ferguson*, 57 Ind. 495; *Western U. Teleg. Co. v. Harding*, 103 Ind. 505; *Lowe v. State*, 72 Ind. 285; *Stribbling v. State*, 56 Ind. 79; *Schmidt v. State*, 78 Ind. 41; *Endlich, Interpretation of Statutes*, § 830.

The statute does not apply to corporations, by reason of the omission of that word.

See *Endlich, Interpretation of Statutes*, § 336; *Remington v. State*, 1 Or. 281.

It cannot be maintained that the word "corporation" is embraced in the terms "company or person."

It is the duty of the court to avoid a construction which would imply that the Legislature was ignorant of the meaning of the language it employed.

Montclair v. Ramsdell, 107 U. S. 153, 27 L. ed. 482; *Dearborn v. Brookline*, 97 Mass. 470; *Ferrett v. Atwill*, 1 Blatchf. 151; *United States v. Willberger*, 18 U. S. 5 Wheat. 76, 5 L. ed. 37; *Kyd, Corp.* p. 218; *Remington v. State*, *supra*.

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If the Act is valid the penalties are not cumulative.

If the putting up of the blackboard is a part of making the report, so long as that failure continues, it remains one and the same failure, and but one penalty could be assessed; after which a resort might be had to mandamus, whereby the party injured, if any one, could compel the erection of a blackboard.

Cummins v. Evansville & T. H. R. Co. 115 Ind. 417.

Upon the question of when penalties will be construed as cumulative, and when not so—

See *Parks v. Nashville, O. & St. L. R. Co.* 18 Lea, 1.

There can be but one penalty growing out of the provisions of the Act, in failing to report, and another out of the violation of the provision, in making a false report.

Washburn v. McInroy, 7 Johns. 184; *Deyo v. Rood*, 8 Hill, 528; *Tiffin v. Driggs*, 13 Johns. 252; *Sturgis v. Spofford*, 45 N. Y. 453; *Fisher v. New York Cent. & H. R. R. Co.* 46 N. Y. 659; 1 Rorer, Railroads, p. 577; *Murray v. Gulf, C. & S. F. R. Co.* 68 Tex. 407.

The Act is in conflict with § 1, art. 14, of the Federal Constitution, and § 12, art. 1, of the state Constitution.

The Act deprives railroad companies of these great constitutional rights, in this: that it, in effect, offers a bribe to a judicial officer who is intrusted with the administration of justice.

State v. Henning, 33 Ind. 189; *State v. Walls*, 54 Ind. 561.

It savors more of bribery, and purchase, than any other terms known to the law.

Lieber's Political Ethics, pp. 411, 418, 420; *Meister v. People*, 31 Mich. 102; *Com. v. Gibbs*, 4 Gray, 146; *People v. Hurst*, 41 Mich. 323; *Sneed v. People*, 38 Mich. 251; *Curtis v. State*, 6 Coldw. 9; *Cooley, Const. Lim.* 4th ed. p. 382; *People v. North Chicago R. Co.* 88 Ill. 545; *People v. Wabash, St. L. & P. R. Co.* 12 Ill. App. 268; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *Wilder v. Chicago & W. M. R. Co.* 70 Mich. 382; *Durkee v. Janesville*, 28 Wis. 468; *Calder v. Bull*, 3 U. S. 8 Dall. 388, 1 L. ed. 649; *San Mateo County v. Southern Pac. R. Co.* 116 U. S. 138, 29 L. ed. 589, 8 Am. & Eng. R. R. Cas. 11; *Ah Kow v. Nunan*, 5 Sawy. 562; *Re Ah Fong*, 3 Sawy. 144; *Pearson v. Portland*, 69 Me. 278, 31 Am. Rep. 276; *Portland v. Bangor*, 65 Me. 120, 20 Am. Rep. 681; *Missouri v. Lewis*, 101 U. S. 22, 25 L. ed. 989; *Live Stock D. & B. Assn. v. Crescent City L. S. L. & S. H. Co.* 1 Abb. U. S. 398; *Parrott's Chinese Case*, 6 Sawy. 377; *Kuntz v. Sumption*, 2 L. R. A. 655, 117 Ind. 1; *Wilson v. State*, 16 Ind. 392.

The Act is in conflict with § 23, art. 1, of the Constitution, which prohibits class legislation.

Cooley, Const. Lim. 4th ed. p. 491; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *State v. Denny*, 4 L. R. A. 79, 118 Ind. 382; *Evansville v. State*, 4 L. R. A. 93, 118 Ind. 435.

It not only selects that class of citizens who operate railroads best, and enjoins a continuous and arduous duty on them, not enjoined on those who operate railroads poorly, and not enjoined on any other common carrier, but for any failure of this lasting, continuous, and never ending duty, it bribes a public officer, one whose public duties are directly connected

with the administration of justice, so that, as to this class, the laws are harshly enforced as against no other class of citizens.

As a class, they are to be arraigned by an officer of the court, who no longer stands as an impartial representative of the state.

As a class, they are arraigned and prosecuted by a judicial officer, who is impelled to a bitter prosecution by the powerful motive of private greed and personal gain.

No other class of citizens is enforced into a compliance with the law by means of the prosecuting attorney getting one half the penalties.

State v. Pennoyer, 5 L. R. A. 709, 65 N. H. 113; *Gaffly v. Rushville*, 107 Ind. 503; *Evansville v. State*, 4 L. R. A. 98, 118 Ind. 426; *State v. Denny*, 4 L. R. A. 79, 118 Ind. 400; *Louthan v. Com.* 79 Va. 196; *Ex parte Frank*, 52 Cal. 606; *Atty-Gen. v. Detroit Board of Councilmen*, 58 Mich. 213, 55 Am. Rep. 675; *Wilder v. Chicago & W. M. R. Co.* 70 Mich. 383; *Schut v. Chicago & W. M. R. Co.* 70 Mich. 438; *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104.

The forfeitures being purely penal should all go to the school fund.

Ind. Const. art. 8, § 2; *Indianapolis v. Fairchild*, 1 Ind. 815; *Burgh v. State*, 108 Ind. 132; *Atchison, T. & S. F. R. Co. v. State*, 22 Kan. 1; *Bartholomew County Comrs. v. State*, 116 Ind. 329.

The punishment is cruel and the penalties are not in proportion to the nature of the offense.

There are some authorities which tend toward the direction that this point is a question for the Legislature to determine rather than courts. The current of authority, however, is the other way.

Cooley, Const. Lim. 4th ed. p. 381; *McLaughlin v. State*, 45 Ind. 338; *Gregory v. State*, 94 Ind. 384; *Block v. State*, 100 Ind. 357; *Parks v. Chattanooga & St. L. R. Co.* 13 Lea, 1; *State v. Cox*, 88 Ind. 254.

It takes property and particular services without just compensation, and is not within the police power of the Legislature.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; *State v. Jersey City*, 29 N. J. L. 170; *Cooley*, Const. Lim. 4th ed. p. 719; *Wood*, Railway Law, p. 1704; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377; *Cincinnati, H. & I. R. Co. v. Clifford*, 118 Ind. 460.

Olds, J., delivered the opinion of the court:

This suit was brought by the prosecuting attorney of Greene county, Indiana, to recover penalties under an Act of the Legislature requiring persons and corporations operating railroads to place blackboards in conspicuous places at their stations and write upon them the fact as to whether or not the trains stopping at such stations are on time, and if late, how much.

The complaint consists of numerous paragraphs. A demurrer was addressed to the complaint for want of facts and sustained, exceptions reserved and this appeal prosecuted, and such ruling assigned as error. The error assigned presents the question as to the validity of the statute upon which such action is 18 L. R. A.

based. Section 1 of the statute, approved March 9, 1889, reads as follows: "That every corporation, company, or person operating a railroad within this state shall, immediately after taking effect of this Act, cause to be placed in a conspicuous place in each passenger depot of such company located at any station in this state at which there is a telegraph office, a blackboard at least three feet long and two feet wide, upon which such company or person shall cause to be written, at least twenty minutes before the schedule time for the arrival of each passenger train stopping upon such route at such station, the fact whether such train is on schedule time or not, and if late, how much."

Section 2 provides "that for each violation of the provision of this Act in failing to report or in making a false report, such corporation, company, or person so neglecting or refusing to comply with the provisions of this Act, shall forfeit and pay the sum of twenty-five dollars, to be recovered in a civil action to be prosecuted by the prosecuting attorney of the county in which the neglect or refusal occurs, in the name of the State of Indiana, one half of which shall go to said prosecuting attorney and the remainder shall be paid over to the county in which such proceedings are had, and shall be part of the common school fund."

Numerous objections are urged to the validity of this statute. Some criticism is made in regard to the wording of the statute in that it is indefinite and inoperative for the reason that it provides that a "corporation, company or person" operating a railroad shall place in the passenger depot of such "company" a blackboard, upon which such "company or person" shall cause to be written, etc. It is contended that as it is a penal statute it must receive a strict construction and that nothing can be supplied as intended by the Legislature, to determine its meaning, and therefore the statute does not apply to corporations for the reason that the word "corporation" is omitted, the statute providing that blackboards shall be placed in the company's office and that the company or person shall cause to be written upon the board. The further objection is made that the statute provides that the blackboards shall be placed in each passenger depot located at any station at which there is a telegraph office and that a passenger depot is commonly understood to be a house for the accommodation of passengers, while a station is a place such as a city, town, and intermediate-way stations where trains stop, so that if there is a telegraph office in the city or town where the railroad company has a passenger depot, no difference to whom the telegraph line belongs or by whom operated, or whether it has any connection with the operation of the railroad or not, yet at each passenger depot within such city or town there must be placed a blackboard upon which shall be written the fact whether the trains are on time, and if late, how much.

It is true that penal statutes as a rule are to receive a strict construction, but this rule is not violated by adopting the sense of the words which best harmonize with the object and intent of the Legislature, and the whole context of the statute must be construed together.

Courts are to take a common sense view of the statute as a whole, and if by so doing and giving to the words used a reasonable construction the object of the Legislature can be definitely ascertained and carried out, the statute must be upheld; if not it must fall. See *State v. Hirsch*, 125 Ind. 207, 9 L. R. A. 170.

The draughtsman was careless in the use of language in constructing this statute. It might have been framed so as to have avoided the criticism urged, but we think the intent and object of the Legislature is clear and certain, notwithstanding it is awkwardly expressed. It is manifest and certain that it was intended to require all persons, whether natural or artificial, who were engaged in operating a railroad in this state to put up in a conspicuous place at each passenger depot provided for the use of passengers traveling upon such railroad, in connection with which depot there was a telegraph office, a blackboard, and to enter upon such blackboard, at least twenty minutes before the schedule time for the arrival of each train, the fact whether such train is on time or not, and if late how much. By "passenger depot" was not meant merely the station house built for the accommodation of passengers, but the grounds prepared and used as depot grounds for the benefit of persons traveling upon the particular railroad, and used by the company at such point in operating it as a common carrier of passengers. It is evident that it was intended that a board should be put up at every station where the train was stopped, if there was a telegraph office at such point, at which office was received information as to the time of the arrival of trains at such stopping place; and it is equally certain that it was not intended to require such notice written if there was not a telegraph office at such place which received information as to the time of the arrival of trains. It is not essential that such telegraph office should be in the house built for passengers, but if there is an office at such stopping place, operated in connection with the railroad, receiving and giving information as to the time of arrival and departure of trains on such road, there would be a liability for failure to write the notice required by the statute. The word "station" as used in the statute is used synonymously with the words "passenger depot," meaning the place, the grounds and the buildings prepared for and used by the traveling public at such point in waiting for, taking, and leaving the trains, and by the company in operating the road at that point. As to just what constitutes a passenger depot or a station at a particular place is a question of fact.

It is next contended that as section two only provides a penalty for failing to report, or in making a false report as to whether a train is on time, or if late, how much, that no penalty can be incurred until a blackboard is put up on which to note the fact as to whether the trains are on time or late, and if late, how much. We cannot concur in this interpretation of the statute. The plain and evident intention of the statute is that the object sought is to require the noting of the fact as to whether trains are on time or not, and if late

how much, and the putting up of blackboards is a mere incident.

Section 2178, Rev. Stat. 1881, provides a penalty for failing to sound the engine whistle upon approaching a road crossing, at a distance of not more than one hundred nor less than eighty rods from such crossing; and section 4020, makes it the duty of railroad companies to have attached to each engine a whistle and bell. We do not think that the penalty of section 2178 could be avoided by a failure to comply with section 4020, in providing a whistle and bell for each engine, and yet if the contention of counsel for the appellees be correct, railroad companies might with impunity run engines without any whistle or bell attached, and the persons in charge of the engines would not be liable to the penalty prescribed for failure to sound them. Section 4020 as originally passed (Acts of 1879, p. 173), made it the duty of railroad companies to have attached to each and every locomotive engine a whistle, and made it the duty of the engineer or other person in charge of the engine, on approaching a road crossing, to sound the whistle at a distance of not more than one hundred rods nor less than eighty rods, and to continue to sound it until the engine passed the crossing. Section 2 of the Act provided a penalty of not less than ten nor more than fifty dollars for a violation of the provisions of section 1, and this Act was held to be constitutional in the case of *Pittsburgh, C. & St. L. R. Co. v. Brown*, 87 Ind. 45. Indeed, to hold the law under consideration void on the grounds contended for by counsel would be to hold that a party can avoid the penalty prescribed by the statute by a failure or refusal to comply with a duty imposed upon him by the same statute. In other words, the law makes it the duty of persons operating a railroad to put up blackboards at each station where there is a telegraph office and to note on the same the fact as to whether or not each train is on time, and if late, how much, and prescribes a penalty for failure to note on the boards the fact as to whether or not each train is on time, etc. The contention is that the penalty can be avoided by a refusal or neglect to perform the duty of putting up the blackboard for the reason that this duty precedes the entering of the fact as to the time of the trains. We do not think a party can avoid the doing of an act for the omission of which a penalty is prescribed by statute by a failure to do what is necessary to be done in performing the act. If the act had made it the duty of all persons and companies operating railroads within this state to enter upon a blackboard in a conspicuous place at each station where there was a telegraph office, twenty minutes before the schedule time of each train, the fact as to whether or not such train was on time, and if late, how much, and prescribed a penalty for omitting to make such entry, the operators of railroads would have been compelled to have provided the means of carrying out the law and complying with its provisions. The imposing of the duty to do a certain thing carries with it the doing of such things as are necessary to perform the duty commanded. The statute by making it the duty of persons

or companies operating railroads to enter the fact as to the time of the arrival of trains upon a blackboard in a conspicuous place at the station imposed upon such persons the necessity and burden of placing blackboards in conspicuous places for they could not make such entries without doing so, unless they were already provided. The duty of putting up blackboards would be imposed if it were not specifically stated in the Act. It is suggested that railroad companies might be compelled by mandate to put up the boards and when compelled to put them up, then they would be liable for the penalty for a failure to enter the fact required on the boards. If the theory of counsel is correct, this would not avoid the objection urged to the law, for if the argument be carried to its legitimate length and the technical and strict construction contended for placed upon the statute, it requires that "such company or person shall cause to be written, at least twenty minutes before the schedule time for the arrival, etc., the fact whether such train is on schedule time, etc.; and if there were blackboards up it might then be said that it required chalk or some other like substance to write upon the board, and there is no provision for compelling the company to provide chalk, and no penalty for failure to provide it, and as it was necessary to have something to write with before you can write, a penalty could not arise for failure to write unless you had something to write with. We do not think statutes should be construed by such a technical rule. The object of the statute is to give notice to the traveling public as to whether or not the trains are on schedule time, and if late how much, and for this purpose it makes it the duty of the company to enter the fact upon a blackboard at all important stations, and provides a penalty for failure to do so, and it is the duty of railroad corporations, companies, and persons operating railroads to provide the necessary means to comply with the law, and to comply with it to avoid the penalty prescribed.

It is suggested that the statute is repugnant to the Constitution on the grounds that it is class legislation and only applies to stations where there is a telegraph office. The law applies alike to all persons operating railroads and to the same class of stations and is uniform in its application. It does not designate at what stations the company shall maintain a telegraph office; that is left to the discretion of the companies to determine at what points along the line of the road it is necessary to maintain telegraph offices to properly operate the road and transact the business of the company, and the statute does not impose on the companies the burden of maintaining an office at points not necessary for the purpose of properly operating the road, but does impose the duty on the companies of designating the fact as to the arrival of trains at all points where it is necessary, and when they do maintain a telegraph office in connection with the road, and this duty is imposed alike on all companies operating railroads. The court judicially knows that telegraph lines are maintained, operated, and used in connection with railroads, and that it is necessary to do so to properly operate a railroad and give advice as

to the time of running of trains and the arrival of them at certain points along the line and in directing the running of trains and transacting the business of the road. That the use of the telegraph is generally used and is necessary in connection with a proper system in operating a railroad. The fact that some company may operate a line of road by telephone or some other means of communication does not invalidate the law on account of class legislation, for the Legislature has not seen fit or deemed it necessary to require the duty of any other roads except those operated by means of the telegraph and to require the information noted when there is a telegraph office at their stations. All roads may come within this rule and all companies or persons that do operate a railroad by telegraphic information and have stations at which there is a telegraph office maintained come within its provisions. We do not think the statute subject to the objections urged, that it is class legislation. *Hancock v. Yaden*, 121 Ind. 366-374, 6 L. R. A. 576.

It is further contended that the statute is in conflict with section 2, art. 8, of the Constitution providing that the common-school fund of the state shall consist of, and be derived from, among other things, "the fines assessed for breaches of the penal law of the state, and from all forfeitures which may accrue." In the case of *Burgh v. State*, 108 Ind. 182, a question very similar to this was passed upon and decided adversely to the contention of counsel for appellee. The statute, section 6339, Rev. Stat. 1881, provided that, "If any person shall give a false or fraudulent list, schedule or statement required by this Act, he shall be liable to a penalty of not less than fifty dollars, nor more than five thousand dollars, to be recovered in any proper form of action, in the name of the State of Indiana on the relation of the prosecuting attorney. The assessor shall forthwith notify the prosecuting attorney of such delinquency or offense, and he shall prosecute such offense to final judgment and execution, and such fine, when collected, shall be paid into the county treasury for the use of the county, and the prosecuting attorney shall receive 10 per centum commission on all moneys so collected and paid in, and a docket fee of ten dollars, to be taxed and collected with costs in such action," etc., and it was contended that this section was in violation of said sec. 2, art. 8, *supra*. The court in that case says: "Section 2 of art. 8 of the Constitution provides that fines assessed for breaches of the penal laws of the state shall go into and be a part of the common-school fund. It is contended that as the above section 6339 requires the penalty therein provided to be paid into the county treasury for the use of the county, it is in contravention of the above constitutional provision. The answer is that the constitutional provision has reference to fines assessed in criminal prosecutions, and the penalty provided in section 6339, *supra*, is not a fine in that sense. It is not to be recovered by a criminal prosecution, but by a civil action. At one place in the section the penalty is spoken of as a fine, but the whole section shows that it is not a fine in the sense in which the word is used in the above section of the Constitution."

There is no difference in these two statutes in so far as the penalty is concerned, for the violation of the Act. Each provides a penalty collectible in the same manner, and if the Legislature may provide that it shall go into the county treasury for the use of the county, it may provide that it may go in any other direction, in so far as this provision of the Constitution is concerned. If the Constitution does not require that such penalty shall go into the school fund, then it may be made a fund for the payment for services of public officers. It is urged that such provision prevents a due process of law, in that it gives to the prosecuting attorney, the officer of the state charged with the prosecution of the action, an interest in the amount recovered. We do not think this objection tenable. It has been the long established system in this state for the prosecuting attorneys to secure a fee taxed against and recovered from the defendant in criminal prosecutions, and his fee depends upon the success of the prosecution. He is likewise allowed a commission for the collection of forfeited cognizance. There can be no difference as regards the effect upon the officer whether he receives a fee to be taxed against and recovered from the defendant which depends upon the successful prosecution of the action and allowing him a certain ten per cent, —or a certain portion of the amount recovered as a compensation for his services. As to whether it is good policy to do either or not is a matter with the Legislature. They have the right, as we think, to do either.

It is further contended that but one penalty can be recovered for the violation of the Act. It seems to us that the statute is clear upon the subject. It provides "that for each violation of the Act, in failing to report, or in making a false report, such corporation, company, or person so neglecting or refusing to comply with the provisions of this Act shall forfeit and pay the sum of twenty-five dollars," etc. The first section makes it the duty of persons operating a railroad, twenty minutes before the schedule time for each passenger train stopping at a station where there is a telegraph office, to note the fact as to whether such train is on time or not, and if late how much. This creates a duty to note the fact in regard to each train stopping at such station; and the second section creates a forfeiture for failing to enter the fact as to any passenger train stopping at such station; also creates a forfeiture for making a false report as to how much the train is late. Of course if there is a failure to make any entry, there would be but one forfeiture as to such train, or if there is a false entry there would be but one forfeiture as to such train. There can only be one forfeiture as to one train at a particular station, during one trip, and that may be either for a failure to make the entry or for making a false entry, whichever may be the fact.

There is a further objection urged to the law, which is, that the statute is void because it assumes to regulate interstate commerce. This objection is stated by one of the learned counsel for the appellee as follows: "It applies in express terms to every corporation, company, or person operating a railroad in this state. It imposes penalties for the failure

to give information when the same can only be obtained by the action of telegraph companies over whom such corporations engaged in interstate commerce have no control."

The construction we have heretofore in this opinion given the statute, in so far as it refers to receiving information from a telegraph company over whom the company have no control, avoids the objection urged. The statute was not intended to require the entry upon a blackboard where there was no telegraph operated in connection with the railroad, but at stations where there was a telegraph office in connection with the railroad, furnishing such information as the railroad company might desire in connection with the operation of the road. While the statute deals with persons and corporations engaged in interstate commerce yet we think that the statute is a proper police regulation which in no way interferes with interstate commerce, and is a regulation which is in no way sought to be exercised by the United States, and hence is within the power of the Legislature of the state to enact. It simply imposes on the company or person operating a railroad the burden of ascertaining in advance of the arrival of a train at a particular station the time when it will arrive and note it upon a blackboard for the benefit of the public. This is required to be done when the company or person possesses the information and has the means within its power to convey such information to the point where it is to be noted. It is information possessed by the company itself, and requires only the command of the master to note it. The company or person operates the whole line of road. It is present at every point along the line by its officers and servants. It knows at all times where its trains are and what time they are scheduled to make, and this statute calls upon them to note the facts designated upon blackboards at certain stations in advance of their arrival. The statute simply commands the company to enter at stations in this state the information which it has and which it has the power of communicating at that particular point or station. Counsel cite in support of their position the case of *State v. Woodruff S. & P. Coach Co.*, 114 Ind. 155, and quote from the opinion language holding that in matters of commerce between the states the power of the Federal government is exclusive and supreme. Counsel thus state the proposition: That "this Act imposes penalties on corporations engaged in interstate commerce for failure of telegraph companies to send telegrams from other states," and counsel in support of their position quote from the decision of the United States Supreme Court in the case of *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, involving the validity of a statute of this state making telegraph companies liable for failure to deliver messages, in which opinion the court says: "In these cases the supreme authority of Congress over the subject of commerce by the telegraph with foreign countries or among the states is affirmed whenever that body chooses to exert its power, and it is also held that the states can impose no impediments to the freedom of that commerce," and in that case the court further holds that "whatever authority the states may possess over the trans-

mission and delivery of messages by telegraph companies within her limits, it does not extend to the delivery of messages in other states."

With the doctrine enunciated in these decisions, while we think it must be conceded some of the language used carries it to the border line, yet we readily yield our assent to it, but the cases referred to enunciated and applied the principles laid down in cases where it involved the rights of the companies as exercised in the discharge of their duties while engaged in interstate commerce, or where the state sought to impose a penalty or tax operating as an impediment to the freedom of commerce. While in this case no such thing is sought to be done, this statute is but a police regulation within this state. The fact that the company or person required to carry it out and comply with the statute are required to bring into use knowledge which they possess or is possessed by other servants situate in another state does not, as we think, impose any restrictions to the freedom of commerce. Indeed, in the communication of the information possessed by the servants of the company at one point on the line of the road to those at another point on the line cannot in itself be termed commerce in the strict sense of the word. Commerce, says Webster, is the exchange or buying and selling of commodities, especially the exchange of merchandise on a large scale between different places or communities; extended trade or traffic; and it is defined in the Century Dictionary as: "Interchange of goods, merchandise, or property of any kind; trade; traffic; used more especially of trade on a large scale, carried on by transportation of merchandise between different countries or between different parts of the same country; distinguished as foreign commerce and internal commerce; as the commerce between Great Britain and the United States, or between New York and Boston; to be engaged in commerce." And when existing or taking place between different states or persons in different states, it is termed interstate commerce. One cannot trade or traffic or buy and sell with himself, though he act by or through his agent or servant, for their acts are all his acts and all result to his benefit. One is not engaged in commerce by passing an article of merchandise from one of his hands to the other or by having one of his servants pass it to another, although it crosses the line between two states in the transit, though he may use the same hands and the same servants in the business of interstate commerce. Railroad companies are engaged in interstate commerce because their railroads are used for the transportation and conducting interstate commerce. Telegraph companies are held to be engaged in interstate commerce as they convey information from citizens of one state to those of another. The railroad company and the telegraph company each occupy contractual relations with other parties in the transportation of articles of merchandise and information or news. One may possess a letter or other writing, deposited with his agent in another state, which may contain information which it is important for him to know in order to intelligently do an act or perform a public duty in this state. In such case we think it cannot be

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said that he is engaged in commerce or interstate commerce if he go and get the letter and bring it to this state and avail himself of the information, and how can it be different in this respect if he direct his agent to bring the writing to him, nor is it interstate commerce in the discharge of the duties of the master where one servant conveys the information he possessed which belongs to the master to the other servant, even though it be conveyed through a third servant, whether it be a person or a telegraph company who act as the servant of the master in conveying the information. As we have said, the statute is but a regulation for the benefit of the public. It is held that parties in crossing the track of a railroad company must avail themselves of such knowledge as they possess in regard to the time of the running of trains upon the road. A party knowing a train was due at a time he is about crossing a track should use care to avoid injury; so this information to be noted on blackboards is as well for the persons having business across or about the railroad as for those who are traveling upon its trains. If it can be said that this legislation is repugnant to the Constitution by reason of the fact that the information to be noted must be received from an agent in another state through the agency of a telegraph company engaged in interstate commerce, so would legislation requiring signals to be given or watchmen to be kept at certain points upon the railroad in case the superintendent who gave instructions as to the running of trains and the manner in which they were to be run resided in another state, and the direction to the agents or servants operating the road in this state must be communicated to them by means of the telegraph.

In *Smith v. Alabama*, 124 U. S. 465, 81 L. ed. 508, in speaking of the validity of state legislation relating to railroads, it is said: "The width of the gauge, the character of the grades, the mode of crossing streams by culverts and bridges, the kind of cuts and tunnels, the mode of crossing other highways, the placing of watchmen and signals at points of special danger, the rate of speed at stations and through villages, towns, and cities, small matters naturally and peculiarly within the provision of that law from the authority of which these modern highways of commerce derive their existence, the rules prescribed for their construction and for their management and operation, designed to protect persons and property otherwise endangered by their use are strictly within the limits of the local law. They are not *per se* regulations of commerce; it is only when they operate as such in the circumstances of their application and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution."

While this statute may be on the border of legislative authority, yet we do not think it attempts to regulate interstate commerce or to interfere with it, or that it places any impediments to the freedom of commerce so as to render it invalid. We have considered and passed upon all the material questions discussed in the case. While the statute is clumsily worded, yet we think its meaning and object

are clearly apparent and not subject to the objections urged against it. It is suggested that the blackboards should be put up immediately after the taking effect of the Act, and that some of the violations are alleged to have occurred upon the day the Act took effect, and there was no opportunity given to comply with the law. This is not an objection to the law. Possibly persons would have a reasonable time to comply with the Act in this respect by putting up

boards after it went into effect, but we do not intimate an opinion upon this question, as it is not before us.

No objection is urged to the averments of the complaint.

The conclusion we have reached being adverse to the rulings of the circuit court, the judgment must be reversed.

Judgment reversed, with costs, with instructions to overrule the demurrer to the complaint.

UTAH SUPREME COURT.

Frank E. BOYCE, *Resp't.*,
v.
UNION PACIFIC R. CO., *Appl't.*

(.....Utah.....)

One maintaining a bathing resort on the shore of a natural body of water, to which he invites the public, must use reasonable care to keep the bottom under the section of water which the bathers use free from everything which might injure their feet, failure to do which, resulting in injury, is actionable negligence.

(November 12, 1892.)

A PPEAL by defendant from a judgment of the District Court for Salt Lake County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Williams & VanCott*, for appellant:

There is no evidence showing or tending to show that appellant carelessly or negligently permitted a piece of glass to be or remain in the water where the respondent bathed at Garfield Beach.

A preponderance of the evidence shows that the appellant used extraordinary care and prudence to keep said water free of any substances likely to injure the respondent or any other person.

A preponderance of the evidence shows that by the exercise of ordinary care and prudence, said glass could not have been discovered by the appellant.

The law in cases of this kind is clear and well settled, and emphasizes the insufficiency of the evidence to support a verdict in this case.

2 Shearm. & Redf. Neg. § 704; *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235; *Heaven v. Pender*, L. R. 11 Q. B. Div. 508.

NOTE.—The above case clearly falls within the general class of cases as to the duty of one who invites people upon his premises for his own profit.

As to the liability of the owner of a summer resort for injuries received on a roller coaster or switch-back operated in such resort by a third person, see the recent case of *Knottnerus v. North Park Street R. Co.* (Mich.) 17 L. R. A. 722, 18 L. R. A.

Messrs. O. W. Powers, S. H. Lewis and C. Ira Krebs, for respondent:

Gross negligence on the part of defendant was fully proven by defendant's own witnesses.

Their evidence showed that one hundred persons would be unable to watch the people visiting the bathing resort in one day; that only six or eight men were employed around the bath houses; that no one was employed especially to look over the bottom of the lake; that no one was employed especially to see that nothing was thrown into the lake; that the bottom was never raked over between the pavilion and bath houses, where plaintiff was injured.

2 Shearm. & Redf. Neg. § 704, and notes and cases cited thereunder; *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235; *Gleason v. Virginia M. R. Co.* 140 U. S. 435, 35 L. ed. 458; *Cunningham v. Union Pac. R. Co.* 4 Utah, 207; *Cooley*, Torts, 1st ed. 605.

Blackburn, J., delivered the opinion of the court:

This suit is brought for damages on account of injuries caused by the negligence of the defendant. Verdict and judgment for plaintiff; motion for new trial; motion overruled; and appeal both from the overruling of the motion for a new trial and the judgment.

Several errors are assigned, but the only one insisted upon is that the evidence does not support the verdict and judgment. The complaint, among other things, alleges that defendant conducted a bathing resort known as "Garfield Beach" on the shores of Great Salt Lake. That defendant had exclusive control of the waters of the Great Salt Lake beach, and erected a pier and pavilion thereon, and bathrooms for the use of bathers; and that it advertised said resort, and invited the public there. That the defendant knowingly, negligently, and carelessly permitted a piece of glass bottle to be and remain in said waters at said place; and on said date plaintiff, acting on said general invitation, hired one of said bath-

As to the liability of the owner of premises for their defective condition generally, see *Schmidt v. Bauer*, 5 L. R. A. 580, and note, 80 Cal. 585; *Wasson v. Pettit*, 5 L. R. A. 794, and note, 117 N. Y. 118; *Factors & Traders Ins. Co. v. Werlein*, 11 L. R. A. 361, and note, 42 La. Ann. 1044.

rooms, and went into said waters to bathe, and while he was bathing, without any knowledge of said piece of glass, stepped upon the same, and cut and injured his left foot, and in consequence thereof was greatly injured, and suffered great pain of body and mind, to his damage in the sum of \$3,000. The answer denies any negligence, injury, or damages. The testimony of the plaintiff is that on June 12, 1890, he went to Garfield Beach, bought a ticket of defendant, and went in the lake to bathe; that while in there he cut his foot badly on a piece of glass lying in the bottom of the lake where the people went to bathe; and that he was laid up a long time, and suffered great pain from the injury. How great the injury was it is not necessary to comment upon, as it is not urged that the damages are excessive. The water was shallow,—about up to the knees. The defendant's testimony shows that it has men in its employ whose duty it was to carefully look over the bottom of the lake where the people bathed, and remove anything that might injure the feet of the bathers; that in the early morning the water was very clear,

except when it was windy; and the bottom was clean sand, and everything lying on it could be easily seen, except when the water was stirred by wind, or by many bathers; and that the bottom of the lake was examined a short time before, but not the morning of the injury, nor the morning before; and that every precaution was taken to prevent people from throwing things into the lake where people bathed that might injure the feet of the bathers. It was the duty of the defendant to use reasonable care to keep the bottom of the lake where people bathed free from everything that might injure the feet of the bathers, and the want of such reasonable care is negligence. If the defendant had examined the bottom of the lake the morning of the injury, it, in all probability, would not have occurred. The question was fairly submitted to the jury whether the defendant was guilty of negligence, and it found that it was; and we think the evidence justifies the verdict.

The judgment is affirmed, with costs.

Zane, Ch. J., and Miner, J., concur.

CALIFORNIA SUPREME COURT.

SOUTHERN PACIFIC R. CO., Appt.,

v.

Henrietta FERRIS et al., Resp'ts.

(.....Cal.....)

1. User by the public of one side only of a dedicated street, laid out and mapped with two tracks having a watercourse and double row of trees between them, constitutes an acceptance of the whole dedication.

2. An abutting owner will be enjoined from tearing up the tracks of a railroad lawfully in a highway.

(February 5, 1892.)

APPEAL by complainant from a judgment of the Superior Court for Los Angeles County in favor of defendants in an action brought to enjoin defendants from tearing up tracks which plaintiff had laid on a strip of land which it claimed to be a highway. *Reversed.*

The facts sufficiently appear in the commissioner's opinion.

Mr. John D. Bicknell for appellant.

Mr. E. E. Keech for respondents.

Foots, C., filed the following opinion:

This action was brought by the appellant, a railroad corporation, for the purpose of re-

NOTE.—Public user as acceptance of dedicated highway.

The general current of modern authorities sustains the proposition that the dedication of a highway may be accepted merely by long continued public user, without any formal act of acceptance. *Wolfskill v. Los Angeles County*, 86 Cal. 405; *Eureka v. Croghan*, 81 Cal. 524; *People v. Reed*, 81 Cal. 79; *Green v. Canaan*, 29 Conn. 157; *Willey v. People*, 36 Ill. App. 609; *Marcy v. Taylor*, 19 Ill. 633; *Lakeview v. LeHahn*, 120 Ill. 92; *Green v. Elliott*, 86 Ind. 58; *Manderschid v. Dubuque*, 29 Iowa, 73, 4 Am. Rep. 198; *Boss v. Thompson*, 78 Ind. 90; *Boyer v. State*, 18 Ind. 451; *Kennedy v. Levan*, 23 Minn. 512; *Price v. Breckenridge*, 92 Mo. 373 (this was a case of a public square); *Stevens v. Nashua*, 46 N. H. 192; *People v. Loehfelme*, 102 N. Y. 1; *Cook v. Harris*, 61 N. Y. 448; *McMannis v. Butler*, 51 Barb. 426; *Holdane v. Coldspring Trustees*, 21 N. Y. 474, affirming 23 Barb. 108; *Buchanan v. Curtis*, 25 Wis. 99; *Eastland v. Fogo*, 66 Wis. 133.

And such user may be sufficient evidence of the acceptance of the highway to charge the public authorities with liability for failure to keep the road in repair. *Green v. Canaan* and *Boyer v. State*, *supra*.

In many of the above cases the question was as 18 L. R. A.

to the sufficiency of the acceptance as against the person who made the dedication. A distinction is made in some cases between the effect of user as evidence of acceptance as against him and as against the authorities so as to charge them with the burden of repairs.

In Illinois public user is held sufficient evidence of acceptance as against the person making the dedication as is shown by the above-cited Illinois cases.

But it is held not sufficient to charge the public with the duty of maintaining the road. *Forbes v. Balenseifer*, 74 Ill. 187; *Willey v. People*, 36 Ill. App. 609.

And in Maine it is held that there must be some proof of acquiescence or adoption by the corporation itself in order to create an obligation on the part of the corporation to repair a highway which has been dedicated. *Mayberry v. Standish*, 56 Me. 842; *State v. Wilson*, 42 Me. 24.

And even that repairs by a highway surveyor will not constitute an acceptance because of his lack of authority to accept the way. *State v. Bradbury*, 40 Me. 154.

In Virginia also it is held that the mere passing over a road by individuals will not constitute an acceptance, and that an acceptance must be by

straining the defendants here from continuing to tear up and remove its track from what was claimed by the plaintiff to be a public highway and for such other and further relief as the facts of the case might warrant. The court below decided the case against the plaintiff, dissolved a preliminary injunction that had been granted, and gave judgment for the defendants for costs. From that and an order refusing a new trial the plaintiff has taken this appeal. From the evidence in the record it is clear that findings 1 and 3 are without legal support. It appears that Henrietta Ferris, one of the respondents here, bought, some years prior to this controversy, a piece of land from Mr. Irvine; that in the deed to that land there was specially excepted therefrom a strip of land in front thereof 60 feet wide, which had been offered for dedication as a public highway, and no title to that land ever vested in the said Ferris; that this strip of land so excepted was laid down upon a map properly filed for record in the proper office, as being reserved for a public road, and it does not appear that the person so offering it for dedication has ever in any way sought to revoke it. The idea of the lower court seems to have been that the public had never made use of the side of the road so offered for dedication next to the defendant's land, and therefore she had an appurtenant right of way over it. In this view of the matter we cannot concur. It seems that the persons who bought land from Mr. Irvine, including the defendant Mrs. Ferris, had conformed their fences and hedges to the line of the proposed highway as set out in the map recorded by Irvine describing the public roads he offered for dedication, among which was this one; that, according to the plan agreed upon for the location of this highway, it had a *zanja* or water ditch running through the middle of it lengthwise, and a double row of eucalyptus trees, one each side of the *zanja*; that the road as it now stands is so located, and has the *zanja* and rows of trees as intended. But because the travel along the public road has been, by the choice of the traveling

public, almost exclusively, if not entirely, on the other side of the road, and on the 60-foot wide strip of it on the opposite side of the *zanja* from the defendants' land, the court seems to have concluded that the public never used the 60 feet of the located road as recognized by proprietors of adjoining lands in building their fences and hedges, and therefore as to it there was never any user. This we take to be a mistake. As well might it be said that, if the public travel had been down the center of a road offered for dedication as a public highway, there was never any user of that part which lay on each side of the track used, and between it and the fences of the adjoining proprietors; or where the travel might be diagonally across the located road, from one side to the other, and from one end to the other of it continuously, that the portion of the ground fenced out by adjoining proprietors over which there had been no travel had never been used. A similar view of an abandonment of a public road was urged in *Watkins v. Lynch*, 71 Cal. 26, but it will be seen from the language which we now quote no such want of user was considered any evidence of an abandonment of the public road: "Any ordinary observer traveling upon the public roads of the more thickly populated portions of this state will often perceive the land on one or both sides of a road-bed, that is fenced out, sowed in grain and pastured by the proprietors of adjoining land; and, while all the travel for many years has been confined to the center of the roadbed, yet we do not see that such acts would of themselves be held to show either an abandonment of the use of the road by the public, or its adverse possession by the person who has thus sowed, reaped, and pastured his stock thereon." So here there is no conflict in the evidence, properly considered, as to the offer of dedication and acceptance and user of this land as a public road. If this is a public road, then, according to the other findings and evidence, the railroad corporation had constructed its road as it had a right to do under section 465, subd. 5, Civil Code, and the de-

record in such form as by the laying off of the highway into precincts or appointing surveyors or overseers. *Com. v. Kelly*, 8 Gratt. 632.

In Vermont also it was decided that the use by the public of a private way to a mill could not make the town chargeable with the duty of repairing it. *Page v. Weathersfield*, 18 Vt. 424.

In Massachusetts the Statute of 1846, chap. 208, § 1, changed the common-law rule so as to prevent the creation of a highway by dedication. *Hayden v. Attleborough*, 7 Gray, 338; *Bowers v. Suffolk Mfg. Co.*, 4 Cush. 822.

Whether public user is sufficient to show acceptance is a question for the jury. *Riley v. Hammel*, 38 Conn. 574; *Green v. Canaan*, 29 Conn. 157; *Hall v. Meriden*, 48 Conn. 428; *Hartford v. New York & N. E. R. Co.*, 59 Conn. 250; *Manderschid v. Dubuque*, 29 Iowa, 73, 4 Am. Rep. 196; *Green v. Elliott*, 86 Ind. 53.

In England it has been decided that the public is bound to repair all roads dedicated and used by the public although there has been no adoption of them. *Rex v. Leake*, 5 Barn. & Ad. 469.

This case disapproves of *Rex v. St. Benedict*, 4 Barn. & Ad. 447, in which it was said that some act of acquiescence or adoption was necessary in order to charge the public with a duty to keep the road 18 L. R. A.

in repair, but in this case there was a qualified right of passage existing without reference to the question of dedication.

The user by the public for fifty years of a street which was a part of the original plot or plan of the town was held evidence of acceptance in *Com. v. Moorehead*, 118 Pa. 344.

In New Hampshire, under a statute requiring twenty years' user to make a highway public, use by the public for that length of time was held sufficient to constitute an acceptance without any formal act of acceptance or any repairs. *Stevens v. Nashua*, 46 N. H. 132.

Common user by the public has been declared by some courts to be the very highest kind of evidence of an acceptance. *Buchanan v. Curtis*, 25 Wis. 99, 8 Am. Rep. 23; *Kennedy v. LeVan*, 23 Minn. 513.

An acceptance of part of a highway does not necessarily extend beyond that part but actual use is the test. *Hall v. Meriden*, 48 Conn. 428.

But where the street is conveyed as a whole, acceptance of part is an acceptance of the whole. *Derby v. Alling*, 40 Conn. 410.

No case similar in its facts to the main case has been discovered B. A. R.

endants had no right to tear up its track. We think the judgment and order should be reversed, and so advise.

We concur: Fitzgerald, C.; Vandelief, C.

Per Curiam:

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

WISCONSIN SUPREME COURT.

FULLER & FULLER CO., *Appt.*,

v.

Thomas McHENRY, *Resp.*

(.....Wis.....)

1. A wife cannot become a partner of her husband under the Wisconsin statutes which authorize her to make contracts in relation to her separate estate and in certain emergencies, as in case of her husband's desertion, give her the power of a *feme sole*.
2. A bill of sale which constitutes a voluntary transfer or assignment of a stock of goods for creditors securing to one of them a preference over all others is in violation of Rev. Stat., § 1693a.

(December 6, 1892.)

APPEAL by plaintiff from a judgment of the Circuit Court for Milwaukee County in favor of defendant in an action brought to recover damages for the alleged wrongful conversion of a stock of goods formerly belonging to John H. Hanson and wife, which plaintiff claimed under a bill of sale. *Affirmed.*

Statement by Pinney, J.:

Action for taking, carrying away, and converting a stock of goods alleged to have been the property of John H. Hanson and Caretha M., his wife, as copartners under the name of Hanson & Co., at West Bend, Wis., and of which property they executed a bill of sale, April 30, 1889, to Daniel K. Green, as the agent of the plaintiff, an Illinois corporation, to secure a debt due to it of \$530.89. Green took possession of the property May 2d thereafter as such agent, to sell and dispose of it to pay said debt and others, and expenses of sale; and the bill of sale was filed on the next day thereafter, when the property was seized by the sheriff under a writ of attachment, by direction of the defendant, issued in an action in favor of said McHenry against said John H. Hanson, for a debt of \$354.86, for which judgment was recovered, with costs, June 1, 1889, and on an execution thereon the property was sold for \$500, and the money was applied to the payment of this judgment. Other writs were issued, and at the time in the hands of the sheriff, some against said Hanson and some against him and his said wife, namely, two against Hanson for about \$200,

and two against him and his wife for about \$300; and it was claimed that the property in question was the property of John H. Hanson, and that the claim of his wife thereto, or to any interest, was fraudulent and void, and it was denied that she had any title to it, as partner or otherwise. Evidence was given to show that the plaintiff first began to deal with the alleged firm of Hanson & Co. February 27, 1889. The order for a bill of goods of that date to plaintiff, to replenish stock, stated, in substance, that Hanson & Co. had just purchased a stock at West Bend, and opened up that day, and was signed, "Hanson & Co., by Mrs M. Hanson, from Barron, Wis." It appeared that she had previously dealt with the plaintiff, and that the plaintiff sold to Hanson & Co. goods to the amount of \$530, which remained unpaid. On the 28th of April a letter was written to plaintiff, purporting to be signed, "C. M. Hanson, by J. H. Hanson, her husband," saying "We have got swindled out of \$24,000 by a friend of ours," giving some details of a real-estate transaction, and inclosing a bill of sale to be filled up in the name of such party as plaintiff thought best, in order to secure plaintiff and pay certain debts, alleging that the stock was worth \$2,000, and urging the plaintiff to give the matter immediate attention. Plaintiff inclosed the bill of sale and letter, May 1st, to Green, to be filled up in his name and to take possession, and they telegraphed J. H. Hanson to that effect. Green went to West Bend, inserted his name in the bill of sale, and took possession, and on the same day the goods were taken on the defendant's attachment, and other attachments soon followed. The bill of sale appeared to have been signed by both Hanson and wife, and recited that in consideration of \$2,000, in hand paid by Green, they granted, sold, and conveyed to him the whole of a "stock of drugs, consisting of drugs," etc., "and any and every thing pertaining to and now being in the building on lot one, block one," etc., "in West Bend with the furniture and everything, of whatever nature, pertaining to said stock." The letter accompanying the bill of sale explained its purpose thus: "Please send a responsible party at once, and relieve us of a terrible burden and anxiety, for your interest. We hope you understand our position. It's to get you paid up first, and then pay the rest, as there is more than enough for all. When all is paid, we will take the rest. In selling to you, we shall avoid all trouble, and all can be paid, as your man can close out the stock in a few weeks. You will understand, owing to the swindle, we have no means at present. Neither are we known here. Hence other

NOTE.—On the subject of partnership between husband and wife, see *Gilkerson-Sloss Commission Co. v. Salinger* (Ark.) 16 L. R. A. 526, and *note*, and *Seattle Board of Trade v. Hayden* (Wash.) 16 L. R. A. 530.

As to partnership between married woman and third persons, see the next case, *Vail v. Winterstein* (Mich.) *post*, 515.

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parties may not be willing to extend any time." Green testified that he went to West Bend and saw Hanson. The bill of sale and letter of instructions had been sent by plaintiff to him at West Bend in Hanson's care and it was opened, and he (Hanson) "mentioned that it would be necessary, as a matter of form, for me to attach [insert] my name to this document; and, thinking he was acting in good faith, I did as he directed. By his request, my name was put in the bill of sale. Nothing more was done until the following day, when I had it registered. He went away that night. I went into the store, under the bill of sale, and the attachment was made the same day." The value of the goods was about the amount of plaintiff's debt. He signed his name to a receipt. The amount he could not tell. Did not know whether it was a note. There was no talk between Hanson and him as to what he was to do with the stock. The defendant testified that prior to February, 1889, he was a druggist, and sold out to J. H. Hanson February 27, and took his note for \$350,—the one in suit, upon which the attachment was made; and there was a large proportion of the property there when the attachment was made. The defendant's attachment, judgment, and execution were put in evidence, and a sale of the property in question thereunder was proved, and the proceeds were applied in payment thereof. The other attachments, judgments, and executions were put in evidence, and it was proved that the residue of the proceeds of the sale was applied to them in their order. There was but little evidence, admissible as against the defendant, tending to show that Mrs. C. M. Hanson had ever entered into any partnership agreement with her husband, and none to show that he had any separate estate, or that she ever attempted to manage or exercise any control over the business in question, or had contributed anything to it; but considerable evidence was given, tending to show that the claim that Mrs. Hanson had any real interest in the matter was simulated, and not real, and that her claim as alleged partner was fraudulent, as against her husband's creditors.

Messrs. S. S. Barney and Charles T. Hickox for appellant.

Mr. P. O'Meara, for respondent:

Husband and wife cannot enter into partnership between themselves and thus render themselves jointly liable for the contracts of the firm thus established.

Artman v. Ferguson, 2 L. R. A. 848, 73 Mich. 146, 16 Am. St. Rep. 572, note, and cases cited.

The married woman in this state is still protected by the rules of the common law in all transactions which do not relate to her separate estate, her separate trade or business, or to contracts relating to her personal services.

Haydock Carriage Co. v. Pier, 74 Wis. 582.

This court will be slow, unless forced by the clear letter of the statute, to hold that husband and wife may carry on business as copartners; for it would greatly increase the opportunities of either to defraud creditors, and it would en-

danger the separate estate of the wife in the many cases where the husband may desire to get it into his own possession. But the plaintiff entirely failed to show that Mrs. Hanson had one dollar in the property which was attached.

Horneffer v. Duress, 13 Wis. 603; **Duress v. Horneffer**, 15 Wis. 195; **Horton v. Dewey**, 58 Wis. 410.

Plaintiff stands in the situation of Mrs. Hanson if she had brought the action in her own name and the burden was upon it to show by the "clearest proof" Mrs. Hanson's interest, if she had any, in the property.

Horton v. Dewey, *supra*; **Stanton v. Kirsch**, 6 Wis. 338; **Gettelmann v. Gitz**, 78 Wis. 439; **Hooser v. Hunt**, 65 Wis. 71.

A chattel mortgage is void as against the mortgagor's creditors, though given to secure an honest debt, if given with intent to hinder and delay the other creditors.

Wis. Rev. Stat. § 2320; **David v. Burchard**, 53 Wis. 492; **Hooser v. Hunt**, 65 Wis. 71; **Avery v. Johann**, 27 Wis. 246; **Brinkman v. Jones**, 44 Wis. 498.

The fact that a chattel mortgage was taken from one known by the mortgagee to be in failing circumstances and pressed by his creditors for a greater amount than is due is conclusive evidence of fraud.

Butts v. Peacock, 23 Wis. 359; **Rice v. Morner**, 64 Wis. 599; **Blakelee v. Rossman**, 48 Wis. 116; **Kalk v. Fielding**, 50 Wis. 339.

Pinney, J., delivered the opinion of the court:

1. It is contended on behalf of the plaintiff that the property in controversy, which was seized on execution and sold to satisfy the judgment recovered by the defendant against John H. Hanson, the husband, was the partnership property of Hanson and his wife, Caretha M. Hanson, as the firm of Hanson & Co., and had been previously transferred to Green for the benefit of the plaintiff, and to secure to it and others partnership debts of Hanson & Co., and therefore the seizure and sale of the property in question for the debt of the husband were wrongful, and that the defendant is liable for its value. It is contended that a great part of the property seized was sold to the so-called firm of Hanson & Co. by the plaintiff and that it acquired a title to it, valid as against all but partnership creditors. The question presented is whether husband and wife can become copartners in carrying on a business, under the statute in relation to married women, and, if not, what is the legal result of such an attempt by husband and wife to carry on business as such. Prior to the statute concerning married women, a *feme covert* might have a separate estate, which courts of equity, only, could recognize and protect; and she might bind it by her engagements or contracts, for the benefit of such estate or on her own account, or for her benefit upon the credit of such estate, which could be enforced only in equity against it, but not by way of judgment or decree as for a personal liability. Her contracts were void at law, and enforceable only in equity against her separate estate. The statute changed the

former equitable ownership of her separate estate into a legal one, and, for its better security and protection, provided that her estate should "not be subject to the disposal of her husband," and that, as to subsequently acquired separate estate, it should "not be liable for his debts." It has repeatedly been held, under this statute, that the contracts of a married woman, when necessary or convenient to the proper use and enjoyment of her separate estate, are binding at law, and that all her other contracts and engagements stand, as before the statute, good only in equity, and that the change from an equitable to a legal estate has not, in respect to such other contracts, enlarged her powers or removed the disability of coverture. The power of a married woman to bind herself at law is a restricted one, and limited to the making of such contracts and engagements as are necessary or convenient to the use and enjoyment of her separate estate. *Conway v. Smith*, 13 Wis. 125; *Todd v. Lee*, 15 Wis. 365; *Beard v. Dedolph*, 29 Wis. 136; *Haydock Carriage Co. v. Pier*, 74 Wis. 582, 585. It has never been held, under this statute, that the wife could contract any debt or obligation, valid at law, not fairly within this restricted power, whatever may have been said in subsequent cases as to her power to acquire and hold property, separate and apart from her husband, with the proceeds of her individual earnings, under section 2343, or either of the preceding sections. And while it is conceded that, separate and apart from her husband, the wife, with her separate estate, not derived from her husband, may engage in and carry on business, and for that purpose contract debts and engagements binding at law, her power to do this without a separate estate exists only in the emergencies specified in section 2344, where her husband shall have deserted her, or shall, from drunkenness, profligacy, or any cause, neglect or refuse to provide for her support or for the support and education of her children, in which event she "shall have the right to transact business in her own name, and to collect the profits of such business," etc., and they will not be subject to her husband's control or interference, or liable for his debts. In other words, in all such cases the wife, without a separate estate, has the rights and powers of a *feme sole*. The guarded terms of this section show that her right to transact business in her own name, beyond the scope of the power implied from the ownership, use, and enjoyment of a separate estate, is denied, except in the particular emergencies specified. The wife has not, therefore, in our judgment, the power to enter into an agreement of partnership with her husband, nor, as for that matter, with any one else, if she has no separate estate, in respect to which she can be considered as a *feme sole*, so as to bind herself at law. There is no competent evidence in this case that Mrs. Hanson had any separate estate at the time her husband made the purchases for the store in West Bend, and started business there under the name and style of Hanson & Co.; and as the plaintiff is claiming to recover for the property in question under

and through a bill of sale executed by such alleged partnership, as against an execution creditor of the husband, within repeated decisions, the burden of showing that she had a separate estate was on the plaintiff. *Stanton v. Kirach*, 6 Wis. 838; *Gottelmann v. Gitz*, 78 Wis. 499, and cases cited. Had it been shown, however, that Mrs. Hanson had a separate estate, we think that the partnership agreement between her and her husband (if any, for there is little more than a *scintilla* of evidence of one) must be regarded as void, and that the business in question was the sole business of her husband, and the plaintiff's claim is his sole and individual debt. The purpose and policy of the statute concerning the rights of married women, in our judgment, forbid the formation of a continuing business engagement between husband and wife, which shall produce a community of interest, liability, and profit, in which the husband would have, as partner, a right of control and management of the separate estate of the wife, so that he could sell and convert it into money from time to time, draw the firm moneys from the bank, and collect notes and bills receivable and dispose of the proceeds, in the payment of his debts or otherwise, without her knowledge or consent. The making of such an engagement by the wife might be, if put in execution, a conversion of her separate estate into that of her husband. Certainly, it is easy to understand that, with his influence and control as husband, such result would be almost inevitable. The principal purpose of the statute is to give the wife the power and rights of a *feme sole* as to her separate property, free "from the disposal of her husband," and "not liable to his debts." Manifestly, it was not intended that the Act should receive a construction that would be subversive of the beneficent purposes for which it was enacted, and which would almost necessarily tend to strike down the protection it was intended married women should have under it in the use and enjoyment of their separate estates. At common law a married woman was incapable of forming a partnership, and the marriage of a *feme sole* partner worked a dissolution of the firm. *Story, Partn.* §§ 10, 306; 1 *Bates, Partn.* §§ 135-141. Her right to enter into a partnership, if she has a separate estate, with a person other than her husband, is quite generally recognized, and is assumed to exist in *Merchants' Nat. Bank v. Raymond*, 27 Wis. 569; but we are not aware of any case where it has been held, under a statute in substance the same as our own, that she may embark her separate estate in partnership ventures with her husband. In the case of *Suau v. Caffé*, 122 N. Y. 308, 6 L. R. A. 593, it was held that the common-law disability of a married woman to engage in a business as a copartner or jointly with her husband, was removed by an Act "Concerning the liability of husband and wife," which authorized a married woman to carry on any trade or business on her sole and separate account, and that the wife could not escape liability for debts contracted in a partnership with her husband, on the ground of coverture; but the statute in question is

much broader than ours, and is unconditional. The case was decided by a mere majority,—three of the judges dissenting,—and is contrary to previous decisions of the supreme and superior courts, and would seem to be in conflict with *Hendricks v. Isaacs*, 117 N. Y. 411, 6 L. R. A. 559. The view we have taken of the statute is sustained by *Lord v. Parker*, 3 Allen, 127; *Lord v. Davison*, Id. 181; *Edwards v. Stevens*, Id. 815; *Plumer v. Lord*, 5 Allen, 463; *Bowler v. Bradford*, 140 Mass. 521; *Payne v. Thompson*, 44 Ohio St. 192; *Hans v. Shaw*, 91 Ind. 384, 390; *Scarlett v. Snodgrass*, 92 Ind. 262; *Artman v. Ferguson*, 73 Mich. 146, 2 L. R. A. 843, 16 Am. St. Rep. 572; *Bassett v. Shepardson*, 52 Mich. 3; *Carey v. Burruss*, 20 W. Va. 571; *Cox v. Miller*, 54 Tex. 16; *Bradstreet v. Baer*, 41 Md. 19.

It is not to be supposed that the Legislature intended that such relations and duties as exist between copartners in trade should be devolved on husband and wife, with their necessary incidents, as a possible means of disturbing domestic peace and confidence, or that they might become contentious litigants in an action to wind up, with a receiver in charge of their affairs and resources. The statute evidently intended that the gains the wife should make in the exercise of her limited business powers should be her sole and separate property, and not be in any way subject to the interference, control, or disposal of her husband. The conclusion to which we have arrived is not in conflict with *Krouskop v. Shontz*, 51 Wis. 204, where the real estate upon which farming was conducted by husband and wife was her sole property, and she was held liable for that reason. No partnership was claimed to exist. Nor is it opposed in principle to *Arndt v. Harshaw*, 58 Wis. 269; *Dayton v. Walsh*, 47

Wis. 118, 32 Am. Rep. 757; *Brickley v. Walker*, 68 Wis. 564, and *Barker v. Lynch*, 75 Wis. 624,—which are clearly distinguishable from the present case. The necessary result is that there was no copartnership estate or liabilities of Hanson & Co., and all the property and liabilities were those of the husband.

2. Inasmuch as the property in question was the sole property of Hanson, the execution and judgment of the defendant entitled him to impeach the validity of the bill of sale under which the plaintiff claims. The bill of sale was given upon the trusts contained in the letter from Hanson to the plaintiff, which was delivered with it, namely: *First*, to pay the plaintiff its debt; *second*, to pay the other creditors, and return the rest to Hanson and wife. The bill of sale was therefore a voluntary transfer or assignment of the stock of goods, etc., in question, for the benefit of or in trust for creditors of Hanson, and was not executed in the manner prescribed by the statute, and fell directly within the condemnation of the statute, section 1694, and of section 1693a, because it gave and secured the plaintiff a preference over all other creditors, contrary to the last-named section. The documents through which the plaintiff claims title created a trust, a trustee, Green, and creditors as *cestuis que trustent* with an ultimate trust in favor of Hanson and wife. The case is thus brought clearly within the adjudged cases of *Winner v. Hoyt*, 66 Wis. 227; *Maxwell v. Simonton*, 81 Wis. 635.

The claim of title of the plaintiff was therefore fraudulent in law, and void, no matter what the intentions of the parties were; and the court properly directed a verdict for the defendant.

The judgment of the Circuit Court is affirmed.

MICHIGAN SUPREME COURT.

William A. VAIL *et al.*, Appts.,
v.

Warren WINTERSTEIN *et al.*

(.....Mich.....)

A married woman can enter a firm as a partner of which her husband is not a member and thus bind her separate property for the undertakings of the firm under the Michigan statutes which give her power to carry on business or trade in her own name and upon her sole account.

(December 22, 1892.)

NOTE.—The power of a married woman to form a partnership in business with a third person depends so entirely upon the words of the statutes by which common-law disabilities are removed in whole or in part that the decisions in each state on this question are less likely to be valuable in other states than the decisions on most other questions. Some of the decisions on this subject are included in a note to *Artman v. Ferguson* (Mich.) 2 L. R. A. 342.

18 L. R. A.

A PPEAL by complainants from a decree of the Circuit Court for Sanilac County dismissing as to defendant, Alice A. Tallmadge, the bill filed for the winding up of a partnership concern, for the appointment of a receiver and an accounting, but in other respects granting the prayer of the bill. *Reversed as to such dismissal.*

The facts are stated in the opinion.

Mr. George McKay, for appellants:

The complainants, while conceding that a married woman cannot be a partner with her husband, nor a member of the same firm with him (*Lord v. Parker*, 3 Allen, 127; *Artman v. Ferguson*, 2 L. R. A. 843, 73 Mich. 146), con-

Partnership between husband and wife involves so radical a change in the common law that very broad language as to the wife's power to contract and carry on business has been held in most cases not sufficient to authorize a partnership with her own husband.

See, on this subject, the preceding case, *Fuller & Fuller Co. v. McHenry* (Wis.) *ante*, 512, and the note there referred to, which reviews all the authorities on the question.

tend that in this state where a married woman may engage in business, she may be a member of a firm if her husband is not a member of the same firm, and may be liable as a partner the same as if she were a *feme sole*.

1 Bates, Partn. § 16; Harris, Contracts of Married Women, 420, 421, §§ 511, 512; Wells, Separate Property of Married Women, chap. 11; *Plumer v. Lord*, 5 Allen, 460; *Abbott v. Jackson*, 48 Ark. 216; *Newman v. Morris*, 53 Miss. 405; *Suau v. Caffé*, 9 L. R. A. 598, 123 N. Y. 808.

The terms "separate property," "separate estate," "sole property," and "sole estate" are never properly used in the sense of several or individual. These terms had a well-defined meaning in the equitable rules governing the separate estate of a married woman, long before a "legal" separate estate was ever known to our system of laws. In equity, a "separate estate," was an estate over which the husband's marital right of ownership and control was excluded by the terms of the settlement, and it was not liable for his debts.

2 Story, Eq. 12th ed. § 1883; *Firemen's Ins. Co. of Albany v. Bay*, 4 Barb. 407.

Our Legislature in enacting the Married Woman's Act must be presumed to use the term "separate estate" in the sense already fixed for it by the courts.

The object of the Legislature by this Act was to give the wife the same power, in all respects, over her property that she had before marriage.

Starkweather v. Smith, 6 Mich. 880.

The interest of the wife in the firm property would be her separate estate. The business and her property invested therein would be free from the husband's common-law right of ownership and control. If the husband is not a member of the firm he has no legal right to control the wife's property invested in the business, and cannot directly or indirectly control this portion of her separate estate any more than any other portion. The property invested by her in a firm business does not cease to be her separate estate—if the term "separate estate" is to retain its well-established meaning, and not to be made a synonym for "several" or "individual." In this state a married woman may be bound jointly with another upon a proper consideration.

Post v. Shafer, 63 Mich. 88.

In this state a married woman may engage in any lawful business and may employ all the necessary agents to assist her in the business. For the acts of her agents within the scope of their agency she is necessarily liable.

Rankin v. West, 25 Mich. 195.

She may purchase her entire outfit on credit, or she may borrow the necessary capital and bind herself personally for its repayment.

Tillman v. Shackleton, 15 Mich. 447, 93 Am. Dec. 198.

In this case, then, Mrs. Tallmadge might have engaged in the banking business; she might have employed as her agents, to aid her in the business, the very men who have been her partners; she might have borrowed from each the amount he agreed to contribute to the capital stock of the firm, and she might have bound herself to pay them a stipulated

share of the profits in lieu of interest on the borrowed capital.

Beecher v. Bush, 45 Mich. 188, 40 Am. Rep. 465.

If a married woman may engage in business freely, as she may in this state, there seems to be no good reason for saying that she may not stipulate with her agent that he shall also be a principal with her and be subject in every way to the liabilities and vicissitudes of the business. She may be bound jointly upon a proper consideration.

Post v. Shafer, supra.

In Massachusetts it was held that a married woman could not enter into a contract of co-partnership with her husband (*Lord v. Parker*, 8 Allen, 127), but that she might enter a firm of which her husband was not a member.

Plumer v. Lord, 5 Allen, 460.

In Arkansas a married woman may be a member of a firm with all the rights and subject to all the liabilities of a partner.

Abbott v. Jackson, 48 Ark. 216.

In Mississippi a married woman may be a member of a trading partnership.

Newman v. Morris, 53 Miss. 405.

In Maryland a married woman has no right to contract even in respect to her separate estate except in writing, in which her husband joins. Such a restricted power to contract is not sufficient for the purposes of a partnership.

Bradstreet v. Baer, 41 Md. 19.

In West Virginia, where a married woman cannot engage in trade or business unless she is living separate and apart from her husband, it is held that she cannot be a member of a trading partnership while living with her husband.

W. Va. Code, 2d ed. 1887, p. 607, § 18; *Carey v. Burruss*, 20 W. Va. 571, 43 Am. Rep. 790.

In Ohio it has been held that a married woman has no power to become a member of a firm.

Swasey v. Antram, 24 Ohio St. 87.

In New York where a married woman is authorized by statute to carry on any trade or business on her sole and separate account, it is held that she may be a member of a firm.

Suau v. Caffé, 9 L. R. A. 598, 123 N. Y. 808.

Mr. George W. Wendock, for appellees:

Alice A. Tallmadge being a married woman at the time of entering into the contract of co-partnership in question in this controversy, could not enter into a contract of co-partnership with any one, and the alleged articles of co-partnership, as to her, are absolutely void. The rule at common law was that by marriage the husband and wife became one person in law, that is the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated or consolidated into that of the husband, under whose wing or protection she performs everything.

1 Bl. Com. p. 442.

This rule of the common law obtains in Michigan, except as modified by the Constitution and statutes of the state.

Artman v. Ferguson, 2 L. R. A. 843, 73 Mich. 146.

A married woman may not become a partner with her husband.

Edward v. McEnhill, 51 Mich. 165; *Bassett v. Shepardon*, 52 Mich. 8; *Artman v. Ferguson*, *supra*.

Artman v. Ferguson, *supra*, seems to decide the question at issue in this case, and determines that a married woman has no power to enter into a contract of copartnership. The decision of *Judge Cooley*, in the case of *Russell v. People's Sav. Bank*, 89 Mich. 672, is to the same effect.

It has been uniformly held that our statutes do not authorize a married woman to become personally liable on an executory promise, except concerning her separate estate. A note given for any other consideration is void.

De Vries v. Conklin, 23 Mich. 255; *West v. Laraway*, 28 Mich. 464; *Emery v. Lord*, 26 Mich. 481; *Ross v. Walker*, 31 Mich. 120; *Jenna v. Marble*, 37 Mich. 319; *Kitchell v. Mudgett*, 37 Mich. 81; *Carley v. Fox*, 38 Mich. 887; *Johnson v. Sutherland*, 39 Mich. 579; *Russell v. People's Sav. Bank*, *supra*; *Grants v. Toles*, 40 Mich. 725; *Kenton Ins. Co. v. McClellan*, 43 Mich. 565; *Reed v. Buys*, 44 Mich. 82; *Buhler v. Jennings*, 49 Mich. 538; *Edwards v. McEnhill*, 51 Mich. 165; *Schlatterer v. Nickodemus*, 51 Mich. 627; *Tompkins v. Hollister*, 60 Mich. 479; *Waterbury v. Andrews*, 67 Mich. 287; *Mutual Ben. L. Ins. Co. v. Wayne County Sav. Bank*, 68 Mich. 127; *Fechheimer v. Petros*, 70 Mich. 440.

Long, J., delivered the opinion of the court:

The complainants Henry W. Wilson and William A. Vail entered into a copartnership with defendants Alice A. Tallmadge and Warren Winterstein under the firm name of Winterstein, Vail & Co. for the purpose of carrying on a general banking business at Marlette, this state. They organized January 1, 1888, and under the terms of the copartnership agreement were to continue to January 1, 1893. They contributed capital stock as follows: Henry W. Wilson \$2,000, William A. Vail \$3,000, Alice A. Tallmadge \$3,000, and Warren Winterstein \$4,000, making a capital stock of \$12,000, Winterstein becoming the president, and Vail the cashier and bookkeeper. March 30, 1891, a bill was filed in the circuit court in chancery for Sanilac county by Vail and Wilson against the defendants Winterstein and Tallmadge and others, to whom it was alleged conveyances and transfers of firm property had been made in violation of the rights of Vail and Wilson and the creditors of the firm. A receiver was asked for. Immediately after the filing of the bill, a common-law assignment was made by Vail and Wilson in the name of the firm to Thomas W. Dawson, one of the complainants here, of all the firm property for the benefit of all the firm's creditors. In making the assignment, Vail and Wilson assumed that the other members of the firm had disposed of their interests in the firm property, and were by such acts disqualified to act for the firm in any capacity, and that their transferees had no authority to act. An amended bill was subsequently filed by Vail and Wilson and Dawson, the assignee, and joining as defendants with the others John J. Lunau, a transferee of

a part of the firm's real estate, and Annie, the wife of Warren Winterstein. A stipulation was thereafter made dismissing the bill as to Margaret Winterstein, Johnson Winterstein, and John J. Lunau. Proofs were taken, and a decree entered reciting in substance that the firm of Winterstein, Vail & Co. had been dissolved by the acts of the partners, and appointing complainant Dawson as receiver. It also recited that certain properties which it had been attempted to transfer to other parties belonged to the firm, and also that Alice A. Tallmadge, at the time of the execution of the partnership agreement, was a married woman, and still so continued. It was therefore decreed that the copartnership be dissolved, placing all the properties in the hands of the receiver, with the right to sue on and collect all the notes, bills, and choses in action belonging to the firm, to collect the rents and avails of all the real estate belonging to the firm, and that Warren Winterstein execute, acknowledge, and deliver to the receiver an assignment of all the personal property belonging to the firm, and that he and his wife make certain conveyances to the receiver. The bill was thereupon dismissed, without costs, as to the defendant Alice A. Tallmadge, and a decree for an accounting to be made.

This appeal raises but the one question whether the defendant Alice A. Tallmadge, being a married woman, could become a member of the firm of Winterstein, Vail & Co., and by such act bind her separate property, so that in the accounting for the benefit of creditors she became liable out of her separate estate to the creditors of the firm? Section 5, art. 16, of the Constitution of this state provides that "the real and personal estate of every female, acquired before marriage, and all property to which she may afterwards become entitled by gift, grant, inheritance, or devise, shall be and remain the inheritance and property of such female, and shall not be liable for the debts, obligations, or engagements of her husband, and may be devised or bequeathed by her as though she were unmarried." Section 6295, How. Stat., provides that "the real and personal estate of every female, acquired before marriage, with all property, real and personal, to which she may afterwards become entitled by gift, grant, inheritance, devise, or any other manner, shall remain the estate and property of such female, and shall not be liable for the debts, obligations, and agreements of her husband, and may be contracted, sold, and transferred, mortgaged, conveyed, devised, and bequeathed by her in the same manner as if she were unmarried." It was held in *Edwards v. McEnhill*, 51 Mich. 165; *Bassett v. Shepardon*, 52 Mich. 8; and *Artman v. Ferguson*, 73 Mich. 146, 2 L. R. A. 343, that a married woman could not become a partner in business with her husband, and make her separate estate liable upon the contracts and engagements of the firm. In the last-named case it was attempted to subject Mrs. Ferguson's separate estate to the payment of the firm's debts and liabilities, the firm being composed of herself and her husband. It was said in that case: "A partnership is a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or busi-

ness and to divide the profits and bear the loss in certain proportions. That a married woman may, when she has separate estate, be a co-partner with a person other than her husband, is held in many of the states under the married woman's statutes; but where the statute gives her no power, or only a limited power, to become a partner, the rule of the common law prevails, and she cannot enter a firm." Great stress is laid by defendants' counsel upon the last clause before quoted, insisting that the court intended to hold in that case that a married woman in this state could not become a member of any firm and incur liability binding upon her separate estate. That question was not involved in the case, but related solely to her ability to bind her separate estate in the firm in which her husband was a partner. The reason given for the holding was that it was the purpose of these statutes to secure to a married woman the right to acquire and hold property separate from her husband, and free from his influence and control; and, if she might enter into a business partnership with him, it would subject her property to his control in a manner wholly inconsistent with the separation which it was the purpose of the statutes to secure, and might subject her to an indefinite liability for his engagements. That the important and sacred relations between man and wife which lie at the very foundation of civilized society are not to be disturbed and destroyed by contentions which may arise from such community of property, and a general power of disposal, and a mutual liability for the contracts and obligations of each other.

The question presented by the present record has not been directly disposed of by any of our previous decisions, and the reasons which have been given why a wife may not become a member of a firm with her husband under our statutes are not at all applicable to cases where she seeks to enter a firm conducting business separate from her husband. As was said in the former case, in many of the states married women are permitted to carry on business in this way, and under statutes quite analogous to our own. The statute of Massachusetts provides: "Any married woman may, while married, bargain, sell, and convey her real and personal property which may now be her sole and separate property, or which may hereafter come to her by descent, devise, bequest, or gift of any person except her husband, and enter into any contracts in reference to the same, in the same manner as if she were sole." Stat. 1857, chap. 249, § 2. Section 7, chap. 304, Stat. 1855, of that state provides: "Any married woman may carry on any trade or business and perform any labor or service on her sole and separate account." It was held under these statutes in *Lord v. Parker*, 3 Allen, 127, that a married woman could not enter into a contract or copartnership with her husband. In *Plummer v. Lord*, 5 Allen, 480, it was held that, while she could not enter into a firm where her husband was a partner, yet she might engage in business with others as partners. Many of the other states, under quite similar statutes, while holding that a married woman could not be a partner in a firm with her husband, have likewise determined that she might engage her

services and property in copartnership undertakings with third parties. The statutes of Massachusetts and many other states expressly confer upon married women the right to carry on trade or business and perform labor or service on their sole and separate accounts. We have no such statutory provision conferring express power, but from the earliest cases since the passage of the Married Woman's Act in 1855 our statutes have been interpreted as giving power to married women to carry on business or trade in their own names and upon their sole accounts. *Tilman v. Shackleton*, 15 Mich. 447, 98 Am. Dec. 198; *Campbell v. White*, 22 Mich. 178; *Powers v. Russell*, 26 Mich. 179; *Rankin v. West*, 25 Mich. 195. If a married woman may carry on a business in her own name, and appoint agents who may make contracts for her and in her name, we see no reason why these statutes should be interpreted as restrictive of her rights to enter a firm as a partner with others aside from her husband, and thus bind her separate property for such firm's undertakings, as partners in a firm are the agents of each other in a transaction of partnership affairs; and it is conferring no more power upon the partner to bind the sole and separate property of a married woman than such married woman would have the right to contract for through any other agency. We think the great weight of authority under statutes quite similar to our own hold that married women, while incompetent to enter into partnership engagements with their husbands, are free to enter partnership firms with third parties, and bind their separate properties as fully and to the same extent as they might do through any other agency, where they carry on business upon their sole and separate accounts. 1 Bates on Partnership, § 136, states the rule as follows: "Where statutes give a married woman power to sell and contract as to her separate property, and to carry on a business, she may invest it in a partnership, since this is a usual way of carrying on business, and it is no objection that she thereby becomes liable for the acts of others, for the same happens if she owns stock in a company, or employs an agent. Her separate property is still hers, and does not become liable for her husband's debts." Harris on Contracts of Married Women, p. 511, also lays down the following proposition: "If the Legislature has conferred upon the married woman the full, complete, and free power to carry on a separate trade or business, that seems to carry with it, by necessary implication of law, the right to conduct such business upon the same principles, the same system, in the same manner, to the same extent, and at her own option, as fully and freely as any other person, and to say that she cannot form a partnership would be to deny her a valuable right in business relations, which is allowed to other persons. It will not do to say that she is a sole trader, with all the power in relation to her trade and business that she would have if a *feme sole*, unless she has the liberty to exercise an unrestricted option as to the mode of carrying on such business, provided there be no fraud perpetrated on others. It has been insisted by some that, if she form a partnership, she becomes, by that relation, liable as a part-

ner, and is bound by the debts, either contracted by herself or another member of the firm, and this would often subject her property to the debts and liabilities of another person. But I can see no good reason consistent with the full power as a sole trader why she should not enter into a partnership in business if she thinks her separate interests would be promoted thereby." The court below was therefore in error in dismissing the bill as against Mrs. Tallmadge. In other respects the bill will stand and an accounting to be had, as provided under the decree; the bill to stand

against Mrs. Tallmadge the same as the other defendants. The bill, having been dismissed as to the defendants Margaret J. Winterstein, Johnson Winterstein, and John J. Lunau, under stipulation between the parties, will not be disturbed.

The decree of the court below, with these modifications, will be affirmed, and the case remanded to the court below for the purpose of taking an accounting. Complainants will recover their costs of this court.

The other Justices concurred.

WEST VIRGINIA SUPREME COURT OF APPEALS.

William T. BUTCHER

v.

WEST VIRGINIA & PITTSBURGH R.
CO., *Pff. in Err.*

(.....W. Va.....)

***1. In an action of trespass against a railroad company for injuries received at a railroad crossing by reason of the failure of the defendant to give the signal required by statute, in order that the plaintiff should recover, he must not only prove that the defendant failed to give the signal required by statute, but that such failure was the proximate cause of his injury.**

2. Where negligence is the ground of the action it rests upon the plaintiff to trace the fault for his injury to the defendant, and for this purpose he must show the circumstances under which the injury occurred, and if, from these circumstances so proven by the plaintiff, it appears that the fault was mutual, or, in other words, that contributory negligence is fairly imputable to him, he has, by proving the circumstances, disproved his right to recover, and on the plaintiff's evidence alone the jury should find for the defendant.

3. A traveler on a public road must exercise at least ordinary care and caution. No recovery can be had by the plaintiff where his negligence in any degree contributed to the injury received by colliding with a railroad train at a public crossing, unless the defendant, being aware of the plaintiff's danger, and having the opportunity to avert it, fails to use ordinary caution to do so.

(December 3, 1892.)

ERROR to the Circuit Court for Lewis County to review a judgment in favor of plaintiff in an action brought to recover dam-

*Headnotes by ENGLISH, J.

NOTE.—For statutory signals as the measure of trainmen's duty at highway crossings, see note to New York, L. R. & W. R. Co. v. Leamon (N. J.) 15 L. R. A. 426.

As to what railway crossings signals of trains are required, see note to Sanborn v. Detroit, B. C. & A. R. Co. (Mich.) 16 L. R. A. 119.

For whose benefit signals by approaching trains are required by statute at highway crossings, see note to Lonergan v. Illinois Cent. R. Co. (Iowa) 17 L. R. A. 254.

15 L. R. A.

ages for injuries to plaintiff's person and property caused by a collision with defendant's train at a point where defendant's road crossed a public highway, which were alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. John Brannon and W. W. Brannon, for plaintiff in error:

If the matter of the statutory signal were of any importance in the case the burden is not upon the defendant to show that the signal was given, but on the contrary it is upon the plaintiff to show that it was not given.

Peoria, D. & E. R. Co. v. Foltz, 18 Ill. App. 535.

If the defendant had failed to give the required alarm in this case, it avails nothing to the plaintiff, for such failure is not the proximate cause of the injury.

Beyel v. Newport News & M. V. R. Co. 34 W. Va. 538; 4 Am. & Eng. Encyclop. Law, 70, and numerous authorities there collated in note 2; also p. 914, note 7; p. 921; vols. 1-35 Am. & Eng. R. R. Cas. Dig. p. 246, §§ 420-423; Patterson, Railway Accident Law, § 179; Deering, Neg. 252; 8 Lawson, Rights, Rem. & Pr. § 1188, note.

If the defendant were liable for injury resulting from fright of plaintiff's horses, there could be no recovery in this action, for the plaintiff in his declaration has ascribed it to the failure of the defendant to give the proper alarm. But a railroad company is not liable for injuries resulting from fright of horses caused by sight of train or noises incident to its movement.

Patterson, Railway Accident Law, 152, and numerous cases cited in note 4; Deering, Neg. § 250, note 1; 8 Lawson, Rights, Rem. & Pr. § 1176; 2 Wood, Railway Law, p. 1332, § 824.

On the general question of the reciprocal duties and obligations of the traveler and the railroad company at a crossing, see the following authorities:

Beyel v. Newport News & M. V. R. Co. supra, and cases cited; *Dean v. Pennsylvania R. Co.* 6 L. R. A. 143, 129 Pa. 514, 15 Am. St. Rep. 783, and note on p. 730; *Cooper v. Lake Shore & M. S. R. Co.* 66 Mich. 261, 11 Am. St. Rep. 486; *Louisville & N. R. Co. v. Crawford*, 89 Ala. 240, 44 Am. & Eng. R. R. Cas. 570; *Mynning v. Detroit, L. & N. R. Co.* 64 Mich. 93, 8 Am. St. Rep. 809, 4 Am. & Eng. En-

cyclop. Law, 70 and cases cited; Deering, Neg. 252; 2 Beach, Railways, 960; Patterson, Railway Accident Law, § 178 *et seq.*; 8 Lawson, Rights, Rem. & Pr. § 1189, and collection of cases there made; 2 Wood, Railway Law, pp. 1301-1332.

Measrs. G. M. Chidester and W. B. McGary for defendant in error.

English, J., delivered the opinion of the court:

This was an action of trespass on the case, brought by William T. Butcher against the West Virginia & Pittsburgh Railroad Company in the circuit court of Lewis county to recover damages for an injury occasioned by a train of cars belonging to the defendant running against a wagon and team of three horses at "Dodson's Crossing" on the line of defendant's road between the village of Jane Lew and town of Weston in said county. The plaintiff, at the time of the collision, was riding in the wagon, and a boy was riding the saddle horse in the team. The declaration contains the usual allegations, and the damages are laid at \$2,000. As the regular judge of the circuit court could not preside at the trial, John J. Davis was elected special judge, and presided at the trial. The plea of not guilty was interposed. Issue was joined thereon, and the case was submitted to a jury, who, having heard the evidence and arguments of counsel, found for the plaintiff, and assessed his damages at \$2,000 and thereupon the defendant, by its attorney, moved the court to set aside said verdict, and grant it a new trial, upon the ground that the same was contrary to the law and the evidence in the cause, which motion was overruled, and judgment was rendered upon said verdict, to which opinion of the court in overruling said motion the defendant, by its counsel, excepted, and tendered a bill of exception, in which the entire evidence introduced by the plaintiff and the defendant is set forth.

The material facts disclosed by the evidence introduced by the plaintiff are that on the 23d day of May, 1890, the plaintiff was passing along the turnpike road leading from the village of Jane Lew to the town of Weston in a wagon drawn by three horses; that when plaintiff and his team, which was driven by a boy riding one of the horses, was about 200 yards from the Dodson crossing, where the railroad crosses said turnpike, the train came up behind him, and scared his horses, and they ran off. At this point, and from there to the said crossing, the turnpike and railroad ran parallel, and were very close together, and at said crossing said team and the railroad train collided, resulting in cutting and bruising the plaintiff, and mashing and lacerating his left hand to such an extent that it had to be amputated. The evidence shows that the train was running at the speed of 16 miles an hour, which would be about 1 mile in four minutes, and it would run 200 yards in about thirty seconds. After the horses commenced running they must have gone at about the same speed, because they met the locomotive at the crossing, or rather ran into it at that point, although they

may have had a little the start of the train. Was the injury complained of caused by the failure of the trainmen to give the statutory signal by blowing the whistle or ringing the bell? Can we say that, if the whistle had been blown for Dodson's crossing at a point 380 yards therefrom, as required by statute, the injury would not have occurred? The plaintiff, when asked, "Where was the train when the team started to run off? How far was it from Dodson's crossing?" answered, "I should say 200 yards, and that when the horses started to run off they were about 200 yards from Dodson's crossing;" so, according to his own statement, the train must have been about opposite to his wagon when they started to run. And he further states that the train came up behind him, and scared his horses, and they ran off; and when asked: How it was that he knew the train was coming. "You say the horses were scared, and there was nothing there to obstruct your view, and the train was running close to the county road?" answered, "The noise of the train behind me scared the horses;" and when asked, "Well, William, were you drinking any that day?" answered, "Yes, sir;" and when asked, "Can you account for them,—how many?" answered, "I know I did not take more than two, and I ain't positive I took two." He further states that Ralph Butcher, a boy seventeen or eighteen years of age, was driving the team, riding the saddle horse, and he (plaintiff) was sitting in the wagon on the seat board, and that the accident occurred immediately on the crossing. We next look to the condition of Ralph Butcher, the driver, and find that Green Waggoner, a witness for the defense, in regard to whose testimony there is no conflict, says that on the 23d of May he went up the road behind plaintiff as far as Van Fleasher's; that there was a young fellow with Butcher; Butcher was on the wagon, and looked like he was drunk; both of them seemed to be tottering along; and when asked to explain to the jury what he meant, answered, "He looked to me like he was drunk;" and when asked, "How was the other fellow?" answered, "He was drunk too," and when asked if he was tottering too, answered, "It looked that way." Harrison Alkire, another witness for the defense, states that he saw them about a quarter of a mile from Dodson's crossing, at Eddy's blacksmith shop. That when Butcher and his young man came up to the shop they ran against the fence, and one of the horses got fastened in the fence. The fore horse got down close to the fence, and got his trace fastened. The young man got off the horse to fix the trace, and fell down in the road. "I would call them drunk. I helped him after he got off his horse, and then he and Mr. Butcher went about their business." That the road was wide enough for two wagons to pass where the horse got fastened. Mr. Eddy, the blacksmith, after speaking of the team running against his fence, states that "Mr. Butcher, after some time, got off of the wagon, and came into the shop, and from his talk and conversation I judged him to be drunk. He could hardly stand up, and had to hold to the side of the shop. The

young man was on the saddle horse. He got off of the horse after the team ran into the fence, and he and Harrison Alkire fixed up a trace that had come unfastened, and got the team away from the fence. After that he staggered around, and fell down." And Moses Kittle, another witness for the defense, states that he saw a man and boy passing with a wagon and three horses before they reached Eddy's shop, and heard great hallooing and whooping on one or two occasions, and thought it was cattle coming up the pike; and when he went over to the rise, towards Waggoner's, saw the wagon with three horses in it and two parties away up on the turnpike. There is other evidence on this point, but this is sufficient to clearly indicate not only the condition of the driver but the plaintiff himself, when he was approaching the crossing where the accident occurred, and was not more than one quarter of a mile therefrom. If the plaintiff was sober himself,—which is more than problematical,—he had intrusted the management of his team and wagon in which he was traveling to a young man, who, if he was himself capable of exercising any degree of care or prudent forethought, he must have seen and known was incapable of driving a team with any degree of safety, and who had already shown himself incapable of keeping the horses in the turnpike road.

Under this statement of the case are we warranted in saying that the failure of the trainmen to give the statutory signals for Dodson's crossing constituted the proximate cause of the injury received by the plaintiff? On the contrary, it is very clear that, if the team had traveled at its ordinary gait, it never would have reached the Dodson crossing at the time the train did from the point where the team started to run off. Instead of going at the speed of 8 or 4 miles an hour, it must have gone at the rate of 16 miles an hour. The plaintiff saw the train, and had notice of its approach towards the Dodson crossing when he was 200 yards away from said crossing; and, but for the fact that his driver was unable to control the team, no accident would have resulted. The plaintiff knew the train was approaching, because, when asked if the train whistled at the Courtright crossing, he answered, "Yes, sir; I think they did;" and Mr Woodell, the engineer who was in charge of the train, says he blew the whistle both at Courtright's and for Dodson's crossing, the last whistle being done just a little on this side of Courtright's house, at the whistling post for Dodson's crossing; and, when asked how far it was from Courtright's crossing to Dodson's crossing, replied, "300 yards, or something like it." This, then, would be a point within the 60 rods required by statute for whistling before a crossing is reached. Woodell swears positively that he did blow the whistle for Dodson's crossing. In this statement he is corroborated by the witnesses Morgan, W. H. Jeffries, and P. T. Lorentz. One or two witnesses say the whistle was not blown for Dodson's crossing, and others say they did not hear it. On this point, Lawson, in his work on Rights and Remedies, (vol. 3,

§ 1184,) says: "Where the evidence is conflicting as to whether the bell was rung or the whistle sounded at a crossing, and there is affirmative testimony that this duty was performed and negative testimony by other witnesses that they did not hear it, the affirmative evidence of the fact should overcome the negative. That the plaintiff did not hear the signal is no evidence that it was not given." But, for the purposes of this case, I regard it as immaterial whether the whistle was blown for Dodson's crossing or not, as all the benefit it would have been to the plaintiff would have been to give him warning of the approach of the train to the crossing, and on this point a witness, T. G. Walker, introduced by the plaintiff states that a man driving along the road sitting on the wagon seat could see the train after it left Jane Lew. Add to this the fact that the plaintiff admits in his testimony that he thinks the train blew its whistle at the Courtright crossing, now if it is true that from his position in the wagon the plaintiff could have seen the train from the time it left Jane Lew, and heard it whistling at Courtright's crossing, and again heard it coming behind him, he must have known it was approaching the Dodson crossing, and he had all the warning he could have had if it had blown for the Dodson crossing. The failure to give the statutory signal, then, was not the proximate cause of the defendant's injury. If I am correct in this conclusion, and it is made to appear that the injury received by the plaintiff was caused by his own negligence, the finding of the jury was erroneous, and the court below erred in refusing to set it aside, because by the language of the statute, (section 61 of chapter 54 of the Code,) which requires such signal to be given, it is provided that "the corporation owning or operating the railroad shall be liable to any party injured for all damages sustained by reason of such neglect;" and it follows that the corporation should not be liable for damage occasioned by the neglect of the plaintiff himself. If it appeared in this case that the plaintiff was in the act of crossing the railroad at Dodson's crossing after looking and listening as the law requires, and that by reason of the failure of the trainmen to give the statutory signal he had no notice of the approach of the train, and, in consequence thereof, his injuries were inflicted, the verdict and judgment complained of might be sustained; but when we can in no manner trace the result to the failure to give such signal, I cannot perceive how said verdict and judgment can be sustained.

The injury to the plaintiff in this case evidently resulted from the fact that the horses attached to his wagon became frightened at the train, and from the further fact that at the time they became so frightened and ran away the plaintiff himself was under the influence of liquor, and the party to whom he had intrusted the management of his team was drunk, and incapable of controlling or managing the horses. Patterson on Railway Accident Law, (page 152,) says: "But the railway is not liable for injuries

resulting from the fright of horses on a highway, caused by the mere sight of the train, or by the noises necessarily incident to its movement." This law is reasonable, and, were it not the law, it would be impossible to operate a railroad where it is paralleled by turnpikes and county roads, as was the case in this instance. In the case under consideration there was nothing to obscure the approaching train. The testimony shows that it was visible from the time it left Jane Lew; that it blew its whistle at Courtright's crossing, so that the party in charge of the team, if he had been in a condition to do so, could have dismounted and unhitched or held his team if he had wished to do so. In the case of *Philadelphia, W. & B. R. Co. v. Stinger*, 78 Pa. 219, point 5 of syllabus, it was held that "a railroad company having a chartered right to propel their cars by steam are not responsible for injuries resulting from the proper use of such agency;" (6) that "whether alarming a horse, and causing an accident by a rapidly moving train, or sounding a whistle, will make the company liable for damages, depends upon whether it was from want of proper care in those in charge of the train;" (7) "what would be due care in running a train through a sparsely settled rural district might be negligence in approaching a large city;" (10) "one driving an unbroken or vicious horse, or one easily frightened by a locomotive, along a public road running side by side with a railroad, does so at his own peril; the right of the company to move their trains on their road is as high as that of the individual to use the public road." In the case of *Flint v. Norwich & W. R. Co.*, 110 Mass. 232, in an action to recover for injuries caused by the plaintiff's horse becoming frightened by cars on the defendant's railroad, it appeared that the railroad crossed the highway on which the plaintiff was traveling; that the horse became frightened when about five rods from the crossing by the approach of two cars about ten rods therefrom; that the cars were coming on a down grade by force of gravitation at the rate of eight or ten miles an hour; and that no signal was given of their approach. Held, that these facts would not warrant the jury in returning a verdict for the plaintiff. Now, as to the horses attached to the plaintiff's wagon on the day he was injured, our only way of determining whether they were afraid of the cars, and liable to run off when the train approached them, is by the fact stated by the witnesses that they did run off; and the plaintiff himself says, "The train came up below, and frightened my team, and they ran away." There is nothing in the evidence that discloses that the defendant was running its train at an unusual rate of speed; in fact it appears that it was only running at the rate of 16 miles an hour. It does not appear that any unusual or unnecessary noise was being created by escaping steam, or by blowing the whistle, but the horses were frightened at the ordinary noise made by a train in motion; and we must conclude that the plaintiff was driving horses that were unbroken, or those that were easily

frightened by a locomotive, and such being the case, the circumstances would be similar in point of fact to the case of *Philadelphia, W. & B. R. Co. v. Stinger*, above quoted.

It would be grossly unreasonable to require the conductor of a railroad train to check its speed or stop its progress every time a team of horses on a lateral road showed a disposition to frighten or run away, and the conductor who pursued that course in these days of rush and rapid transit would receive a very small share of the patronage of the traveling community. As to the manner in which this accident occurred there is no conflict between the plaintiff and the engineer, Woodell. The latter says he was standing in the cab, on the right side, looking out,—the only place he could stand,—when he heard something strike the cab, and chains rattling, and then whistled down brakes, and looked out, and saw the lead horse up against the cab, the wagon and two men. That was the first knowledge he had of the approach of the wagon. That Butcher was not hurt until after down brakes was whistled, for just after the horse struck the cab he looked back, and saw Butcher sitting in the wagon. They were on this side of the crossing, in the cut, when they ran against the train in the cut. The wagon upset against the train, and threw plaintiff out between the railroad and the side of the hill. And Butcher, in his testimony, says: "There was a little embankment there, and the horses went in between that and the train. The wagon turned over, and was broken to pieces." And when asked what part of the train struck him, replied that he did not know for certain what part of the train; some of the coaches, he thought. So that it appears from the evidence that the plaintiff's team was not run over by the train at the crossing, but that the team, in its fright, running away, struck the cab, which, as is well known, and as is shown by the evidence, is back of the engine; and the plaintiff was injured by his wagon upsetting and throwing him against one of the coaches. The injury to the plaintiff, then, was not occasioned by the train running against the team, but by the team, in its fright, running against the side of the train. My conclusion, then, is that the fright of the team was the proximate cause of the injury. Shearman & Redfield on Negligence (vol. 2, § 463) states the law as follows: "The rights of a traveler on the highway, at a point where it is crossed on a level by a railroad, are subordinate to those of the railroad company, so far as to require the traveler to give way to any train which is in sight or hearing, though not in such a sense as to give the company a right to block up the highway; for its right is only given for the purpose of travel, not of storing its cars or goods. Both parties are, however, equally bound to use ordinary care,—that is, such care as a prudent man would usually take under similar circumstances,—the one to avoid committing, and the other to avoid receiving, injury." In this instance the engineer was at his post on the right-hand side of the cab, his attention directed to the crossing, which was apparently clear, while the runaway

Team was on the left side of the train, advancing rapidly in the same direction the train was going, but did not reach the crossing until the head of the train had passed, and in consequence the lead horse struck the cab back of the engine, which gave the engineer the first intimation of the presence of the horses and wagon. The train was where it had a right to be, and the frightened horses, by running against it, caused the plaintiff's injury. The fright of the horses was occasioned by the appearance of the moving train, without any unusual noise or emission of steam, so far as appears from the evidence. In the case of *Bevel v. Newport News & M. V. R. Co.*, 84 W. Va. 538, this court held that "the traveler and the company have mutual and reciprocal duties and obligations in such case, [that was where the traveler was crossing the railroad at a regular crossing,] and, though a train has the right of way, the same degree of care and diligence to avoid collision is due to both." Lawson on Rights, Remedies, and Practice, (vol. 8, § 1183,) states the law as follows: "Where, by statute or municipal ordinance, the railroad is required on approaching a crossing to ring a bell or sound a whistle, the omission to do so is negligence rendering the company liable, provided the failure of duty is the proximate cause of the injury, and they are not able to show that the omission was reasonable and prudent." Shearman & Redfield on Negligence, (vol. 1, § 25,) under the heading "Proximate Cause," says: "We now come to the most important and difficult part of the general definition of a right of action upon negligence,—the connection between the negligent act or omission and the damage. No action can be maintained upon an act of negligence unless the breach of duty has been the cause of the damage. The fact that the defendant has been guilty of negligence followed by an accident does not make him liable for the resulting injury unless that was occasioned by the negligence. The connection of cause and effect must be established; and the defendant's breach of duty, and not merely his act, must be the cause of the plaintiff's damage." And in section 26 it is said: "Breach of duty must be the proximate cause. The breach of duty upon which an action is brought must be not only the cause, but the proximate cause, of the damage to the plaintiff. . . . The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred. . . . That is the proximate cause which is most proximate in the order of responsible causation. . . . If it cannot be said that the result would have inevitably occurred by reason of the defendant's negligence, it cannot be found that it did so occur, and plaintiff has not made out his case." See Bigelow, Torts, 608-626.

Now, the question is, Did the failure to whistle for Dodson's crossing, if such failure was clearly proven, have anything whatever

to do with frightening the plaintiff's horses? What witness in the case testifies that such failure if it existed, had any effect whatever in causing the plaintiff's injury? If the horses were frightened at the train, and the evidence is that they were 200 yards from the crossing, can any one say that a whistle sounded near them would have had a tendency to quiet them and allay their fears? Surely not. It is, however, too evident that this injury was not caused by any negligence on the part of the defendant. The injury resulted from the fact that the plaintiff went onto this turnpike road, which he knew ran parallel with and very near to the railroad track, and in so doing he intrusted his team to a driver who, by reason of his intoxication, was incapable of controlling it. The horses became frightened at the train passing along without unusual noise. The fright of the horses was the proximate cause of the injury, and not the failure to give the statutory signal. By going onto this road with a team that was afraid of the cars, with a drunken driver, he was guilty of contributory negligence. In the case of *Phillips v. Ritchie County*, 81 W. Va. 478, this court held that a traveler on a public road must exercise at least ordinary care and caution. No recovery can be had by the plaintiff in an action against a county where his negligence in any degree contributed to the injury, unless the defendant, being aware of the plaintiff's danger, and having the opportunity to avert it, fails to use ordinary caution to do so. In the case of *Gerity v. Haley*, 29 W. Va. 98, this court held that, "where negligence is the ground of the action, it rests upon the plaintiff to trace the fault of his injury to the defendant, and for this purpose he must show the circumstances under which the injury occurred; and if, from these circumstances, so proven by the plaintiff, it appears that the fault was mutual, or, in other words, that contributory negligence is fairly imputable to him, he has, by proving the circumstances, disproved his right to recover, and on the plaintiff's evidence alone the jury should find for the defendant." Judge Green, in his opinion, quoted this law from Judge Cooley's work on Torts, (page 673,) and, in commenting on it, says: "This, it seems to me, is a correct exposition of the law, and consists with our decisions, though there are to be found in them expressions which, unless the whole case is examined with care, might seem to be inconsistent with the law as above stated;" and this quotation was incorporated in the syllabus.

Numerous other cases might be cited bearing upon the questions involved in this case, but these are regarded as sufficient to show that the plaintiff was not entitled to recover anything from the defendant under the facts disclosed by the testimony; and for these reasons, the judgment complained of must be reversed, the verdict set aside, and the case remanded to the Circuit Court of Lewis County for further proceedings to be had therein, and the defendant in error must pay the costs of this writ of error.

IOWA SUPREME COURT.

WINNEY
v.
SANDWICH MANUFACTURING CO.,
Appt.

(.....Iowa.....)

1. A petition against a foreign corporation showing that defendant had no agent within the state upon whom personal

service could be had between the inception of the right and the commencement of the action is not demurrable on the ground that the cause of action is barred.

2. In an action on a contract against a foreign corporation, service to be good must be made on an agent conducting the business out of which the contract arose.

3. The running of the Statute of Limitations in favor of a foreign corporation depends on the fact of its residence

NOTE.—Right of foreign corporation to plead Statute of Limitations.

In some states it is established that a foreign corporation cannot plead the Statute of Limitations. This is the law in New York. *Thompson v. Tioga R. Co.* 86 Barb. 79; *Mallory v. Tioga R. Co.* 8 Keyes, 354; *Olcott v. Tioga R. Co.* 20 N. Y. 210, 75 Am. Dec. 393.

And even if such corporation has property and an agent subject to service of process within the state it is still denied the right to plead the Statute of Limitations. *Rathbun v. Northern Cent. R. Co.* 50 N. Y. 656; *Boardman v. Lake Shore & M. S. R. Co.* 84 N. Y. 157.

These New York decisions overrule the earlier case of *Faulkner v. Delaware & R. Canal Co.* 1 Denio, 441, which upheld such a plea by a foreign corporation.

In Nevada also the same rule is adopted that prevails in New York and a foreign corporation is not allowed to plead the Statute of Limitations. *Robinson v. Imperial Silver Min. Co.* 5 Nev. 44; *State v. Central Pac. R. Co.* 10 Nev. 47; *Barstow v. Union Consol. Silver Min. Co.* Id. 383.

The Federal courts follow the state decisions in cases arising in these states. *Blossburg & C. R. Co. v. Tioga R. Co.* 5 Blatchf. 347; *Kirby v. Lake Shore & M. S. R. Co.* 14 Fed. Rep. 231; *Tioga R. Co. v. Blossburg & C. R. Co.* 37 U. S. 20 Wall. 137, 22 L. ed. 331; *Union Consol. Silver Min. Co. v. Taylor*, 100 U. S. 37, 25 L. ed. 541.

On the other hand, the right of a foreign corporation to plead the Statute of Limitations was assumed without discussion in *Koons v. Chicago & N. W. R. Co.* 23 Iowa, 493; *Cobb v. Illinois Cent. R. Co.* 38 Iowa, 601.

And in *Wall v. Chicago & N. W. R. Co.* 60 Iowa, 493, a plea of the Statute of Limitations by a railroad company was upheld where the statute provided for commencing actions against such corporations by service "upon any agent of such corporation . . . wherever found or upon any station, ticket, or other agent of such corporation or person transacting the business thereof in the county where suit is brought. If there be no such agent in said county then service may be had upon an agent thereof transacting said business in any other county."

Likewise in *Pennsylvania Co. v. Sloan*, 1 Ill. App. 334, a foreign railroad company was allowed to plead the Statute of Limitations under a statute allowing actions against railroad companies in any county where the road runs and service upon "any agent of said company found in said county," and providing that foreign corporations should be subject to all liabilities, etc., imposed upon the corporations of like character organized under the general laws of the state, and should have no other or greater powers.

So in Alabama, California, and Montana it has been held that where a corporation is present in the state by a known place of business and an authorized agent on whom process may be served during the whole period of the Statute of Limitations

it is entitled to plead such statute. *Huss v. Central R. & Bkg. Co.* 66 Ala. 472; *Lawrence v. Ballow*, 50 Cal. 233; *King v. National M. & E. Co.* 4 Mont. 1.

The same rule is adopted by the Federal court sitting in Iowa in accordance with the decisions of that state. *McCabe v. Illinois Cent. R. Co.* 4 McCrary, 492, 13 Fed. Rep. 327.

In *United States Exp. Co. v. Ware*, 37 U. S. 20 Wall. 543, 22 L. ed. 422, on writ of error to the circuit court of the United States for the district of Nebraska a charge to the jury that an action against a foreign corporation was barred after the statutory period had run if service might have been had at any time during that period upon an agent of the company and otherwise not was held not erroneous. It does not appear that this question had been decided by the state courts of Nebraska.

In *Norris v. Atlas S. S. Co.*, 37 Fed. Rep. 423, it was decided by a circuit court of the United States that under N. Y. Code Civ. Proc., § 401, providing that the exception in the Statute of Limitations as to a person out of the state should not apply while a designation by him of a person within the state on whom service could be made was in force, the statute did not run if before the expiration of the statutory period the person so designated left the state. But, as will be seen by the other decisions above, this exception in the statute does not apply in any case against a foreign corporation in New York.

But a foreign corporation is entitled to the benefit of that provision of the New York Statute of Limitations providing that an action against a non-resident which accrued in another state and is there barred shall not be brought in New York state except in certain specified cases. *Penfield v. Chesapeake, O. & S. W. R. Co.* 134 U. S. 351, 33 L. ed. 940.

An early decision of the United States Supreme Court held that where the plaintiff in an action was a foreign corporation the members of which were averred to be aliens and British subjects the presumption was that they were residents abroad and if so were within the exception of the statute as to persons "beyond seas." *Society for Prop. Gosp. v. Pawlet*, 20 U. S. 4 Pet. 430, 7 L. ed. 327.

The change in the doctrine of the United States Supreme Court as to the citizenship of corporations for purposes of jurisdiction whereby the corporation itself is regarded as a legal entity existing at the place of its incorporation without regard to the citizenship or residence of its members has rather strengthened than impaired the above decision, which was made at a time when the residence or citizenship of the members of a corporation was regarded as determining that of the corporation itself.

The main case makes a distinction which is entirely new as to the corporations which may and those which may not plead the statute. But it cannot reconcile the conflict in the decisions because some of them deny that any foreign corporation can plead such statute.

B. A. R.

in the state in such sense that service may be made on it, through its keeping a managing agent therein, and not upon the knowledge or lack of knowledge of one having a cause of action against it as to the presence of such agent, but a foreign manufacturing corporation whose business is such that it can carry it on without a resident general agent cannot set the statutes running by appointing at any time or times an agent in the state upon whom process might be served.

4. It will be presumed on appeal that the jury followed an erroneous instruction allowing interest for a greater period than demanded in the petition although the verdict is much less than the damages demanded.

5. Plaintiff in an action upon a warranty cannot recover interest for a longer period than asked in his petition.

(October 25, 1892.)*

APPPEAL by defendant from a judgment of the District Court for Franklin County in favor of plaintiff in an action brought to recover damages for alleged breach of warranty of a harvesting machine. *Affirmed on condition.*

The facts sufficiently appear in the opinion.

Messrs. Andrews & Bedell for appellant.

Messrs. Taylor & Evans for appellee.

Kinne, J., delivered the opinion of the court:

1. The original opinion in this case will be found in 60 N. W. Rep. 565. February 28, 1889, plaintiff filed a petition asking damages on an oral contract of warranty made in 1883. An amendment to the petition was filed in March, 1889, alleging that defendant was a foreign corporation; that the contract was made with its agent at Hampton, Iowa; that said agency terminated in 1885, and was never re-established. It pleaded the warranty, the breaches thereof, and that in 1885 defendant agreed to so fix the harvester that it would comply with the warranty; pleaded its refusal so to do; that said agency was terminated immediately thereafter. A demurrer to the petition was sustained, and a substituted petition was filed, which alleged that in 1888 the contract was made with one Coble, then an agent of defendant at Hampton, Iowa; that he ceased to be such agent in July, 1885, and that since that time defendant had never had an agency at said place; that the defendant then was, and ever since continued to be, a nonresident of this state, and plaintiff could not at any time after July 25, 1885, and prior to January 1, 1889, obtain personal service on defendant in this state. Other allegations were made, not necessary to be set out here. A motion to strike the substituted petition was sustained as to a portion not set out herein, and overruled as to the balance. Defendant insists that the motion should have been sustained, because the substituted petition is, in effect, the same as the original petition, to which

a demurrer was sustained. One of the grounds of the demurrer was that the cause of action was barred by the Statute of Limitations.

2. The amended petition alleges that defendant is a foreign corporation, having its principal place of business in and being a resident of Illinois, but it does not aver that it was a nonresident of this state. In the substituted petition it is alleged that defendant was a nonresident of the state, and personal service could not have been had on it in this state after 1885. Although defendant was a resident of Illinois, yet, if it had an agency in this state, it would constitute it a resident of Iowa, so as to authorize the service of process on its agent in an action brought against it. Hence it appears from the allegations of the substituted petition that from 1885 to 1889 no action could have been brought against defendant in this state. The substituted petition, thus showing on its face that the action was not barred, was not vulnerable to a demurrer, and hence the motion to strike was properly overruled, so far as it was based on the defense of the Statute of Limitations.

3. The sixth instruction given by the court reads thus: "If you shall find from the evidence that the defendant during the year 1888 had an agent and agency at Hampton, Iowa, for the sale of the reapers and binders, and that in July of said year said agent sold to plaintiff the machine in question, then the original notice in this action could have been served upon such agent or his successor in such agency at any time while such agent or his successor retained the agency and authority to sell such machines, or to settle for any damages arising from warranty on the sale of such machines. But if such agency for the sale or management of the reaping and binding machines was revoked and canceled by the defendant and such agent at such agency at any time, then, and in that case, service of the original notice in this action could not have been legally made upon such agent so as to bind the defendant while such revocation and cancellation existed, *even though you should find that defendant had still kept an agent or agency there, whose duties were limited to the sale of his repairs and other implements.*" Appellant objects to so much of the instruction as is in italics. The instruction seems to mean that service, to be good, would have to be made on an agent engaged in conducting the business out of which the contract arose. To that extent it is correct. *State Ins. Co. v. Granger*, 62 Iowa, 272; *Philp v. Covenant Mut. Ben. Assn.* 62 Iowa, 633. In some other respects we think the instruction is erroneous, but appellant does not complain of it.

The court also instructed the jury on the theory that defendant might avail itself of the Statute of Limitations as follows: "If you shall find from the evidence that between the date of the alleged purchase and warranty of the machine in question and the time of the commencement of this action the defendant had one or more general agents located in this state, and that plaintiff knew such fact, or by the exercise of ordinary prudence

*A decision was reached in this case and an opinion handed down on December 17, 1891. A rehearing was subsequently granted after which the decision as represented by the opinion given herewith was reached which, to some extent, is in conflict with, and therefore supersedes, the former opinion, and renders its publication unnecessary.

and diligence he could have ascertained such fact, then, and in that case, you are justified in finding that during the time defendant's said general agents were located in the state, and the plaintiff knew, or by the exercise of ordinary prudence and diligence could have known such fact, that during such time, for the purpose of this suit, the defendant was a resident of this state. But even though you shall find that during said time or a part of such time the defendant did have a general agent or agents located in the state, but that, owing to such fact not being generally known, plaintiff did not know of it, and by the exercise of ordinary prudence and diligence could have known of it, then, and in that case, the mere fact that defendant did have a general agent or agents in the state would not constitute defendant a resident of this state for the purpose of this action." Appellant complains of this instruction, for that the running of the Statute of Limitations is made to depend upon the knowledge that plaintiff had, or by the exercise of ordinary prudence and diligence might have had, of the existence within this state of an agent of the defendant, having general management of its business. This instruction is evidently drawn in view of the provisions of section 2612 of the Code, which reads: "When the action is against a municipal corporation, service may be made on the mayor or clerk, and, if against any other corporation, on any trustee or officer thereof, or on any agent employed in general management of its business," etc. Under the provisions of this section service made on the defendant's agent employed in the general management of its business would be good. Nor need such agent have a fixed or definite place of business or location, but he might be served at any place where found within the state. *Centennial Mut. L. Assn. v. Walker*, 60 Iowa, 78. But the instruction in effect holds that, though defendant might have an agent in the state, employed in the general management of its business, yet, if such fact was not known to plaintiff, and he could not have ascertained it by the exercise of proper care and diligence, then the Statute of Limitations would not run against plaintiff's cause of action. In other words, the running of the statute is made to depend upon plaintiff's knowledge or lack of knowledge of the fact of the existence of a general agent in the state. We do not think that this is the law. The running of the statute in such a case must depend on the fact of residence of the defendant in such a sense that service of process could be made upon it. If it be to that extent a resident, the statutes would run in its favor, regardless of the fact of plaintiff's knowledge of such residence, if such defense was available in favor of defendant, — a question hereafter discussed.

5. The sixth instruction in effect states the law to be that a foreign corporation can set in operation in its favor the Statute of Limitations by establishing an office or agency in this state. In the eighth instruction it is held that such corporation can accomplish the same purpose by having a general agent located in this state if plaintiff knew, or by

the exercise of ordinary prudence might know, that such an agent was located in this state. Our statute provides that "the time during which a defendant is a nonresident of the state shall not be included in computing any of the periods of limitations above described." Code, § 2533; *Wetmore v. Marsh*, 81 Iowa, 677. In *Koons v. Chicago & N. W. R. Co.* 23 Iowa, 493, and *Cobb v. Illinois Cent. R. Co.* 38 Iowa, 601, the question as to whether a nonresident corporation could plead the statute was not directly raised. In *Wall v. Chicago & N. W. R. Co.*, 69 Iowa, 498, it was held that a foreign railroad corporation could avail itself of the defense of the Statute of Limitations. That decision was based upon the ground that, though the corporation was a resident of another state, yet it had a residence in this state for the purpose of being at any time served with process and made amenable in our courts. Without in any way impairing the force of that decision, we may say that we are not inclined to apply the rule there laid down to foreign corporations generally. A railroad company is of necessity obliged to operate its road. It must always have officers and agents in the state where its road is situated, in order to carry on its business. By our statutes it may be brought within the jurisdiction of our courts by service of processes upon its general agent anywhere in this state; also process may be served on its station, ticket, or any other agent, or on any trustee or officer. Code, §§ 2611, 2612. In such cases, then, service of process may always be had on the corporation within the state. Not so in the case at bar. Here is a manufacturing corporation. It may establish an office or agency, and, if it does, process may be served in certain cases upon the agent or clerk employed therein. It may have a general agent in the state, in which case process may be served upon him. It may, however, carry on its business without either establishing an office or agency in the state, or having a general agent therein. Surely, in such a case, it would hardly be contended that the corporation was a resident of the state so as to be served with process; hence it could not avail itself of the defense of the Statute of Limitations. If appellant's theory is good, a foreign corporation can, at its pleasure, and for its own benefit, put in motion the statute. We do not think such result was ever anticipated by the Legislature when it enacted the statute we have quoted. A foreign corporation, whose business in this state is such that it is not incumbent upon it to put itself in position to be at all times subject to the service of process, ought not to be permitted to shield itself behind the Statute of Limitations, because it may at some time or times (perhaps unknown to one having a cause of action against it) have an agent in this state upon whom process could be served. There is a wide distinction between the case of a railroad company, whose officers or agents may always be found within the state, and can readily be reached with process, and a foreign manufacturing corporation, having perhaps a general agent in this state, who

may have no settled abiding place, whose relations to the party he serves are not generally known to the public, and the knowledge of whose coming and going must of necessity be limited to a few individuals. This question, so far as it relates to an office or agency in the state by an individual residing in another state, was mentioned, but not decided, in *Bellows v. Litchfield*, (Iowa) 48 N. W. Rep. 1062. In the view we have taken, appellant not being entitled to avail itself of the defense of the Statute of Limitations, it was not prejudiced by the giving of the sixth and eighth instructions in so far as they referred thereto.

6. In the tenth instruction the court told the jury that they should allow interest on any amount they might find due plaintiff from the date of sale of the machine at 6 per cent per annum. The petition on which the case was tried prayed for judgment with

interest from the time of the commencement of the suit. The machine was sold in July, 1883, and the suit was begun in February, 1889, and the verdict was rendered March 22, 1890,—over six years after the machine was sold. If the jury followed the instruction, they allowed the plaintiff interest for over five years, to which he was not entitled under his prayer. We must presume that the jury followed the instruction. It seems to us that, notwithstanding the fact that the petition prayed for \$300 damages, and the verdict was for much less than that, the giving of the instruction was prejudicial error.

7. Many other errors are assigned. We have examined them, and found nothing prejudicial to appellant. *If appellee within sixty days files a remitter of the interest from date of contract to time of bringing of the suit, the judgment of the court below will be affirmed; otherwise it will be reversed.*

ARKANSAS SUPREME COURT.

**LITTLE ROCK & FORT SMITH RAILWAY *et al.*, Appts.,
v.
W. L. CRAVENS.**

(.....Ark.....)

A carrier cannot by special contract limit its common-law liability for

losses not occasioned by negligence where it does not afford the shipper an opportunity to contract for the service required without such restriction even if he makes the special contract without objection or demand for a different one.

(December 24, 1892.)

APPEAL by defendants from a judgment of the Circuit Court for Johnson County in

NOTE.—*Right of a common carrier to limit common-law liability by contract in the absence of negligence.*

The statement that a common carrier may by contract limit its common-law liability except where it is guilty of negligence has been made in a multitude of cases, and this has been repeatedly declared to be a well-established doctrine. Such a general statement clearly conflicts with the doctrine of the above case. But a careful examination of the numerous cases in which this doctrine has been laid down shows that in them the question of right to refuse the shipper an option to pay to have his goods carried without any limitation of the carrier's liability at reasonable rates was not presented. Among the many such cases are the following: *Dorr v. New Jersey Steam Nav. Co.* 11 N. Y. 485, 62 Am. Dec. 126; *Fibel v. Livingston*, 64 Barb. 179; *Parsons v. Monteath*, 13 Barb. 363; *Stoddard v. Long Island R. Co.* 5 Sandf. 180; *Moore v. Evans*, 14 Barb. 624; *Pennsylvania R. Co. v. Railroad*, 119 Pa. 577; *Grogan v. Adams Exp. Co.* 114 Pa. 523, 40 Am. Rep. 360; *Van Schaack v. Northern Transp. Co.* 3 Bess. 304; *Indianapolis, D. & W. R. Co. v. Forsythe* (Ind. App.) Feb. 2, 1892; *Adams Exp. Co. v. Fendrick*, 38 Ind. 150; *Cooper v. Berry*, 21 Ga. 528; *Kallman v. United States Exp. Co.* 3 Kan. 205; *Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; *Christenson v. American Exp. Co.* 15 Minn. 270, 2 Am. Rep. 122; *Davidson v. Graham*, 3 Ohio St. 181; *Graham v. Davis*, 4 Ohio St. 362, 38 Am. Dec. 285; *Baltimore & O. R. Co. v. Skeels*, 8 W. Va. 556.

In numerous other cases where a limitation of liability by contract is held to be allowable the report shows that there was in fact a consideration therefor in a reduction of rates although this was not expressly mentioned by the court as a reason for the decision. *St. Louis, I. M. & S. R. Co. v. Weekly*, 50 Ark. 397; *Illinois Cent. R. Co. v. Morris*, 18 L. R. A.

son, 19 Ill. 136; *St. Louis & S. E. R. Co. v. Smuck*, 49 Ind. 302; *Bartlett v. Pittsburgh, C. & St. L. R. Co.* 94 Ind. 281; *Squire v. New York Cent. R. Co.* 98 Mass. 239, 38 Am. Dec. 162; *Durgin v. American Exp. Co.* (N. H.) 9 L. R. A. 453; *Baltimore & O. R. Co. v. Brady*, 32 Md. 333; *Lowe v. Booth*, 13 Price. 329; *Morrison v. Phillips & C. Constr. Co.* 44 Wis. 405, 28 Am. Rep. 599; *Richmond & D. R. Co. v. Payne*, 6 L. R. A. 349, 86 Va. 431.

The English doctrine until it was modified by Act of Parliament is generally said to be that the carrier may limit his liability to any extent by contract; but that the English decisions to this effect do not mean to free the carrier from liability to carry the goods without limitation of liability on reasonable terms clearly appears by examination of them.

Thus in *Harris v. Packwood*, 3 Taunt. 271, in which a special acceptance limiting liability was held allowable, the court says that carriers "will not be insurers unless paid according to value."

So in *Wyld v. Pickford*, 3 Mees. & W. 443, it is declared that a carrier is entitled by common law to insist upon the full price of carriage and that he may if such price be not paid refuse to carry upon the terms imposed by the common law and insist upon his own.

The other English cases in which special acceptances, as they are termed, limiting liability are upheld are not opposed to this doctrine, but decisions allowing a restriction of the carrier's liability are clearly to be construed as permitting it only in case of a reduction of rates.

So in many American cases where the doctrine of the main case is not clearly stated it is fairly implied.

Thus in *Farnham v. Camden & A. R. Co.*, 55 Pa. 53, in which a limitation of liability was upheld, the court says: "We are to presume, of course,

favor of plaintiff in an action brought to recover the value of certain cotton which had been burned while in defendants' possession for transportation. *Affirmed.*

The facts are stated in the opinion.

Messrs. Dodge & Johnson, for appellants:

Common carriers have the right to limit their common-law liability by express contract, and the fire-exemption clause is recognized as valid in the courts of this state and throughout the United States.

Taylor v. Little Rock, M. R. & T. R. Co. 82 Ark. 393, 29 Am. Rep. 1; *Little Rock & Ft. S. R. Co. v. Hall*, 82 Ark. 870; *Taylor v. Little Rock, M. R. & T. R. Co.* 39 Ark. 148; *Little Rock, M. R. & T. R. Co. v. Talbot*, Id. 529; *Little Rock, M. R. & T. R. Co. v. Corcoran*, 40 Ark. 375; *Little Rock, M. R. & T. R. Co. v. Harper*, 44 Ark. 209; *St. Louis, I. M. & S. R. Co. v. Lesser*, 46 Ark. 243; *Little Rock, M. R. & T. R. Co. v. Talbot*, 47 Ark. 108; *St. Louis, I. M. & S. R. Co. v. Weekly*, 50 Ark. 412; *St. Louis, I. M. & S. R. Co. v. Bone*, 52 Ark. 26; *New Jersey Steam Nav. Co. v. Merchants Bank*, 47 U. S. 6 How. 344, 12 L. ed. 465; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Evansville & O. R. Co. v. Androscoogin Mills*, 89 U. S. 22 Wall. 594, 22 L. ed. 724; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* 83 U. S. 16 Wall. 318, 21 L. ed. 297; *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 267, 22 L. ed. 558; *United States Exp. Co. v. Kountze*, 75 U. S. 8 Wall. 342, 19 L. ed. 457; *Bank of Kentucky v. Adams Exp.*

Co. 93 U. S. 174, 28 L. ed. 872; *Hart v. Pennsylvania R. Co.* 112 U. S. 837, 28 L. ed. 719; *Whitworth v. Erie R. Co.* 87 N. Y. 418, 6 Am. & Eng. R. R. Cas. 351; *Whitehead v. Wilmington & W. R. Co.* 87 N. C. 255, 9 Am. & Eng. R. R. Cas. 174.

The contracts of shipment on their face disclose that there was a good, valid, and reasonable consideration moving from the carriers to the plaintiff, which carried with them a right to limit the carrier's liability, and that was not overcome by any evidence introduced at the trial.

At common law, a carrier is not bound to carry except on its own line.

If carriers agree to carry beyond their lines and assume other duties and obligations not required by law, they have a right to demand a remuneration for the same, and it may be done in any way they see proper, provided it is reasonable and fair.

Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 687, 28 L. ed. 291; *Baltimore & O. R. Co. v. Green*, 25 Md. 73.

The shipment of plaintiff's cotton was an interstate shipment, for the reason that this cotton was destined to interstate points outside of the state of Arkansas.

Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co. 41 Fed. Rep. 562; *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.* 3 Inters. Com. Rep. 454, 8 I. C. O. Rep. 1; *St. Louis, I. M. & S. R. Co. v. Lear*, 54 Ark. 403.

There is no law requiring carriers to assume any liability beyond their own line of road.

that the charge for transportation was in proportion to the risk."

And in *Judson v. Western R. Corp.*, 6 Allen. 486, 63 Am. Dec. 648, the court says: "The carrier has not the option to accept or refuse the carriage of the goods at his pleasure, but the person seeking to have them transported can choose whether they shall be carried without any restriction of the carrier's duty as prescribed by law."

And in *York Mfg. Co. v. Illinois Cent. R. Co.*, 70 U. S. 3 Wall. 107, 18 L. ed. 170, the court says the carrier cannot "coerce the owner to yield assent to a limitation of responsibility by making exorbitant charges when such assent is refused," but that he may "fix a rate of charges proportionate to the magnitude of the risks."

Likewise in *Graham v. Davis*, 4 Ohio St. 362, 62 Am. Dec. 235, the court says the carrier is "still regarded as exercising a public employment and incapable by any act of his own of limiting or evading the responsibility which the law attaches to its exercise."

In a few cases the courts have still more clearly and explicitly announced the doctrine of the main case which, as we have seen, may fairly be regarded as underlying all the decisions, even those in which the general statement of the right of a carrier to limit his liability may seem to deny it.

Thus, in *Atchison, T. & S. F. R. Co. v. Dill*, 48 Kan. 210, it is expressly declared that a carrier cannot limit his liability unless the contract is freely and fairly made, and that he cannot exact as a condition precedent to carrying goods that the shipper shall sign a contract limiting or changing the common-law liability. Also that if the carrier has two rates, one for the common-law liability and the other for the special contract, the shipper must have real freedom in making his selection.

So in *McMillan v. Michigan & N. I. R. Co.*, 16 Mich. 78, 98 Am. Dec. 208, it is said by Judge Cooley 18 L. R. A.

in the opinion of the court that "subject to reasonable regulations every man has a right to insist that his property, if of such description as the carrier assumes to convey, shall be transported subject to the common-law liability."

Again, in *O'Connell v. Adams Exp. Co.*, 1 Cent. L. J. 186, it is said: "A stipulation limiting the common-law liability of the carrier in order to be binding must be based on a special consideration such as a lower rate of freight or something equivalent."

This is reaffirmed in *Dillard v. Louisville & N. R. Co.*, 2 Lea, 283, deciding that a lower rate of freight or something equivalent thereto will constitute a sufficient consideration for a limitation of liability.

Still more closely parallel with the main case is the decision in *Louisville & N. R. Co. v. Gilbert*, 7 L. R. A. 162, 88 Tenn. 490, that a "fire clause in a bill of lading exempting the carrier from liability for loss by fire is not valid where transportation under the rules of the common law is not offered as an alternative and no reduction of rates is made as a consideration for the exemption."

The same principle in substance is announced in *Missouri Pac. R. Co. v. Fagan* (Tex.) 2 L. R. A. 75, holding that a common carrier has no right to demand of a shipper a waiver of his rights as a condition precedent to receiving freight.

By statute in some places a limitation of a carrier's liability by contract is prohibited. Thus in Texas, by Rev. Stat., art. 278, and in several other states by similar provisions.

And in England the Act of Parliament allows only such limitations as shall be found by the courts to be "just and reasonable."

The same doctrine on which the main case is based, and which seems clearly to underlie the general current of decisions, appears in cases as to the limitation of the amount of liability, as to which, see notes to *Ballou v. Earle* (R. I.) 14 L. R. A. 433.

B. A. R.

If then it is done, it must be voluntarily done by special contract and the carrier has the right to exact of the shipper a consideration therefor, because it is an accommodation in many ways. The carrier can charge greater rates, or he can require that in consideration of this routing and through rate his liability shall be limited, but in either event the consideration is a valid one on both sides.

Perkins v. Portland, S. & P. R. Co. 47 Me. 590, 74 Am. Dec. 507; *Baltimore & P. S. B. Co. v. Brown*, 54 Pa. 82; *Pennsylvania R. Co. v. Berry*, 68 Pa. 277; *Evansville & O. R. Co. v. Androscoggin Mills*, 89 U. S. 22 Wall. 601, 22 L. ed. 726; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* 88 U. S. 16 Wall. 324, 21 L. ed. 801; *Cutts v. Brainerd*, 42 Vt. 568, 1 Am. Rep. 358; *Root v. Great Western R. Co.* 45 N. Y. 580; *Hill Mfg. Co. v. Boston & L. R. Corp.* 104 Mass. 185, 6 Am. Rep. 202.

The carrier thus issuing its through bill of lading is liable for the negligence of succeeding carriers on the line of transportation, whom he employs, to the same extent that he is liable for that of his own line.

Neuell v. Smith, 49 Vt. 265; *Bussey v. Memphis & L. R. Co.* 4 McCrary, 405; *Peete v. Chicago & N. W. R. Co.* 19 Wis. 118; *Condict v. Grand Trunk R. Co.* 54 N. Y. 502.

The right to make a contract for a through routing and a through rate beyond the terminus of its line carries with it the right to limit the liability on freight so transported beyond the first carrier's line.

Bristol & E. R. Co. v. Collins, 7 H. L. Cas. 218; *Toledo, P. & W. R. Co. v. Merriman*, 52 Ill. 129, 4 Am. Rep. 590.

The mere receipt of goods directed to a point beyond the carrier's route does not create a special contract to carry to destination, nor does it give the shipper a through rate.

Stewart v. Terre Haute & I. R. Co. 3 Fed. Rep. 768; *McCarthy v. Terre Haute & I. R. Co.* 9 Mo. App. 166; *Converse v. Norwich & N. Y. Transp. Co.* 33 Conn. 166, 6 Am. L. Reg. N. S. 214.

The contracts or bills of lading in this case were all through bills of lading, so stated and disclosed on their face, and not denied or controverted in the evidence.

Denny v. New York Cent. R. Co. 13 Gray, 481, 74 Am. Dec. 645; *Hoadley v. Northern Transp. Co.* 115 Mass. 304, 15 Am. Rep. 106.

The initial carrier guaranteed the through rate and became liable to plaintiffs for any and all costs or overcharge that defendants' connecting carriers might enforce.

Little Rock & Ft. S. R. Co. v. Daniels, 49 Ark. 854.

Was the naming and guaranteeing of this through freight of no value or consideration to plaintiff?

When the first carrier has contracted merely to transport to the end of his own line, and there deliver to the connecting carrier, the clause limiting his liability will not support the exemption as a just and reasonable consideration.

Babcock v. Lake Shore & M. S. R. Co. 49 N. Y. 495; *Camden & A. R. Co. v. Forsyth*, 61 Pa. 86; *Maghee v. Camden & A. R. & Transp. Co.* 45 N. Y. 517, 6 Am. Rep. 124; *Lamb v. Camden & A. R. & Transp. Co.* 46 N. Y. 278, 7 18 L. R. A.

Am. Rep. 327; *Jennison v. Camden & A. R. & Transp. Co.* 5 Pa. L. J. 409, 4 Am. L. Reg. 284.

Neither party can allege that as to him there was no contract. Such is the general rule as to contracts, and no reason is here shown why it should not apply to those between carriers and the shippers, so long as they are permitted to make their own terms.

Nelson v. Hudson River R. Co. 48 N. Y. 506; *Christenson v. American Exp. Co.* 15 Minn. 270, 2 Am. Rep. 122; *Squire v. New York Cent. R. Co.* 98 Mass. 289, 95 Am. Dec. 162.

Messrs. J. E. Cravens and J. M. Moore, for appellee:

It is urged that the plaintiff's agent filled the blanks in the form furnished him by the station agent without objecting to the terms contained in them, and hence that the plaintiff assented to the stipulation and is estopped to question its validity. This position is not tenable under the evidence, which shows that the station agent had no authority either to change the terms of the contract as to the exemption, or to give a different rate.

Louisville & N. R. Co. v. Gilbert, 7 L. R. A. 162, 88 Tenn. 430; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627.

It must appear that the shipper knew the contents of the bill of lading and assented thereto.

Merchants Despatch Transp. Co. v. Leysor, 89 Ill. 48; *Erie & W. Transp. Co. v. Daler*, 91 Ill. 195, 33 Am. Rep. 51.

The acceptance by the consignor of a bill of lading containing stipulations against liability, which are invalid for want of consideration, will not bind and preclude him from showing the want of consideration.

Dillard v. Louisville & N. R. Co. 2 Lea, 289; *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 3 Wall. 112, 18 L. ed. 171; *Oswell v. Adams Exp. Co.* 1 Cent. L. J. 186.

Defendant could not by any mere act of its own or by general or special notice, or in any manner except by a valid contract with the shipper based upon a consideration, avoid such responsibility.

St. Louis, I. M. & S. R. Co. v. Weekly, 50 Ark. 405; *Taylor v. Little Rock, M. R. & T. R. Co.* 39 Ark. 157; *York Mfg. Co. v. Illinois Cent. R. Co.* *supra*.

Even if the contract is signed, it is not binding upon the customer unless it is just and reasonable in its terms.

Redman, Railway Carriers, 69, 75.

Hemingway, J., delivered the opinion of the court:

The plaintiff sued to recover the value of cotton that was burned, without fault of the defendants, while they held it for shipment. The defense was that the defendants were exempt from liability by the terms of the bills of lading under which they received the cotton. It was alleged in the complaint, and admitted in the answer, that the defendants operated a line of road from Hartman, where the cotton was received, to the several points of consignment, and that they received the cotton under bills of lading containing provisions to the effect that they should not be liable except for losses occasioned by their negligence; but it was al-

leged that said provisions were void, for the reason that they were without consideration, unfair, unjust, and unreasonable. To sustain his contention he proved that the defendants fixed and published a uniform rate for carrying cotton between said points, and that his shipments were made according to that rate; that the defendants furnished to their agent at Hartman printed forms for bills of lading that were uniform in their terms, and contained the provisions relied upon in this case; and that said agent had no authority to receive, and would not have received, the cotton except under said bills. It is shown that the plaintiff knew that the bills contained the provisions relied upon, and that he made no objection to the rate fixed, or the provisions contained therein. There were other facts proved, but, as we understand the law, they do not affect the case made. There was no serious controversy as to the amount of plaintiff's loss, and it is not now insisted that the verdict was excessive.

The contention is that the court erred in directing the jury upon the law regulating the provisions of the bills of lading, providing for defendants' exemption from their common-law liability, and no objection is made to its directions upon other principles of law. We deem it unnecessary to set out or consider *seriatim* the several instructions; for, in stating our views of the law, we determine all questions arising upon them that are material in this case. If, upon the case stated, the provisions are deemed valid in law, the defendants have a perfect defense, and the action should be dismissed. On the contrary, if the provisions are deemed invalid in law, the defendants have no defense, and no error in the court's charge could have prejudiced them. That is, the judgment should be reversed or affirmed, according as the contracts are deemed valid or invalid.

It is contended that they were invalid because they were without consideration, but we have not deemed it necessary to enter upon the consideration of this question. The further objection urged to them is that they were unfairly obtained, and are therefore unjust and unreasonable in the eye of the law. To maintain this position it is argued that the plaintiff had an absolute right to demand that defendants receive and carry his cotton under their accountability at common law, but that he could procure them to do it only by accepting the bills offered, and that for this reason his agreement to the conditions of the bills was not fairly obtained, and they should be adjudged unjust, unreasonable, and void. To this the defendants reply that there is nothing to show that the terms of the bills were unjust or unreasonable, and that, as plaintiff understandingly accepted them, he is conclusively bound by them.

There are principles of law pertinent to the case that are well settled, among which may be stated the following: That a carrier is bound to receive and carry all articles tendered him of the kind that he engages in carrying; that in performing that service the law casts upon him the accountability

of an insurer, unless he undertakes the service in the particular case under a special contract with the shipper restricting his liability; that the carrier can by no act of his own modify his liability, but that every modification must arise out of a contract fairly made, and just and reasonable in its terms. It follows from the principles stated that the law deems it just and reasonable to hold the carrier to the duty of carrying with the accountability of an insurer, if the shipper so wish; so that the carrier can neither decline to perform the service nor, of his own motion, escape that extreme accountability. He is authorized to contract with the shipper for a restricted liability, but such restriction depends upon the consent of the shipper. He has the right of choice between the common-law undertaking and any special contract that the carrier may wish to make, and the making of a modified contract must represent his choice. But, although his consent is an indispensable element in such contract, it is not conclusive of its validity; for the law will permit the carrier to be released from his common-law liability, not upon every contract to that effect that would be valid if it related to other matters, but only in pursuance of a contract fairly made, the terms of which are deemed just and reasonable. So that, while a carrier claiming an exemption must show a contract providing for it, even this will not avail him, if it appear to be unfair, unjust, or unreasonable. Whether the agreement relied upon in a particular case satisfies the requirement of the law, as regards its terms and the manner of its procurement, must be determined in view of the rights and duties of the parties, the policy of the law in defining them, and the tendency of the contract to conserve or to violate such policy. If an intending shipper should be refused transportation because he would not make a special contract, he might desist from shipping, and hold the carrier for damages. Of this there can be no doubt, and we do not understand that defendants question it. If it were otherwise, the carrier could refuse to perform a service, the performance of which is its primary duty, and justify upon the ground that its intending customer declined to release him from a liability which the wisdom of the law imposes on him; and, while the law will not permit him to restrict his liability, it would thus recognize a restriction due to what, viewed practically, was no less than his compulsion. This, in effect, would authorize him to abrogate a rule of law designed to hold him to a discharge of his duties; and the law does no such foolish thing as to prescribe regulations and vest the party to be regulated with the right to repeal them.

Taking it to be settled that a refusal to carry except upon such condition is a wrong, and that one intending to ship, who declines to do it upon such terms, has a right of action for his damage, we are next to consider what his attitude is if, instead of declining to ship upon the condition, he elects to ship, and accedes to the condition in order to obtain transportation. The law as we have

seen, deems it the best policy that the carrier should bear the general liability of an insurer, except where his customer consents to bear a part of the risk, in which case it seems to contemplate that the terms upon which such consent is given will guard and preserve the public interest. But the consent meant is certainly not a constrained submission to terms imposed,—not a consent extorted by what the law characterizes as “dureas,” nor what is practically, as society is organized, the same thing; but it is what Mr. Pomeroy calls an “absolute consent,”—a consent that implies a physical, intellectual, and moral power, freely and deliberately exercised. Consent of a different kind may be, and often is, all that is required to make a contract binding at law, and even in equity; but it cannot make a contract fair, just, or reasonable. As a rule, the validity of a contract in no wise depends upon its fairness, nor the justness or reasonableness of its terms, nor the adequacy of the consideration, provided it rests upon one deemed valuable. Nor will it be invalidated by reason of the fact that the party was in pecuniary or other necessity or distress, provided it was intelligently and freely made, without the use of undue pressure. If the party freely and intelligently elect to make a hard, unequal, and unjust contract, the courts will not make a better one for him, or relieve him of the one made, merely because he was in straitened circumstances, and it seemed to him necessary to make it in order to secure relief. The courts decline to thus hamper the independence of the individual, or limit his right to make his own contracts; such functions pertaining to paternal, and not to free, government. But relief is withheld upon the ground that the party had his choice between not acquiring the benefits accruing under the contract and acquiring them according to its terms, and had intelligently and freely exercised his choice, and elected to take the benefits of the contract. The reason does not apply where the party acquires nothing under the contract, and is constrained to consent to it by reason of the fact that the other party had made this agreement necessary to the enjoyment of an important and apparently indispensable privilege, to which he was already entitled. But even when a party by an unequal or unjust contract, made without duress or misrepresentation, acquires something to which he had no other right, courts of equity have shown a disposition to relieve him where it appeared he was in pecuniary necessity or distress that impelled him to make an undue sacrifice, and advantage was taken of such condition. 2 Pom. Eq. Jur. § 948; *Buford v. Louisville & N. R. Co.* 82 Ky. 286; *Brown v. Hall*, 14 R. I. 249, 51 Am. Rep. 375; 1 Whart. Cont. § 170. Upon this principle, contracts to pay unconscionable interest, where no usury laws are in force, and to transfer expectant estates for considerations grossly inadequate, have been declared void. *Miller v. Cook*, L. R. 10 Eq. 641, and cases *supra*. Without committing this court to the doctrine of those cases, to the extent of holding that an advantage

taken of one's necessities or distress to obtain a hard bargain will afford ground for equitable relief, we think it necessarily and properly deducible from them that it is not fair, just, or reasonable in the eye of the law, to take advantage of one's necessities or distress to obtain a contract by which he releases some valuable right, or assumes some onerous liability,—at least, where it does not appear that he received any corresponding benefit,—and that, while the circumstances might not warrant the avoidance of an ordinary contract, they would defeat such a one as depends for its efficacy upon its fairness and just and reasonable terms.

Applying the principle stated to this class of cases, the question is whether it can be declared, as matter of law, that an intending shipper is under a necessity to agree to a special contract which the carrier proposes as a condition to receiving and carrying his property; and, if so, whether it can be further declared that the carrier takes an unfair advantage of his necessity to obtain the contract.

It is a well-known fact that the prosperity of the public collectively, and of its members individually, depends absolutely upon transportation and transportation agencies, and that the carrying business is mostly concentrated in a few powerful corporations, to a large extent controlling monopolies, natural if not legal, whose position enables them to control it. Circumstances, well understood, that exist without any design of the law, give them the power to shape the carrying business, and impose upon it such conditions as they see fit. Every demand it makes represents the will of its aggregate being, backed up by all its concentrated powers. The public, in meeting such demands, acts separately, and not collectively. The individual stands alone, and can oppose to the demand coming from such concentration of corporate power the influence of but one member of the vast aggregate that comprises the public. Whether he gives the carrier his patronage, or does not, matters but little to the latter; but whether the carrier transports his property promptly and safely will perhaps determine whether he succeeds or fails in business. If he declines the terms proposed, and refrains from shipping, he has no adequate redress. If he sues to recover his damage, he is subjected to all the delay and expense incident to such litigation, and at last recovers only what the law regards as his damage, and must himself stand—what would generally be much greater—the loss which the law deems too remote to estimate as damage. If he withholds his patronage, and attempts by this means to induce the carrier to recede from his terms, he can accomplish nothing; for his business is too small to make his patronage material, and, besides, if his property is to be transported, he must at last deliver it to the exacting carrier, for, from the nature of the business, he can rarely find any other. So that he would only have postponed giving his patronage, and the delay in shipment, that may have been very detrimental to his business, would not be ap-

preciable to the carrier. In considering the relative positions of the parties, Judge Miller thus states his attitude: "He is one individual of a million. He cannot afford to higgie or stand out and seek redress in the courts. His business will not admit such a course. He prefers rather to accept any bill of lading, or sign any paper, the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this or abandon his business." *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 879, 21 L. ed. 640.

The Supreme Court of Michigan, with reference to the same subject, thus defines the attitude of railroad companies: "They do, and necessarily must, absorb nearly the entire business of carrying merchandise and property requiring carriage and deposit along and in the vicinity of their route, and competition is virtually destroyed. There is, in a certain sense, a compulsion upon all requiring transportation to employ them; and a restriction of liability by notice is measurably compulsory. There is no mutuality or freedom of choice offered. The person desiring to have goods forwarded is compelled, in reality, to have them carried forward by the company. The obligation is to carry them; and a restriction of the liabilities primarily growing out of that obligation by a notice is an imposition of terms rather than a contract." *Michigan Cent. R. Co. v. Hale*, 6 Mich. 258; *Little Rock & Ft. S. R. Co. v. Eubanks*, 48 Ark. 460.

Why, we would ask, is restriction by express agreement, if necessary to obtain transportation, less compulsory, less an imposition of terms, or more in the nature of a contract? The unequal condition of the parties is the same in either case. The necessity of the one to obtain transportation, and the control of it by the other, exist in either case. The only difference between the agreement by notice and that by writing in the bill of lading is that in the one case consent is implied and in the other express; but in either case the party is bound to give it in order to enjoy a privilege of great, and possibly vital, financial importance to him. The agreement in neither case embodies the free and deliberate consent of both parties; for one did what he felt bound to do, while the overmastering influence of the other enabled him to embody his will in a formal contract.

The relative position of the parties must be well understood by both of them,—by the individual desiring to ship property, and the carrier to whom it is offered. The individual feels that transportation is necessary to his success, and that unless he gets it promptly he will suffer inconvenience, and perhaps loss. He regards the probability of loss in transit as remote, and knows that if there is no loss the contract is immaterial. Under such circumstances he will assume the risk of contingent future loss, rather than sustain a loss that is certain and present, as men usually are prone to sacrifice contingent future interest to satisfy present wants. So we think it should be held, as matter of

law, that the parties stand upon a footing of inequality, and that individuals desiring to make shipments are under a necessity sufficient, in the ordinary affairs of life, to amount to compulsion, where it is pressed. The question then is, whether, in the case stated, a carrier, in making agreements exempting him from his common-law liability, takes an unfair or unjust advantage of the situation and of his customer's wants. The answer seems plain, in the light of what has already been said. The service is in fact an absolute necessity to the individual. The carrier is by law bound absolutely to perform it. It affects as well the public interest as that of the individual, and the law regulating it, recognizing the unequal footing of the parties, has regard alike to both interests. Great and valuable powers and privileges are conferred upon the carrier, and in return for them, out of regard for the general good, the law exacts that he shall promptly perform it, without damage to property committed to him. He accepts the grant upon those terms, enjoys its benefits, and thereby acquires a controlling influence in the body politic, and then declines to perform the service, except upon the condition that he be released from the accountability he assumed; that is, he will perform the service only upon the condition that his customer carry a risk which, except where his customer prefers to carry it, the wisdom of the law has imposed upon him. This is a plain dereliction of a public duty; and it is a wrong to the customer, since it deprives him of the right to have the service, and to choose whether it be performed at one price without risk to him, or at another partly at his risk.

But it is said that, if the party knowingly consent to a special contract, no one else can object, and that he cannot be heard to say that it was unfair, or that an advantage was taken of him, since he acted freely and intelligently. This, as we have seen, is a mistake, for such contracts affect the interests of the public, and are subject to public regulation; and besides, the circumstances do not warrant the assumption of fact that the party consented freely, but rather show that he submitted to terms that he was bound to accept when the other party deprived him of the opportunity to choose between them and the contract which the law entitled him to demand, for he was, as we have seen, as much entitled to be indemnified against loss in transit as to the service demanded. The law imposes no necessity for an election between the two rights, and the carrier can impose none. But the carrier's refusal to perform the service without a release of his liability takes away the right to choose which the law gives, and forces an election between rights that are not inconsistent. Thus the carrier does a wrong, and thereby creates a necessity for the wronged party to give the consent relied upon; and the question is whether one who does a wrong that places another under the necessity of agreeing to his proposals takes an unfair or unjust advantage in the matter. It is the tyranny of power over dependence, and therefore unfair;

the deprivation of a right, and therefore unjust. The reply that the party knowingly consented under circumstances not constituting duress or fraud, and that this is conclusive against him, is not sufficient in law. If it were, a contract knowingly made to release a carrier from liability for his negligence would be sustained; but we know that the law is otherwise. It overlooks two important features of this class of contracts,—the *first*, that the individual is at a disadvantage in dealing with the carrier, and is bound by force of circumstances to accept whatever terms are offered, because he has no reasonable or practicable alternative; the *second*, that such contracts affect the interests of the public, on account of which the law will suffer them to be made only when they are fair, just, and reasonable.

In this case the plaintiff did not object to the contract proposed, or ask for a different one; but if he had, the agent could not, and would not, have entered into any other. Does this affect the case? We think not, but that the case stands just as if the plaintiff had demanded a different contract, and agreed to the one accepted because he could get no other. Carriers do their business in pursuance of a general plan, and of this the public are advised; and when the defendants adopted a plan, and instructed their agent to pursue it, and authorized him to pursue no other, their customers were not called upon to ask a change of the plan, or a departure from its terms, in their particular matters. They had a right to suppose that the agent would not deviate from his instructions, and the evidence shows that in this instance he would not. Besides, if defendants prepared to do business upon one plan only, it should have been in accordance with their common-law liability. The public had a right to that service, promptly performed, and should not have been subjected to any delay incident to preparing to do it, or instructing agents with regard to it. If any customer were to be delayed, such as desired service under special contracts, and not those who desired it under the common-law contract, should have been subjected to the inconvenience.

The case may be stated as follows: The defendants were bound to accept and carry the cotton as insurers. They prepared to do

it, and authorized their agent to do it for them, only upon condition that they be exempt from such liability; and the plaintiff, being able to make no other contract for the carriage of his cotton, agreed to the one proposed. They contend that, though the law prescribes that such contracts shall be fair, just, and reasonable, the party's making it is conclusive as to those matters, in the absence of fraud or duress, as defined by law. We do not assent to the position, but hold that, to maintain the policy of the law with reference thereto, such contracts must be the free act of the party, and reflect his choice as between the contract to which the law entitles him and the one relied on. One which it was necessary for him to make by reason of his circumstances, and the carrier's refusal to make any other is not fair to him, and would not be deemed just or reasonable in law, at least without a showing that its terms really conserved his interest. In other words, we think it would violate the policy of the law to permit contracts to be made restricting the carrier's common-law liability, where the carrier does not afford his shippers an opportunity to contract for the service without such restriction. It may be that shippers would prefer cheaper service, with restricted accountability, to more expensive service, with unrestricted accountability; but they are entitled to a choice, and the carrier cannot deprive them of it, either directly or by anything which amounts practically to its deprivation. In support of this conclusion, we cite the case of *Louisville & N. R. Co. v. Gilbert*, 88 Tenn. 490, 7 L. R. A. 163. But, if we were without a precedent, we think the established principles and policy of the law could not be maintained upon a different conclusion. If carriers could maintain exemptions where the opportunity to make a contract without them was not afforded, the result would be that such contracts would be universal; and it would be better to state the law generally, as it would in fact be in every case, that the carrier was only liable for his negligence. But the law has, in its wisdom, established a different rule, which it is the duty of courts to conserve, rather than overturn.

It follows, upon the views indicated, that the contracts relied upon are invalid, and the judgment is therefore affirmed.

KANSAS SUPREME COURT.

W. F. KLINE *et al.*, *Plffs. in Err.*,
v.

BANK OF TESCOTT.

(.....Kan.....)

***Where a note is executed by a corporation, and is signed by its president and secretary, and its directors write their names upon the back thereof, as directors, before de-**

***Headnote by HORTON, Ch. J.**

livery, extrinsic evidence is admissible between the original parties or any subsequent holder of the note, accepting the same as collateral, with full notice of all the facts and circumstances connected with the execution and delivery thereof, not only to show that the president and secretary executed the instrument in their official capacity as officers of the corporation, but also that the directors signed the note, on the back thereof, solely as officers of the corporation, and to bind the corporation only.

NOTE.—For prior cases in this series touching the question involved in the above case, see *Reeve* 18 L. R. A.

v. *First Nat. Bank of Glassboro* (N. J.) 16 L. R. A. 143.

(December 10, 1892.)

ERROR to the District Court of Ottawa County to review a judgment in favor of plaintiff in an action brought to enforce the alleged liability of respondents as guarantors of a promissory note. *Reversed.*

Statement by **Horton, Ch. J.:**

The Bank of Tescott, a banking corporation, located in Ottawa county, in this state, brought its action against the Kanopolis Creamery Company and others upon a promissory note, of which the following is a copy:

"\$950. Kanopolis, Kansas, June 1st, 1888.

"Nine months after date we promise to pay to the order of Western Creamery Building and Supply Company nine hundred fifty dollars, at the Kanopolis State Bank, Kanopolis, Kansas, with interest at the rate of twelve per cent per annum from date until paid. [Signed] Kanopolis Creamery Company. H. C. Waite, President. W. B. Wooley, Secretary. No. 1,120. Due March 1st, 1889." On the back of the note is:

"W. F. Kline, Wm. Vandeventer, H. V. Faris, D. H. Funk, Board of Directors."

Underneath is:

"Tescott, Kansas, August 15th, 1888. For value received, we hereby sell and assign this note to the Bank of Tescott or order, and guaranty payment at maturity; demand, notice of nonpayment, and protest waived. Western Creamery Building and Supply Company."

The petition charged the Kanopolis Creamery Company as a corporation, and sought to hold the creamery company, H. C. Waite, and W. B. Wooley as makers. It charged and sought to hold Kline, Vandeventer, Faris, and Funk as guarantors. It charged F. F. Scidmore, F. L. Scidmore, and M. B. Buell, as partners under the firm name of Western Creamery Building & Supply Company, as indorsers. The two Scidmores and Buell were residents of Ottawa county. The action was brought on the note in Ottawa county, and summons issued against all the other defendants to Ellsworth county, where they reside. The Kanopolis Creamery Company and the Scidmores and Buell did not answer, but made default. All of the other defendants joined in an answer. The answer first denied under oath all of the allegations of the petition, except the incorporation of the Kanopolis Creamery Company. *Second*, the answer alleged as a defense, in brief, that the Scidmores and Buell came to Kanopolis and promoted a creamery enterprise; that they solicited subscriptions to that end, and all of the defendants became subscribers, as well as many others; it being the object of the promoters, when subscriptions sufficient were made, to incorporate the subscribers, and issue stock to them to the amount of their several subscriptions, the sums so subscribed to be taken by the Scidmores and Buell as payment for the creamery which they were to erect for the intended corporation. Just prior to June 1, 1888, the subscription list was still short \$950 of the amount the Scidmores and Buell were to have for the building of the creamery. They then proposed to

the several subscribers that the corporation be formed at once; that for the balance of \$950 they would take the note of the creamery company itself, and proceed to erect the creamery. Their proposition was accepted. The corporation was formed, and on June 1, 1888, the officers met to give the note. The note was written on the blank form of the Kanopolis Bank. When it came to executing the note, the defendants, who were the officers of the creamery corporation, only intended to give a note of the corporation. F. F. Scidmore was present, and assured them that the only way to make a corporation note was for all the officers and directors of the corporation to sign their names, and attach their official positions to their names. He also assured the defendants that, by signing this note in the manner it is signed, no personal liability would be incurred, but the note would be the note of the corporation alone; that being the note the Scidmores had agreed to take, and the corporation to give. Defendants believing in and trusting to the representations of Scidmore that, in signing the note in the manner and form it is signed, they would not create any personal liability, and that they, as officers of the creamery company, were only giving the note of the company, the Scidmores obtained the paper sued on in this case. To the answer a reply of general denial was made. The case came on for trial before the court and a jury. The court held that, on the face of the paper, it was the note of the Kanopolis Creamery Company, and that Waite and Wooley executed it in their official capacity, and were therefore not liable personally, but that the other defendants were liable as guarantors. The court also held that there was no question in the case except the assignment, which the court permitted to go to the jury. The court excluded all evidence of the second defense set up in the answer, and defendants excepted. Judgment was rendered for plaintiff below. The defendants below, who were held as guarantors, excepted, and bring the case here.

Messrs. LaFerty & Sternberg for plaintiffs in error.

Messrs. Chipman & Malthy for defendant in error.

Horton, Ch. J., delivered the opinion of the court:

On August 15, 1888, the discount committee of the Bank of Tescott accepted the note of the Kanopolis Creamery Company to the Western Creamery Building & Supply Company, of June 1, 1888, for \$950, "as collateral." F. F. Scidmore, F. L. Scidmore, and M. B. Buell were partners under the firm name of the Western Creamery Building & Supply Company. This company was also a stockholder in the Kanopolis Creamery Company, a corporation duly organized and existing under the laws of this state. F. L. Scidmore was a director of the Bank of Tescott. F. F. Scidmore was the cashier of the bank, and the discount committee of the bank consisted of F. F. Scidmore, T. E. Scidmore, and T. B. Seers. F. F. Scidmore

was the person who secured the note sued on, and knew all the facts and circumstances under which it was executed and delivered, and was present with the discount committee of the bank when that committee acted upon and accepted the same.

Under the rule in *Mann v. Second Nat. Bank of Springfield*, 80 Kan. 412, we must treat the note as if this action were between the original parties only,—as if no assignment or transfer had been made. The trial court held that the note, upon its face, was the note of the Kanopolis Creamery Company and that Waite and Wooley executed it in their official capacity only, but that the parties who signed upon the back were liable personally as guarantors. If extrinsic evidence were not admissible, the ruling of the trial court would be correct. Under the authorities, if the parties who signed the note on the back, and who composed the board of directors of the Kanopolis Creamery Company, had signed the note upon its face, they could show they made it only in their official capacity, as directors of the corporation. "Where individuals subscribe their proper names to a promissory note, prima facie, they are personally liable, though they add a description of the character in which the note is given; but such presumption of liability may be rebutted, as between the original parties, by proof that the note was in fact given by the makers as agents, with the payee's knowledge." *Byles, Bills, Notes & Checks*, 27, note 1; *Haile v. Peirce*, 32 Md. 327, 3 Am. Rep. 139; *McWhirt v. McKee*, 6 Kan. 412; *Talley v. Burtis*, 45 Kan. 147. In this case it is claimed that, if extrinsic evidence had been received it would have shown the directors of the Kanopolis Creamery Company—the corporation—signed their names at the instance of F. F. Scidmore, one of the members of the Western Creamery Building & Supply Company, on the back of the note, as officers of the corporation, and for the corporation only. It is claimed that F. F. Scidmore assured these directors that the only way to make a corporation note was for the officers and directors of the corporation to sign their names and affix their official positions thereto, and that the note was thus signed under his direction to bind the corporation, but not the officers individually. If the parties who wrote their names upon the back of the note as directors had signed

their names upon the face thereof, they could have shown by extrinsic evidence that they were acting for the corporation only; and we perceive no reason why, as between the original parties or any subsequent holder of the note, accepting the same as collateral, with full notice of all the facts and circumstances connected with the execution and delivery thereof, the same rule will not apply when such signatures are upon the back of the instrument before delivery. In *Fullerton v. Hill* (Kan.) 29 Pac. Rep. 583, it was ruled that "a stranger to a promissory note, who writes his name across the back thereof before it is delivered to the payee, incurs, prima facie, the liability of the guarantor. But parol proof may be received to show the exact liability of such indorser, by showing the agreement and understanding of the parties at the time of such indorsement." *Baker v. Chambles*, 4 G. Greene, 428; *Whitney v. Stow*, 111 Mass. 368; *Souhegan Bank v. Boardman*, 46 Minn. 293; *Metcalf v. Williams*, 104 U. S. 93, 26 L. ed. 665; *Good v. Martin*, 95 U. S. 90, 24 L. ed. 841. "Considerable diversity of decision, it must be admitted, is found in the reported cases, where the record presents the case of a blank indorsement by a third party, made before the instrument is indorsed by the payee, and before it is delivered to take effect; the question being whether the party is to be deemed an original promisor, guarantor, or indorser. Irreconcilable conflict exists in that regard, but there is one principle upon the subject almost universally admitted by them all, and that is that the interpretation of the contract ought in every case to be such as will carry into effect the intention of the parties; and in most cases it is admitted that proof of the facts and circumstances which took place at the time of the transaction are admissible to aid in the interpretation of the language employed." *Denton v. Peters*, L. R. 5 Q. B. 475; *Good v. Martin*, *supra*. We think that the parties who signed as directors had the right, at the trial, to give in evidence to the jury that the note in question was not their note as guarantors, but that it was the note of the Kanopolis Creamery Company only.

The judgment of the District Court will be reversed, and cause remanded for further proceedings in accordance with the views herein expressed.

All the Justices concur.

NEW YORK COURT OF APPEALS (2d Div.).

Henry WELSH, *Appt.*,

v.

John TAYLOR, *Resp.*

(.....N. Y.....)

1. An easement acquired by grant can-

NOTE.—*Effect of nonuser of an easement.*

In England and in this country distinction has almost invariably been made between easements acquired by deed and those acquired by prescription.

But there seems no ground for this distinction. 18 L. R. A.

See also 40 L. R. A. 81.

not be extinguished by mere nonuser without anything to show an intention to abandon it.

2. Owners of the fee of land are not estopped by the conduct of a life tenant of which they have no knowledge.

3. The purchaser of land from several

since prescription is based on the presumption of a grant. *Veghte v. Raritan Water Power Co.* 19 N. J. Eq. 156.

Mere nonuser will not extinguish the easement.

Mere nonuser of an easement which has been ac-

owners is not estopped from asserting his rights therein by the estoppel of a part only of his grantors.

4. The mere existence of a gate in an alley and acquiescence therein by one having an easement by grant in the alley but who does not use it will not be prejudicial to his right unless an adverse claim is brought to his knowledge.
5. The erection of a house and fence without any opening on an alley in which the owner has an easement by grant does not show an intention to abandon the easement.
6. The failure or refusal of a life tenant of premises to which an easement in an alley was made appurtenant by grant to pay taxes and expenses on the alley which she was primarily bound to do will not show any intention of the owners of the fee to abandon the easement unless they knew of such failure or refusal.

(October 1, 1892.)

APPEAL by plaintiff from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of a Special Term for New York County in favor of defendant in an action brought to enjoin defendant from maintaining a gate at the entrance to an alley, and to compel him to remove an alleged obstruction consisting of a building which he had built over a part of it. *Reversed.*

Statement by **Brown, J.:**

The plaintiff is the owner of property in New York known as Nos. 148 and 145

Franklin street bounded easterly by an alleyway. Defendant is the owner of property known as Nos. 189 and 141 Franklin street, bounded westerly by said alley. The common source of title was Alexander L. Stewart. He conveyed Nos. 148 and 145 to plaintiff's grantors, with the "right and privilege of passing and repassing through said alley without hindering, obstructing, or annoying such other persons as may be legally privileged to pass through the same; and subject at all times hereafter to the bearing and paying of a just proportion of the expenses of regulating and repairing the said alley and of such taxes and assessments as may be laid thereon." Nos. 189 and 141 were conveyed to defendant's grantors, with a similar right expressed in similar language; and the further right to extend any building erected or to be erected on the front part of the lot under or over said alley, but so as to leave the same 7 feet 9 inches wide, and not less than one story high in the clear. The alley was 83 feet deep, and at a distance of 62 feet from Franklin street broadened out so that at its rear end, and for a distance of 19 feet therefrom, it was about 21 feet wide. The evidence showed that, in 1836, Smith Harriot acquired title to No. 148, which abutted upon the alley on the west with the easement in the alley. He died in 1844, leaving a will whereby he devised the property to his wife, Mary Ann, for life, and upon her death to his three children, Frederick P., Smith, and Estelle. Mrs. Harriot subsequently acquired title to No. 145. She died

quired by prescription or adverse use is nothing more than evidence of an intention to abandon the right, but where the easement has been acquired by grant or its equivalent no length of mere non-user will defeat the right. *Curran v. Louisville*, 83 Ky. 628.

Interruptions of the user after the lapse of the time which raises the presumption of a grant of the easement furnish evidence of, but do not constitute, an abandonment. *Willey v. Norfolk S. R. Co.* 96 N. C. 408.

Easements acquired by deed are not lost by mere nonuser. *Kuecken v. Volts*, 110 Ill. 284.

Neglect to enjoy an easement is no more significant in its bearing upon the rights of the grantee than neglect to enjoy the freehold to which the easement is appurtenant. *Day v. Walden*, 48 Mich. 583. This was the case of a grant of a water privilege for the use of a mill.

A right of way created by deed cannot be lost by mere nonuser. *Wiggins v. McCleary*, 49 N. Y. 848.

Nor can it be surrendered by verbal declarations. *Longendyk v. Anderson*, 59 How. Pr. 1.

To prove the abandonment of an easement created by deed there must be more than proof that it was not exercised by the grantee. *Bombaugh v. Miller*, 82 Pa. 208.

In this case the plaintiff's use of an alley was not exclusive but concurrent only; his reserved right was spread on the record, and the defendant had notice thereof. It was held that a continuous use was not necessary to preserve the right.

The omission of a party to make use of his right to the use of water does not impair his title or confer any right on another. *Pillsbury v. Moore*, 44 Me. 154, 60 Am. Dec. 91. This was an action on the case for the continuance of a dam, to the injury of the plaintiff's mill site. At the time when the dam was erected the plaintiff had acquired no pre-

scriptive right; and at the time when the action was brought the defendant had acquired no rights by lapse of time to maintain the dam at its then height. *Townsend v. McDonald*, 12 N. Y. 381, 64 Am. Dec. 508.

In *Butts v. Ihrie*, 1 Rawle, 218, it was held that the nonuser for thirty-two years of a privilege to swell water on the land of the grantee did not forfeit the right.

In *Nitzell v. Paschall*, 8 Rawle, 82, it was held that a privilege devised to swell water back on other lands of the deviser might be resumed although not used for thirty-eight years. In this case Mr. Chief Justice Gibson, thought that lapse of time might be so great as to give rise to a presumption that a license granted by deed had been abandoned; and he supposed that a right acquired by adverse use for twenty years might be lost by nonuser for the same period. But he proceeded to say: "Where it has been acquired by grant, it will not be lost by nonuser in analogy to the Statute of Limitations, unless there were a denial of the title or other act on the adverse party to quicken the owner in the assertion of his right."

This was re-asserted in *Erb v. Brown*, 60 Pa. 218, where evidence of a parol agreement to give up a right granted by deed to maintain water pipes through certain lands was held to have been properly rejected.

In support of the same principle, see *St. Mary's Church v. Miles*, 1 Whart. 229, where it was decided that where ground rent had been reserved by deed extinguishment could not be presumed from any length of possession without payment. And see further, to the same effect, *Lindeman v. Lindsey*, 60 Pa. 93.

Where a street railway company had been granted the right to lay a double track on a certain street in Philadelphia, and actually operated its

in 1877, and in 1879 plaintiff purchased both pieces of property. All deeds in plaintiff's chain of title conveyed the same rights in the alley subject to the same duties. The defendant and one James Wilson acquired title to a part of 139 and 141 in 1859, and the balance in 1872. Wilson conveyed his interest to defendant in 1877. Defendant's property was of an average depth exceeding 100 feet, and included a lot about 23 feet by 23, directly in the rear of the alley. The right to build over and under the alley was appurtenant to a lot fronting on Franklin street and 62 feet deep. In 1878 defendant and Wilson erected a four-story brick building across the full width of the alley, and covering 20 feet of the rear thereof. They also maintained a gate at the entrance. This action was brought to compel the removal of the building and the gate, and to enjoin defendant from interfering with plaintiff's easement. The defense was (1) that during the ownership of the Harriots the easement had been abandoned; and (2) that the building had been erected with the knowledge of the owners of 143 and 145, and without objection on their part, and that plaintiff had purchased with knowledge of such facts, and was therefore estopped from asserting any right to use the alley. The trial court found that the owners of 143 and 145, or some of them, knew that the building was being erected over the alley, and made no objection thereto, and that Mary Ann Harriot, Smith Harriot, and the other owners of 143 and 145, by their acts, manifested an intention to abandon, and did

abandon, the right to use the alley; and, as a conclusion of law, that plaintiff had failed to establish any right to the easement; and dismissed the complaint.

Further material facts appear in the opinion.

Mr. James C. Carter for appellant.

Mr. John E. Parsons, with **Mr. Samuel Riker**, for respondent:

The finding of the trial court, that the then owners of the plaintiff's premises had by their acts manifested an intention to abandon, and that they did abandon, the right to use the alley, is supported by overwhelming testimony.

The owners of Nos. 143 and 145 Franklin street having abandoned the right to use the alley before the plaintiff's purchase, such right was thereby extinguished and the plaintiff never acquired a right to use the alley.

Crossley v. Lightowler, L. R. 2 Ch. App. 478.

The mere nonuser of an easement for twenty years will afford a presumption of a release or extinguishment, but not a very strong one, in a case unaided by circumstances; but if there has been in the mean time some act done by the owner of the land charged with the easement, inconsistent with, or adverse to the existence of the right, a release or extinguishment of the right will be presumed.

8 Kent, Com. 443.

Encroachment by one party upon a way held in common, by building a house on it, works an extinguishment by operation of law, especially where the other party acquiesces in what has been done.

Corning v. Gould, 16 Wend. 581.

road for some years and then abandoned one track for ten years after which time it relaid it, it was held that the city could not sustain a suit to enjoin the company from operating its road over the double track, this being merely a change in the mode of exercising a right given by the state. *Restonville M. & F. Pass. R. Co. v. Philadelphia*, 89 Pa. 210.

The nonuser for less than twenty years will not prove an abandonment of a mill privilege or right of way. *Williams v. Nelson*, 23 Pick. 141, 84 Am. Dec. 45; *French v. Braintree Mfg. Co.* 23 Pick. 216; *Hurd v. Curtis*, 7 Met. 94.

A nonuser of private ways for twenty years affords a presumption that the right never existed, or has been extinguished in favor of some adverse right. To raise the presumption of a release there must be nonuser for such a length of time as would found the presumption of a grant. *Webber v. Chapman*, 42 N. H. 323, 80 Am. Dec. 111; *Emerson v. Wiley*, 10 Pick. 816; *Doe v. Hilder*, 2 Barn. & Ald. 791; *Moore v. Rawson*, 3 Barn. & C. 339; *Hillary v. Waller*, 12 Ves. Jr. 265.

Nonuser for twenty years affords a presumption either that the former presumptive right was extinguished in favor of some other adverse right, or if no such adverse right appears that it has been surrendered or never existed. *Corning v. Gould*, 16 Wend. 583.

Nonuser for nineteen years of an easement acquired by grant and temporary alteration of buildings so as not to require the enjoyment of the easement does not work a forfeiture where others have not been led to change their position or condition. *Tyler v. Cooper*, 47 Hun. 94.

In *Riehle v. Heulings*, 38 N. J. Eq. 20, the right to use a passageway had been granted in connection with the conveyance of the lot for the convenience of the owners thereof and it was claimed that the 18 L. R. A.

lane had not been used for twenty-seven years except by permission. It was held that even if this were so the right would not on that account be forfeited.

The right to use an alley, granted with abutting lots, is lost in Louisiana, under the Code by non-usage for ten years. *Thompson v. Meyers*, 34 La. Ann. 615.

A right to use a passageway given by a deed "so long as the same shall be used by the grantor" as a passageway ceases when the grantor ceases so to use it unless the way is one of necessity. *Batchelder v. National State Capital Bank (N. H.)* March 18, 1891.

The nonuser must be accompanied by an adverse use of the servient estate.

Nonuser of an easement united with an adverse use of the servient estate inconsistent with the existence of the easement will extinguish it. *Jennison v. Walker*, 11 Gray, 423; *Smith v. Langewald*, 140 Mass. 205.

Mere nonuser for any length of time of an easement created by express grant will not destroy or extinguish it. In order to extinguish it by non-user there must be some conduct on the part of the owner of the servient tenement adverse to and in defiance of the easement and a nonuser must be the result of it and must continue for twenty years. *Dill v. Camden Board of Education*, 10 L. R. A. 276, 47 N. J. Eq. 421.

See, to the same effect, *Rannon v. Angier*, 2 Allen, 128; *Veghte v. Raritan Water Power Co.* 19 N. J. Eq. 156; *Eddy v. Chase*, 140 Mass. 471; *King v. Murphy*, 140 Mass. 254; *Smith v. Worn*, 38 Cal. 203; *Lathrop v. Elsner (Mich.)* Dec. 2, 1882.

The nonuser "must be accompanied with the express or the implied intention of abandonment; and the owner of the servient estate acting upon

A cesser to use accompanied by an act clearly indicating an intention to abandon the right would have the same effect as a release without reference to time.

Washb. Easem. 3d ed. 663, 4th ed. 707.

Whenever the facts are such as to show clearly an intention to abandon the easement as such, it is sufficient, though the obstruction be not of a more permanent character than that created by a board or rail fence.

Crain v. Foz, 16 Barb. 187.

The period of time is only material as one element from which the grantee's intention to retain or abandon his easement may be inferred against him, and what period may be sufficient in any particular case must depend on all the accompanying circumstances.

Reg. v. Chorley, 12 Q. B. 519; *Cartwright v. Mapleden*, 63 N. Y. 622.

The plaintiff's contention that because the alley right was created by deed it could only be lost by deed or by adverse possession, is untenable. It could be extinguished by abandonment.

Snell v. Levitt, 1 L. R. A. 414, 110 N. Y. 595, citing *Vogler v. Geiss*, 51 Md. 407; *Steele v. Tiffany*, 13 R. I. 568; *Dyer v. Sanford*, 9 Met., 395, 43 Am. Dec. 399; *Curtis v. Noonan*, 10 Allen, 406; *Morse v. Copeland*, 2 Gray, 302; *Pope v. Devereux*, 5 Gray, 409; *King v. Murphy*, 140 Mass. 254; *Reg. v. Chorley*, *supra*; *Crossley v. Lightowler*, L. R. 2 Ch. App. 478; *Cartwright v. Mapleden*, *supra*; *White's Bank of Buffalo v. Nichols*, 64 N. Y. 65.

The facts proved upon the trial and found by the court make out a case of adverse possession.

Snell v. Levitt, *supra*; *Baron v. Korn*, 127 N. Y. 224; *Corwin v. Corwin*, 24 Hun, 147; *Jennison v. Walker*, 11 Gray, 423; *Veakle v. Nace*, 2 Whart. 123.

Although the owners of 143 and 145 Franklin street might not have abandoned their right to use the alley, yet they manifested such an appearance of having abandoned it as to induce the owners of 139 and 141 to alter their position, in the reasonable belief that the right was abandoned, and are therefore precluded as against them from claiming that right.

Stokoe v. Singers, 8 El. & Bl. 81; *Crossley v. Lightowler*, L. R. 8 Eq. 279; *Cook v. Bath*, L. R. 6 Eq. Cas. 177; *White's Bank of Buffalo v. Nichols*, *supra*; *Arnold v. Cornman*, 50 Pa. 861.

Brown, J., delivered the opinion of the court:

The judgment in this action was first reversed by the general term, but upon a re-argument it was affirmed. The final decision of the court rested upon the authority of *Snell v. Levitt*, 110 N. Y. 595, 1 L. R. A. 414, and it appears from the general term opinion that the proposition assumed to have been there decided, which was made applicable to this case, was that an easement acquired by grant may be extinguished by actual abandonment or nonuser for a period less than 20 years. That question was not involved in the facts of the case cited, and its consideration was not necessary to its decision. There was in evidence a release in writing of the easement executed by the grantee thereof, who was the plaintiff's

the intention of abandonment and the actual non-user must have incurred expenses upon his own estate. The three elements—nonuser, intention to abandon, and damage to the owner of the servient estate—must concur in order to extinguish the easement." *Tiedeman*, Real Prop. § 605.

The omission for forty years to use a right granted by deed to dig ore on the land of another does not forfeit the privilege without any adverse acts by the owner of the land; and the cultivation of the land by the owner is not adverse enjoyment by the owner. *Arnold v. Stevens*, 24 Pick. 106, 35 Am. Dec. 305.

Where the right to use four springs by an aqueduct had been granted by deed and the grantee had used only two for fifteen years and at the expiration of that time had taken the other two into the aqueduct, there having been no adverse use on the part of the owner of the servient estate during that period of time, the easement was not destroyed. *Owen v. Field*, 102 Mass. 112.

A presumption of reconveyance "will be made when it is necessary to clothe a rightful possession with a legal title; but the court must first see that there is nothing but the form of a conveyance wanting. But this presumption in favor of a grant against written evidence of title can never arise from the mere neglect of the owner to assert his right, where there has been no adverse title or enjoyment by those in whose favor the grant is to be presumed." *Sutherland, J.*, in *Doe v. Butler*, 3 Wend. 149.

Duration of adverse use.

The adverse use by the owner of the premises over which the easement was granted must have continued long enough to create a prescriptive 18 L. R. A.

right. Washb. Easem. 4th ed. 717; Cal. Civ. Code, § 811, subd. 4, note; *Curran v. Louisville*, 83 Ky. 628; *Chandler v. Jamaica Pond Aqueduct Corp.* 125 Mass. 549; *Weish v. Taylor*, 50 Hun, 144.

In *Barnes v. Lloyd*, 112 Mass. 224, the defendant claimed a right of way from the highway to his land over the intervening land of the plaintiff, the defendant's grantor had received from the owner of both lots a conveyance in 1800 in which was expressly granted a right of way across the lot retained. Subsequently in a conveyance to the plaintiff's grantor a right of way in favor of the defendant's lot was reserved and this reservation had been inserted in all subsequent conveyances down to 1859. Prior to 1870 no use whatever of the right of way had been made by the owners of the defendant's lot and the plaintiff's lot had always been kept fenced both on its road side and on the line with the defendant's lot and across the middle by fences having no opening and the lot itself had been cultivated. The easement was held not to have been extinguished. To the same effect, see *Ward v. Ward*, 7 Exch. 838.

The intention of the owner of the easement, as indicated by his acts, governs.

It is not so much the duration of the cesser to use the easement as the nature of the act done by the owner thereof or of the adverse act acquiesced in by him, and the intention so indicated that is material. *Reg. v. Chorley*, 12 Q. B. 515; *Pope v. Devereux*, 5 Gray, 409.

Where nonuser is evidence of abandonment, it will depend upon the circumstances and is a question of intention. *Ward v. Ward*, 14 Eng. L. & Eq. 413; *Wiggins v. McCleary*, 49 N. Y. 348.

A cesser of the use coupled with any act clearly

grantor, made in consideration of \$75 and the grant of a new easement. There was nonuser of the easement in question for upwards of 20 years, and use of the substituted easement during a large part of the same period. The question, therefore, whether nonuser alone for a greater or less period than twenty years would have extinguished the easement was not before the court. Nor is there anything in the opinion to the effect that such question should be answered in the affirmative.

On the contrary, it was said by *Judge Earl*, in stating the law applicable to the extinguishment of such an easement, that it could not be lost by nonuser for any length of time. All that the court there decided was that the release of the right claimed by plaintiff, followed by nonuser for upwards of twenty years, and use for a long period of a substituted easement, constituted conclusive evidence of its extinguishment, and that the trial court should have so ruled as a question of law. The main reliance of the plaintiff in that case was upon the fact that the release was not recorded, and was therefore void as to him, he being a purchaser without notice. But that claim was not sustained, on the ground that the agreement to give up the easement, and the unequivocal intention thereby expressed to abandon it, were the effectual and material things to be considered, and not the fact that such an agreement was expressed in writing and executed under seal. It was this element in the case that led the learned judge writing the opinion of the court to say that

"nonuser for a period of twenty years, under such circumstances as show an intention to abandon and give up the easement, is sufficient to extinguish it; and even an abandonment for a shorter period, under such circumstances as show an intention to give up and release an easement which is acted upon by the owner of the servient tenement, so that it should work harm to him if the easement was thereafter asserted, would operate to extinguish it." The learned general term evidently overlooked the qualifying language of the last sentence quoted. It was applicable to the case then before the court. There was the release and the use of the substituted easement showing an unequivocal intention to abandon, and, in reliance on that act, use of the waters of the spring in question by the grantor of the easement, and those who subsequent to the release had acquired his title. There was therefore a clear case of estoppel, and that an easement created by grant could be extinguished by estoppel was the effect of the language used in reference to an abandonment for a less period than twenty years, which I have quoted from the opinion. In *Washburn on Easements* (4th ed. p. 707) it is said that the question of abandonment is one of intention, but that time is not a necessary element therein. "A cesser to use, accompanied by an act clearly indicating an intention to abandon the right, would have the same effect as a release, without reference to time." And this proposition is fully sustained by authority. *Pope v. Devereux*, 5 Gray, 409; *Reg. v. Chorley*, 12 Q. B. 519; *Moore v.*

indicating an intention to abandon the right would have the same effect as an express release of the easement without reference to time. *Glenn v. Davis*, 35 Md. 308, 6 Am. Rep. 389; *Vogler v. Geiss*, 51 Md. 410; *Liggins v. Inge*, 7 Bing. 682; *Reg. v. Chorley*, 12 Q. B. 515.

And a cesser to use for a less period than twenty years accompanied by acts clearly indicating the intent to abandon the right is sufficient. *Moore v. Rawson*, 3 Barn. & C. 322; *Liggins v. Inge*, *supra*; *Dyer v. Sanford*, 9 Met. 395, 43 Am. Dec. 399; *Pope v. Devereux*, *supra*; *Snell v. Levitt*, 1 L. R. A. 414, 110 N. Y. 595.

In *White's Bank of Buffalo v. Nichols*, 64 N. Y. 74, *Allen, J.*, said: "It is not easy to define what act of the owner of an easement could operate to extinguish the same but in all cases the act must be judged by the intention indicated by it and nothing short of an intention to abandon the right will operate to extinguish it unless other persons have been led by such acts to treat the servient estate as if free from servitude."

The acts must be of a decisive character; and the question of intention is for the jury. *Vogler v. Geiss*, *supra*.

The acts of the owner of the dominant tenement which will prevent him from claiming an easement acquired by grant must conclusively indicate an intention to abandon the easement. *Hayford v. Spokefield*, 100 Mass. 494; *Smyley v. Hastings*, 32 N. Y. 224.

In *Jamaica Pond Aqueduct Corp. v. Chandler*, 121 Mass. 3, a highway had been laid out between the termini of a private way owned by the plaintiff. These facts accompanied by the fact of entire nonuser of the private way would, it was held, be strong though not conclusive evidence of an abandonment.

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Where one had, by a window in an ancient wall, an easement of light in the land of another, but pulled down the wall and rebuilt without the window, it was held after seventeen years, the owner of the servient tenement having, in the meantime, so built as to intercept the light, that the easement was lost. *Moore v. Rawson*, 3 Barn. & C. 322.

In *Jennison v. Walker*, 11 Gray, 423, the right had been granted by deed to lay and maintain an aqueduct through certain lands. The owner of the servient estate having removed the logs by which the water was conveyed over his lands, and the owner of the dominant estate having made no attempt to renew the enjoyment of the privilege for over thirty years, it was held that it might be inferred that the right had been released by a subsequent, non-appearing deed.

In *Farrar v. Cooper*, 34 Me. 394, the owner of a right to use water had not used his privilege for some years; and when a dam was erected below him destroying his property he stood by without complaint for the balance of the twenty years. He was held to have lost the right.

In *Warbauer v. Randall*, 109 Mass. 586, the plaintiff's grantor was permitted to testify that when he owned the easement more than twenty years before, he orally relinquished it to the defendant's grantor and ceased to use it.

In *Louisville & N. R. Co. v. Covington*, 2 Bush, 526, the railway company had not only ceased to use a portion of its track but had by deed for private use clearly indicated an intention to abandon, and it was held that this portion of the road was forfeited.

In *Roanoke Invest. Co. v. Kansas City & S. E. R. Co.* (Mo.) Dec. 2, 1891, it was held that mere nonuser of a railroad right of way in the absence of adverse

Rawson, 8 Barn. & C. 822; *Dyer v. Sanford*, 9 Met. 395, 43 Am. Dec. 399; *Veghies v. Raritan Water Power Co.* 19 N. J. Eq. 143; *Crain v. Fox*, 16 Barb. 184; *Cartwright v. Maplesden*, 53 N. Y. 622. *Snell v. Levitt* is not, therefore, an authority for the proposition that an easement created by grant can be extinguished by nonuser. Under the rule of that case, an intention to abandon must exist in connection with and as a cause of nonuser. The case is distinguished from the one before us, in that there was evidence of an unequivocal act releasing the easement. The learned counsel for the respondent, while not claiming that that case goes further than I have indicated, contends that the evidence of the intention to abandon, which is necessary to sustain the conclusion reached at the trial, exists in the facts found by the court. Giving him the full benefit of that decision, we may examine this case in the light of its authority.

The judgment in this case rests upon two grounds: (1) An estoppel based upon knowledge of the erection of the building and omission to object to it by the owners of Nos. 143 and 145 Franklin street; (2) abandonment of the easement. The trial court found (1) "that the owners of Nos. 143 and 145 Franklin street, or some of them, knew that the building was being erected over the alley, and made no objection to the erection of the same." This finding, if supported by the evidence, is insufficient to create an estoppel. The owners of 143 and 145, at the time of the erection of the build-

ing, were the widow and three children of Smith Harriot. The plaintiff has succeeded to the title of all of them; and, if any of the children who were owners of the fee were ignorant of the erection, the act was a wrong to them, and in violation of their rights. The plaintiff, therefore, is not estopped from asserting his rights in the alley unless all his grantors are estopped. The evidence does not show more than that Mrs. Harriot knew that the building was being erected. She was a life tenant, and was in the legal possession of the property. But knowledge on her part did not affect the rights of her children. There is no pretense that her daughter, Mrs. Schilling, ever received any information concerning the building, or had any knowledge of it. Frederick P. Harriot testified that he was first informed of it in the summer of 1885, and Smith Harriot testified that he was informed by his mother that Taylor & Wilson were putting up a building in the rear of the lot, but there is no evidence that he knew at the time of its erection that it was upon any part of the alley, and this might very well have been the effect of the statement on his mind, as the defendant and Wilson owned a lot 28 feet deep, directly in the rear of the alley. Smith Harriot and his brother resided at Cherry Valley in this state, and were rarely in the city of New York. It does not appear that the fact that Mrs. Harriot informed her son that a building was in process of erection was known to Taylor & Wilson, and nothing that any of the owners of No. 143 did in-

possession by the servient owner or other acts of such unequivocal nature on the part of the owners of the railroad as evince a clear intention to abandon the easement would not work an extinguishment of the right however acquired. *White v. Crawford*, 10 Mass. 187; *Nitsell v. Paschall*, 3 Rawle, 78.

In *Pratt v. Sweetser*, 38 Me. 344, in an action of trespass, the defendant set up a right of way by prescription over the plaintiff's field to a marsh. It was held that though nonuser for twenty years was evidence of an intention to abandon, it was open to explanation, and that the owner might show that in the omission he had no such intention.

In *Steele v. Tiffany*, 13 R. L. 570, where the half of a private way created for the common use of the owners of adjoining lots had been appropriated by the owner of one of the lots, it was held that this, added to the fact of a failure to use, clearly indicated an abandonment. See also *Illinois Cent. R. Co. v. Houghton*, 1 L. R. A. 213, and note, 136 Ill. 233.

Public easements.

Judge Dillon in his work on Municipal Corporations, §§ 623, 633, lays it down that municipal corporations cannot be considered to be within ordinary limitation statutes. "There may be instances where the nonuser has continued so long and private rights have grown up of such a nature as to amount to an equitable estoppel, or an estoppel *in pais* on the public, which the courts will enforce upon principles of justice." *Brooks v. Riding*, 46 Ind. 15; *Sims v. Frankfort*, 79 Ind. 448.

In *Wilder v. St. Paul*, 13 Minn. 192, it was said to be a question not free from doubt whether nonuser would bar the right of the public in an easement clearly obtained.

The Statute of Limitations does not apply to one 18 L. R. A.

who wrongfully obstructs the streets and alleys of a town or city (*Sims v. Frankfort*, *supra*); but the maxim "once a highway always a highway" does not exist except where the right of abutters is involved, (*Elliott, Roads & Streets*, 558); and the rule does not apply to easements other than streets and alleys such as are not necessary to public convenience. *Washb. Easem.* 242; *Pella v. Scholtz*, 24 Iowa, 233, 35 Am. Dec. 729; *Callaway County v. Nolley*, 31 Mo. 398; *Baldwin v. Buffalo*, 29 Barb. 398; *Georgetown Street Comra. v. Taylor*, 2 Bay, 286; *Fox v. Hart*, 11 Ohio, 414; *Rowan v. Portland*, 8 R. Mon. 268; *Knight v. Heaton*, 23 Vt. 430.

While the state may not be barred by the Statute of Limitations from insisting on the use of the highway, yet long acquiescence in a portion thereof and improvement of their property by adjoining owners induced by nonuser and apparent abandonment will estop the state from disturbing long established lines. *Hamilton v. State*, 106 Ind. 361.

In *Henderson v. Central Pass. R. Co.*, 21 Fed. Rep. 368, it was said that the rules applied to nonuser of an easement held and owned for private use should not be applied with strictness to a right held for the public benefit. In this case it was decided that the nonuser for ten years of a street railway's right of way without the consent of the city was sufficient evidence of abandonment.

Public rights may be lost by unreasonable delay in enforcing them. Abandonment of streets may be presumed from long continued neglect. *Derby v. Alling*, 40 Conn. 410.

A partial nonuser of a highway and diversion of traffic to another road will not suffice to forfeit the right. *Lewiston v. Proctor*, 27 Ill. 414.

The easement of the public in a way is not lost by mere nonuser. The placing on the land of

duced them to build on the alley. Taylor & Wilson were not the owners of the fee of the alley. They possessed the right to use the easement in common with the owner of the adjoining property. Their deeds conceded the right of equal enjoyment in the owners of such property, and limited them to the enjoyment of the privilege of ingress and egress upon the terms set forth in the instrument. In contemplation of law, the rights in themselves and others, with their limitations, were known to them at the time of the erection of the building. To have shown an estoppel, it was essential for them to have proven that they were induced to erect the building by the conduct or language of their cotenants in the easement in the alley. Here there was no inducement. They were not misled. They acted with the full understanding of the rights of the other owners and of the limitations upon themselves. No defense, therefore, can be based on an estoppel.

The judgment, if it can be sustained, must rest upon the fact of abandonment. The appellant challenges this finding on the ground that it has no support in the evidence, and we are of that opinion. The facts on which it rests are (1) that from 1846 to 1879, when it was torn down by the plaintiff, a gate was maintained by the defendant and his grantors at the entrance to the alley on Franklin street; (2) that, as early as 1842, a brick building was erected on the lot No. 148, extending along the alley 36 feet deep, the easterly wall of which had no opening

through which access could be had to the alley, and a high board fence without opening was maintained from the rear of the house to the end of the lot, thus shutting out the owners and occupants of that lot from the alley until 1879, when plaintiff opened a door through the fence; (3) that for 40 years no taxes or assessments on the alley, and no part of the expenses of paving or repairing, had been paid by the owners of 148 and 145, but the same had been paid by the owners of defendant's property; (4) that since 1842 the owners of 148 and 145 had made no use of the alley, but it had been exclusively used by defendant and his grantors. The last fact is, of itself, of no importance. Abandonment necessarily implies nonuser, but nonuser does not create abandonment, no matter how long it continues. There must be found in the facts and circumstances connected with the nonuser an intention on the part of the owner of the easement to give it up, but intention existing, coupled with nonuser, will uphold a finding of abandonment. The evidence in this case is substantially undisputed, and the question is, Do the facts I have referred to show an intention on the part of the plaintiff's grantors to give up and abandon the easement? It is unnecessary to consider these facts in connection with Mrs. Harriot. Although she was the owner of No. 145, and may have intended to and did abandon any right she had in the alley as the owner of that lot, yet as to No. 148 she was but a life tenant, and no act of hers could prejudice or

permanent obstructions may have that effect; but using the land for pasturage or the growth of crops is not a sufficient indication of intention that the street shall never be used as such to shut out the public. *Bartlett v. Bangor*, 87 Me. 460.

The right to a highway may be lost by nonuser for a number of years. *Georgetown Street Comrs. v. Taylor*, 2 Bay, 232. But in this case there was an exclusive adverse use.

And nonuser for a great number of years is prima facie evidence of a release to the person over whose land it ran. *Beardslee v. French*, 7 Conn. 125, 18 Am. Dec. 86; *Brownell v. Palmer*, 22 Conn. 121.

In *Brownell v. Palmer*, 22 Conn. 107, it was said that the disuse for fifteen years of a private way acquired by prescription would forfeit the right, but it was held unnecessary to determine the effect of nonuser of a public way accompanied by adverse occupation.

It was said in *St. Vincent Female Orphan Asylum v. Troy*, 12 Hun, 819, citing *Corning v. Gould*, 16 Wend. 581, that mere nonuser of an easement for twenty years would be termed an abandonment of it. But in this case there was more than nonuser; there was an express surrender followed by nonuser for more than twenty years, of a strip of land within the line of the public highway.

The nonuse of a highway and the constant adverse possession of an individual will establish a prescriptive right. *Knight v. Heaton*, 22 Vt. 460.

In *Alves v. Henderson*, 16 B. Mon. 181, it was held that the enclosure and adverse and exclusive possession by an individual of portions of a public ground for more than twenty years would defeat the right of the public.

In *Bowen v. Team*, 6 Rich. L. 298, nonuser and adverse obstruction for ten years (the statutory 18 L. R. A.

period) of a right of way was held to bar the easement.

In *Peoria v. Johnston*, 56 Ill. 45, the public had, for more than twenty years, ceased to use land dedicated for a highway and the land had been in open and adverse possession of the owner. It was held that the right of the public was extinguished.

This case was cited and its principle followed in *Winnetka v. Prouty*, 107 Ill. 225, which was a case where a village had been laid out by a plan which failed to give the width of the streets; and the owner of certain blocks fenced them, inclosing land intended for a street. The public acquiesced in his action and built sidewalks and ditches near the land, and for more than twenty years did not use the land inclosed.

In *Fox v. Hart*, 11 Ohio, 414, it was held that a partial encroachment on a highway by an adjacent owner, continued for eighteen years, did not forfeit the right by nonuser.

In *Lane v. Kennedy*, 18 Ohio St. 42, a street had been laid out four rods wide but had been opened only part of that width. The plaintiff fenced the portion not used and occupied it for eighteen years. It was held that he could not maintain trespass against the supervisors for removing the fence. The circuit court in this case distinguished between the case of the abandonment of the entire street and the exclusion of the public from a portion of the street.

In *Cheek v. Aurora*, 32 Ind. 114, there had been a private occupation of a portion of the city street, but the use of the public had not altogether ceased.

To raise a presumption of abandonment of a highway by the public nonuser of the right is necessary for the same period as is required to raise a presumption of dedication. *State v. Culver*, 65 Mo. 807, 27 Am. Rep. 295. In this case it was held

destroy the rights of the owners of the fee of that property, unless done with their knowledge and approval. The erection and maintenance of a gate at the entrance to the alley on Franklin street is not a fact indicating an intention with reference to the easement on the part of the owner of No. 143. It was not their act. It would appear to be important only in connection with an adverse claim or possession on the part of those who erected and maintained it. Abandonment of the easement is not inconsistent with entire and full recognition by the owners of defendant's property of the rights and privileges of the owners of No. 143. But their exclusion from the alley would be a denial of their rights, and could exist only in connection with a claim adverse to such owners. It does not appear that any of the owners of 143 were ever excluded from the alley, or that any claim to the exclusive use by defendant or his grantors was ever made to or brought to their knowledge. But adverse possession, although alluded to in the special term opinion, needs no consideration, as it was not pleaded as a defense, and no finding was made upon it, and none was requested.

The fact of the existence of the gate is of no importance in the case, as evidence of abandonment, in the absence of evidence that it was used to exclude the owner of the adjoining property. It is not denied that no use was made of the alley by the owners of 143, and, as long as there was no occasion on their part to use it, the mere existence of a gate was not notice of any adverse claim on the part of their cotenants. Nor would acquiescence in its existence be prejudicial to their rights, unless an adverse claim was brought to their knowledge. So long as it did not "hinder, obstruct, or annoy others legally privileged to pass through the same," it was not in violation of the terms upon which the easement was granted.

The erection of the house and fence without an opening on the east gives no indication of an intent to abandon the easement. It indicates no more than that the owners of

143 did not use the alley. It is evidence of nonuser, and nothing more. But the nonpayment of taxes and repairs is an act of some significance. Voluntary payment by defendant, of course, amounts to nothing; but if the failure to pay by plaintiff's grantors was coupled with a refusal to pay, on the ground that the easement was not desired, I think it would be sufficient to support a finding of an intent to abandon and give up the right. The owners of No. 143 must be deemed to have known that the privilege in the alley was subject to these payments, and, if for a long term of years they refused to contribute, it would, in connection with the other facts, be strong evidence that the privilege was not desired and was given up. It would be no answer to this fact to say that they were liable under their deed, and could have been sued for half of the taxes and repairs. Perhaps such a suit could have been maintained against them, but certainly the other owners of the easement were not bound to sue them, and defendant has lost none of his rights by a failure to sue. If nonpayment on the part of the owners of No. 143 is evidence of a surrender by them of the easement, the defendant may avail himself in this action of that defense. But the situation was somewhat peculiar. Mrs. Harriot, the widow, was the life tenant of No. 143. Her children had no right to the possession of the property until her death, and therefore no occasion to make use of the alley. She was bound to pay the taxes and repairs, and her children had a right to assume that she would do so. Her failure or refusal to pay the taxes could not, therefore, be regarded as a fact indicating any intention as to the easement on the part of her children, unless they knew of it and approved of it.

While it may be that the children were liable for part of the expenses and taxes between themselves and the owner of the defendant's property, between them and their mother, the life tenant, she was primarily bound to pay them, and they might assume

that nonuser of a highway for ten years did not amount to such an abandonment as would justify the owner of the fee in fencing it.

In *Kelly Nail & Iron Co. v. Lawrence Furnace Co.*, 5 L. R. A. 652, 46 Ohio St. 544, it was held that nonuser to work an abandonment of a city street must extend over a period of twenty-one years. In this case the road was almost impassable, no work had been done on it for fifteen years and travel had been substantially diverted to a new road; but this was held not evidence sufficient to show abandonment.

Where a road had been laid out six rods wide but had been used for thirty years four rods wide, it was held that the rights of the public were limited to the extent of the use. *Peckham v. Henderson*, 27 Barb. 214. To the same effect, substantially, is *People v. Cortland County Judges*, 24 Wend. 491.

An easement created by implied dedication for a boat landing is abandoned when not used for more than thirty years and when the commerce for whose promotion the easement was created has ceased to exist. *Freedom v. Norris (Ind.)*, May 23, 1891.

In Michigan a highway can be partially discontinued by nonuser and stands against long possession 18 L. R. A.

no better than any other property. *Gregory v. Knight*, 50 Mich. 61; *Lyle v. Lesia*, 61 Mich. 16; *Coleman v. Flint & P. M. R. Co.* 64 Mich. 160. In all these cases the question arose on the true line of the adjoining owner's fence.

The nonuser must continue for the statutory period; but where there is a formal abandonment, and the opening of a new road, the case is different. *Lyle v. Lesia*, *supra*.

The principle of the above cases was affirmed in *Big Rapids v. Comstock*, 65 Mich. 78. In this case the land claimed by the city had been occupied for twenty-five years by a building which encroached 4 1/4 inches on the street as originally laid out and had never been used as a street.

Until a street is required for the public use no mere nonuser will work an abandonment of it. *Reilly v. Racine*, 51 Wis. 523; *State v. Leaver*, 62 Wis. 383; *Childs v. Nelson*, 69 Wis. 125. But after the time arrives when the street is necessary to the public, neglect to open the same may operate as an abandonment by nonuser. *Reilly v. Racine*, *supra*.

See, in connection with this as to adverse possession of highway, *Meyer v. Graham (Neb.)* 18 L. R. A. 146, and *note thereto*. A. P. W.

that she would do so. Mrs. Harriot, as the owner of 145 and life tenant of 143, was bound to pay one half, while her children were liable only for such proportion as was properly chargeable to No. 143. Now, it does not appear that any demand was ever made upon Mrs. Harriot's children to pay their share of the expenses and taxes in the alley, nor does it appear that Mrs. Schilling or Frederick Harriot ever knew that their mother refused to pay them. The only evidence is that Smith Harriot was informed by his mother that she had been advised not to pay them, and that she did not pay them. But he was not charged with any duty in reference to the property by his brother and sister, and his knowledge then acquired cannot be imputed to them. In the absence of any refusal on the part of the children to pay, the payment by defendant was voluntary, and, of course, gives him no right to the property. I think, therefore, that the children of Mrs. Harriot had a right to assume that their mother would pay these taxes and expenses, and, in the absence of any evidence that they knew she had refused so to do, the mere fact of nonpayment is no evidence that they intended to give up and abandon the use of the alley. Mrs. Harriot did not die until 1877, and two years later her children conveyed No. 143 to plaintiff, with the easement. As to Mrs. Schilling and Robert Harriot, there is no evidence to support the finding of the court.

This conclusion leaves the case to rest en-

tirely upon the fact of nonuser; and, the easement having been created by deed, that is not sufficient to sustain the finding that it had been given up and was extinguished. A person who acquires title by deed to an easement appurtenant to land has the same right of property therein as he has in the land, and it is no more necessary that he should make use of it to maintain his title than it is that he should actually occupy or cultivate the land. Hence his title is not affected by nonuser, and, unless there is shown against him some adverse possession or loss of title in some of the ways recognized by law, he may rely on the existence of his property, with full assurance that when the occasion arises for its use and enjoyment he will find his rights therein absolute and unimpaired. We do not deem it necessary to consider the question whether the plaintiff made out a case which would justify a court in adjudging that the building should be removed, or whether complete indemnity could be obtained by an award for the damages sustained. As a new trial must be had, the evidence thereon may not be the same as is contained on the record before us, and, should occasion arise for the consideration of that question, the trial court is the proper tribunal to determine it in the first instance.

The judgment must be reversed, and a new trial granted, with costs to abide the event. All concur, except Follett, Ch. J., not voting.

NEW YORK COURT OF APPEALS.

Frederick P. FORSTER, *Respt.*,

v.

David SCOTT, *Appt.*

(.....N. Y.)

1. A lien or incumbrance on land would be created by filing a map of a proposed street across it by virtue of a statute denying compensation for any buildings subsequently erected thereon if such statute were valid.
2. A statute denying compensation for any building erected on land after filing a map of a proposed street across it, although proceedings to open the

street or condemn the land have not been begun and perhaps never will be, is unconstitutional as depriving the owner of property without just compensation.

(January 17, 1893.)

APPEAL by defendant from a judgment of the General Term of the Superior Court of the City of New York in favor of plaintiff upon a case submitted to it without action for the determination of defendant's liability to specifically perform a contract to purchase real estate. *Affirmed.*

The facts are stated in the opinion.

NOTE.—Protection of private rights from interference by public.

No more important questions arise at this time than those which touch the power of the state over the citizen, and these in practice relate mostly to his property rights. It is certain that the trend of modern decisions, with which the main case is in full harmony, has been toward an enlargement of the rights of the citizen or at least toward their fuller protection. As an instance of this may be noted the recent decisions in *Buffalo v. Pratt*, 15 L. R. A. 413, 131 N. Y. 233, in which by practically overruling the previous decisions in that state the property right of the owner of the fee of a street was protected from the practical confiscation which would have been justified by the doctrine of the earlier cases.

18 L. R. A.

A similar instance appears in *Rumsey v. New York & N. E. R. Co.*, 15 L. R. A. 613, 133 N. Y. 79, in which case the rights of a riparian owner were protected against a taking without compensation by building a railroad embankment along the water front, although to give this protection it was necessary to overrule a decision of the same court which had stood for a generation.

Again the elevated railroad cases have equitably established the rights of abutting owners by limiting or distinguishing the doctrine of earlier cases which if applied to this class of cases would have produced great injustice. The same tendency is shown by the cases on the subject of injury to an abutter's easements of light, air and access by vacating a street, changing grade, etc., which are fully reviewed in the note to *Selden v. Jacksonville*

also 18 L. R. A. 487; 22 L. R. A. 241; 27 L. R. A. 648.

Mr. Rollin H. Lynde, for appellant:

The filing of the maps, covering the lot in question, pursuant to Laws 1886, chap. 681, 2 Laws 1882, chap. 419, §§ 672, 677, 958, and amendments thereto, gave to the city of New York such rights and interests, and created such a restriction upon the property, that respondent was unable, after the filing of said maps, to convey said lot by "a full covenant and warranty deed," "in fee simple, free from any lien or incumbrance."

The statute was clearly intended to prohibit, from the time the map should be made and filed, any owner from building on the site of any street laid out on the map, except at the risk of not being paid for such building.

Re Wall Street Widening, 17 Barb. 617; *Re Furman Street*, 17 Wend. 659.

All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title or possession.

Munn v. Illinois, 94 U. S. 141, 24 L. ed. 90.

If there was any taking by the city of any right in said lot respondent cannot convey a good title, in fee simple, free from any lien or incumbrance.

Seaman v. Hicks, 8 Paige, 655, 4 L. ed. 580; *Suburban Rapid Transit Co. v. New York*, 128 N. Y. 510.

By the filing of said map an incumbrance was created for the benefit of the city.

1 Bouvier, Law Dict. p. 696; 2 Greenl. Ev. § 242; 3 Washb. Real Prop. *659, § 14.

Covenants restricting the use of lands are incumbrances.

Wetmore v. Bruce, 118 N. Y. 819; *Raynor v. Lyon*, 46 Hun, 227.

By the filing of said map the city of New York has acquired a lien which gives it the right to take said lot for street purposes without making any allowance for improvements.

Rochester, H. & L. R. Co. v. New York, L. E. & W. R. Co. 110 N. Y. 128; *Suburban Rapid Transit R. Co. v. New York*, *supra*.

The right of the city of New York to open streets in accordance with maps to be filed, without compensation to property owners for improvements made after the filing of said maps, has existed unquestioned since 1818, and the provisions of §§ 677 and 958 are not unconstitutional.

Re 127th Street, 56 How. Pr. 60; *Webb v. New York*, 64 How. Pr. 10, and cases cited.

Mr. Henry A. Forster, for respondent:

Section 677 of the Consolidation Act is unconstitutional because it deprives the plaintiff

of the right to build on his lot, which is the only purpose for which it is adapted and from which it derives its chief value, and by thus depriving the plaintiff of the beneficial use of his property deprives him of his property without due process of law.

By conferring upon the city an option to take or destroy a building on the land covered by a proposed street without compensation, if the city sees fit to open the street, the statute prevents the use of the land for building purposes.

Fotherby v. Metropolitan R. Co. L. R. 2 Q. P. 188; *Morgan v. Metropolitan R. Co.* L. R. 8 Q. P. 553.

If the practical effect of a statute is the accomplishment of some end which the Legislature would not have power to accomplish directly, or if it effects a result indirectly which could not be done directly, it is unconstitutional.

Gilman v. Tucker, 18 L. R. A. 804, 128 N. Y. 190; *People v. Albertson*, 55 N. Y. 50; *Homes Ins. Co. v. New York*, 184 U. S. 598, 83 L. ed. 1029; *Taylor v. Ross County Comrs.* 23 Ohio St. 22; *Cooley, Const. Lim.* 6th ed. 207, *note*; *New York v. Miln*, 36 U. S. 11 Pet. 103, 9 L. ed. 648; *Passenger Cases*, 48 U. S. 7 How. 283, 12 L. ed. 702; *Henderson v. Wickham*, 92 U. S. 259, 28 L. ed. 543. See also *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550; *Morgan's L. & T. R. S. Co. v. Louisiana*, 118 U. S. 455, 30 L. ed. 287; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455; *Brimmer v. Rebmam*, 138 U. S. 78, 34 L. ed. 862.

A statute which deprives a person of the right to erect any building on his land deprives him of his property without due process of law and is unconstitutional.

The right to erect buildings on land is one of the beneficial uses thereof.

Atkins v. Bordinan, 2 Met. 467, 87 Am. Dec. 100; *Kelsey v. King*, 38 How. Pr. 48.

Any statute which deprives the owner of land of the right to use it for any lawful purpose in a legal sense deprives him of the land itself and is unconstitutional.

Munn v. Illinois, 94 U. S. 141, 24 L. ed. 90; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 83 L. ed. 970; *Wynehamer v. People*, 13 N. Y. 378; *Janesville v. Carpenter*, 8 L. R. A. 808, 77 Wis. 288; *Com. v. Bacon*, 13 Bush, 210, 26 Am. Rep. 189; *Koch v. Delaware, L. & W. R. Co.* 58 N. J. L. 256.

The right to use real estate is in a legal sense as truly "property" as is the land itself.

Eaton v. Boston, C. & M. R. Co. 51 N. H.

14 L. R. A. 370, 28 Fla. 558; and also by the cases on injury to special easements by a railroad, in the *note to Egerer v. New York C. & H. R. R. Co.* 14 L. R. A. 381, 181 N. Y. 106.

The more liberal modern doctrine as to what constitutes a "taking" of property by the exercise of eminent domain is also illustrated in *Memphis & C. R. Co. v. Birmingham, S. & T. R. R. Co.* (Ala.) *ante*, 166.

In a somewhat different line the cases as to a special taxation or assessment for public improvements illustrate the same tendency. See the cases as to the necessity of special benefit to sustain such assessments in *note to Re Bonds of Madelra Irrig. Dist.* (Cal.) 14 L. R. A. 756. See also the case 18 L. R. A.

next reported, *Bloomington v. Latham* (Ill.) *post*, —.

As to general taxation also an increasing tendency appears to guard against taxation or the use of money raised by taxation for other than public purposes. On this point see the *note to Daggett v. Colgan* (Cal.) 14 L. R. A. 474, also *Bourn v. Hart* (Cal.) 15 L. R. A. 431; *Cutting v. Taylor* (S. Dak.) 15 L. R. A. 691.

While the police power of the government is extended rather than restricted by modern decisions so far as the protection of society seems to demand it, this is rather in the line of protecting citizens from injury by other citizens than of restricting the real rights of any. B. A. R.

511, 12 Am. Rep. 147; *Pumpelly v. Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 179, 20 L. ed. 560; *Babcock v. Buffalo*, 1 Sheld. 840, affirmed, 56 N. Y. 268; *People v. Kerr*, 37 Barb. 399; *Glover v. Powell*, 10 N. J. Eq. 229; *Hutton v. Camden*, 89 N. J. L. 180, 23 Am. Rep. 208; *Hefrich v. Catonsville Water Co.* 74 Md. 269; *People v. Haines*, 49 N. Y. 590.

The word "property" in a legal sense means the exclusive right to use and enjoy things as well as the legal title to such things.

2 Burrill, Law Dict. title *Property*; 2 Abbott, Law Dict.; Webster, Dict.; 1 Bl. Com. 188; 2 Kent, Com. 820, 826; *Sherman v. Elder*, 24 N. Y. 884; *People v. Otis*, 90 N. Y. 48; *People v. Gillson*, 109 N. Y. 339; *Rigney v. Chicago*, 102 Ill. 64; 1 Hare, Am. Const. Law, pp. 857, 383, 884; 2 Hare, Am. Const. Law, p. 823.

Section 677 of the Consolidation Act is unconstitutional because it takes the plaintiff's property for public use without compensation.

To the amount of pecuniary sacrifice incurred by the plaintiff by reason of the prohibition against the erection of any building on the lot and by reason of the deprivation of the beneficial use thereof, his property is taken.

Health Dept. New York v. Trinity Church, 43 N. Y. S. R. 142; *Millett v. People*, 117 Ill. 295, 57 Am. Rep. 869.

A statute which either directly or in a roundabout manner prohibits the owner of land from erecting a building thereon, takes his property for public use.

Re Wall Street, 17 Barb. 625; *Seaman v. Hicks*, 8 Paige, 660, 4 L. ed. 582.

Even if the statute only prohibits the erection of a building on the front part of a lot with a view of setting back the house line a few feet, it takes the property so restricted for public use.

Re Chestnut Street, 118 Pa. 598; *Grand Rapids v. Powers*, 89 Mich. 94; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984.

To constitute a taking of land for public purposes a physical seizure is not required; it is enough if the use of the land shall have been restricted.

Evansville & C. R. Co. v. Dick, 9 Ind. 433; *Glover v. Powell*, 10 N. J. Eq. 212; *Pumpelly v. Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166, 20 L. ed. 557; *Gardner v. Newburgh*, 2 Johns. Ch. 162, 1 L. ed. 832, 7 Am. Dec. 528; *Abendroth v. New York Elev. R. Co.* 22 Jones & S. 417, affirmed, 122 N. Y. 1; *Babcock v. Buffalo*, 1 Sheld. 843, affirmed, 56 N. Y. 268; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 56 Am. Rep. 1; *Trenton Water Power Co. v. Raff*, 86 N. J. L. 343; *Tiedeman*, Pol. Powers, § 121d; *Cooley*, Const. Lim. 6th ed. p. 670.

The Legislature has not the power to affect the claim of a private citizen for the injuries he has sustained by reason of the interference with the use and enjoyment of his property.

Grand Rapids v. Powers, 14 L. R. A. 498, 89 Mich. 94; *Bohan v. Port Jervis Gas Light Co.* 9 L. R. A. 711, 122 N. Y. 18; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739; *Edson v. Boston, C. & M. R. Co.* 51 N. H. 504, 12 Am. Rep. 147; *Evansville & C. R. Co. v. Dick*, 9 Ind. 433; *Hooker v. New Haven & N. H. Co.* 148 Conn. 146, 36 Am. Dec. 477; *Sinnickson v. Johnson*, 17 N. 18 L. R. A.

J. L. 129, 84 Am. Dec. 184; *Grand Rapids Boom Co. v. Jarvis*, 80 Mich. 808; *McAndrews v. Collier*, 42 N. J. L. 189, 86 Am. Rep. 508; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 380, 56 Am. Rep. 1.

Any statute which imposes restrictions or burdens on the property of particular individuals or classes, or allows public officers to impose such restrictions or burdens, is unconstitutional.

Cooley, Const. Lim. 6th ed. 484.

So of ordinance allowing public officers to impose restrictions or burdens on the property of a certain class.

Baltimore v. Radecke, 49 Md. 217, 82 Am. Rep. 239.

So of statutes imposing disabilities or liabilities on particular individuals or classes.

Re Kuback, 9 L. R. A. 482, 85 Cal. 274; *Millett v. People*, 117 Ill. 295, 57 Am. Rep. 869; *Godcharles v. Wigeman*, 113 Pa. 431; *State v. Goodwill*, 6 L. R. A. 621, 83 W. Va. 179; *State v. Fire Creek Coal & C. Co.* 6 L. R. A. 359, 83 W. Va. 188; *State v. Indianapolis*, 69 Ind. 375, 85 Am. Rep. 223; *Com. v. Perry*, 14 L. R. A. 325, 155 Mass. 117; *State v. Pennoyer*, 5 L. R. A. 709, 65 N. H. 113; *Budd v. State*, 8 Humph. 483, 89 Am. Dec. 189; *Officer v. Young*, 5 Yerg. 320, 26 Am. Dec. 288; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *State v. Ramsey County Sheriff* (Minn.) Jan. 19, 1892; *Anderton v. Milwaukee* (Wis.) 15 L. R. A. 830.

So of statutes granting special privileges to favored individuals or classes to the detriment of other individuals or classes.

Norwich Gas Light Co. v. Norwich City Gas Co. 25 Conn. 19; *Park v. Detroit Free Press Co.* 1 L. R. A. 599, 72 Mich. 561; *Durkee v. Janesville*, 28 Wis. 464, 9 Am. Rep. 500; *Hudson v. Thorne*, 7 Paige, 261, 4 L. ed. 148; *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196.

The property rights of individuals may not be violated for the general profit of the community.

Com. v. Bacon, 18 Bush, 210, 26 Am. Rep. 189; *Wynehamer v. People*, 18 N. Y. 386; *Pumpelly v. Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 177, 20 L. ed. 560.

The police power does not extend to the invasion of private property merely for the profit of the community.

People v. Gillson, 109 N. Y. 400; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Re Cheesbrough*, 78 N. Y. 237.

The mere right to open a street across property is not a lien or incumbrance.

Huyck v. Andrews, 8 L. R. A. 789, 118 N. Y. 85; *Wagner v. Perry*, 47 Hun, 516; *Keating v. Gunther*, 32 N. Y. S. R. 1112.

O'Brien, J., delivered the opinion of the court:

The question in this case is in respect to the plaintiff's rights under a contract made by him with the defendant June 18, 1891, whereby he agreed to sell and the defendant to purchase a parcel of vacant land in the City of New York, at a price specified, subject to, but without assuming a mortgage thereon of \$4,000. The plaintiff on his part agreed to convey the premises to the defendant by a full covenant warranty deed, suffi-

cient to vest the title in fee simple free from any lien or incumbrance except the mortgage. At the time stipulated in the contract the plaintiff tendered to the defendant a deed in the required form and containing the proper covenants, which the defendant declined to accept for the reason that, upon searching the title, he had discovered that there was such an incumbrance upon the land that the plaintiff was unable to convey a good title as required by the contract. The facts were agreed upon and submitted to the general term under the provisions of section 1279 of the Code, where it was held that no lien or incumbrance, aside from the mortgage, existed or attached to the land by reason of the facts so stated, and directed judgment for the plaintiff that the defendant accept the deed tendered and pay the purchase price. The facts, so far as they are material, to the point involved, are these: On the 18th of October, 1890, the department of parks of the city of New York, under the provisions of chapter 681 of the Laws of 1886, filed a map of a proposed street or avenue which entirely covers the plaintiff's lot. The map so filed complies strictly, with respect to form and substance, with all the provisions of law on the subject. The proposed street has not been opened and no proceedings have been taken to open it or to acquire the title to plaintiff's land by condemnation. Section 677 of the Consolidation Act provides as follows with reference to damages for taking lands for such streets when the same are finally opened: "No compensation shall be allowed for any building, erection, or construction which at any time subsequent to the filing of the maps, plans, or profiles mentioned in section 672 of the Act, may be built, erected or placed in part or in whole, upon or through any street, avenue, road, public square or place exhibited upon such maps, plans or profiles." The plaintiff's vacant lot derives almost its entire value from the fact that it is possible to use it for building purposes. The facts, therefore, present two questions: (1) whether, assuming the statute to be valid, a lien or incumbrance was created and attached to the land in question by the filing of the map by the park department; and (2) whether the Legislature had power under the Constitution to enact, as it virtually did, that whenever land thus exhibited upon the map is taken for street purposes, at any time after the filing thereof, no compensation shall be made to the owner for any improvements put upon the land during the time between the filing of the map and the condemnation proceeding.

An incumbrance is said to import every right to or interest in the land, which may subsist in another, to the diminution of the value of the land, but consistent with the power to pass the fee by a conveyance. 1 Bouvier, Law Dict. p. 696; 2 Greenl. Ev. § 242; 8 Washb. Real Prop. 659, § 14.

Any right existing in another to use the land, or whereby the use by the owner is restricted, is an incumbrance within the legal meaning of the term. *Wetmore v. Bruce*, 118 N. Y. 819.

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It was conceded by the general term that the public authorities might or might not appropriate the land according to their pleasure, notwithstanding the filing of the map, and further that in case the owner, after the map was filed, made improvements upon it he did so at the peril of losing the enhanced value of the land resulting therefrom. These propositions seem to be correct, but we are constrained to differ with that court in the conclusion that such a situation does not impair the value of the property and amount to an incumbrance within the meaning of the contract. If the law was valid it virtually imposed a restriction upon the use of the property because it enacted that it could not be used for building purposes, except at the risk to the owner of losing the cost of the building at some time in the future. We are also constrained to differ with the general term in regard to the validity of the statute in so far as it enacts that the owner of land exhibited upon the maps is not entitled to compensation for improvements subsequently made. This statute is of somewhat ancient origin, and it was said in some of the cases that it was at first enacted at the solicitation of the landowners in order to enhance the value of their property. *Re Furman Street*, 17 Wend. 658; *Re Wall Street*, 17 Barb. 639; *Seaman v. Hicks*, 8 Paige, 660, 4 L. ed. 582.

However that may be, in the aspect in which the question is now presented, we think it is in conflict with the provisions of the Constitution for the protection and security of private property. The constitutional guarantees against the appropriation of private property for public use, except upon just compensation, as well as that against depriving the owner of its enjoyment and possession without due process of law, have been the subject of much judicial discussion in the manifold aspects in which the questions have been presented in the numerous cases. These provisions have been so thoroughly expounded, and their application, meaning and practical scope so minutely explained, that it would be very difficult to suggest now any views which could be called new, and a restatement of propositions, so often before sanctioned by courts and judicial writers, is quite needless. This case is governed by a few principles so well settled and understood that they are elementary, and nothing can be added to their force or application by illustration or extended discussion. The validity of a law is to be determined by its purpose and its reasonable and practical effect and operation, though enacted under the guise of some general power, which the Legislature may lawfully exercise, but which may be and frequently is used in such a manner as to encroach, by design or otherwise, upon the positive restraints of the Constitution. What the Legislature cannot do directly, it cannot do indirectly, as the Constitution guards as effectually against insidious approaches as an open and direct attack. Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment that materially affect its

value, without legal process or compensation, it deprives him of his property within the meaning of the Constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner. Though the police and other powers of government may sometimes incidentally affect property rights, according to established usages and recognized principles familiar to courts, yet even these powers are not without limitations, as they can be exercised only to promote the public good, and are always subject to judicial scrutiny. *Wynehamer v. People*, 18 N. Y. 878; *People v. Budd*, 117 N. Y. 1, 5 L. R. A. 559; *Gilman v. Tucker*, 128 N. Y. 190, 16 L. R. A. 804; *People v. Albertson*, 55 N. Y. 50; *Re Jacobs*,

98 N. Y. 98, 50 Am. Rep. 636; *People v. Otis*, 90 N. Y. 48; *People v. Gillson*, 109 N. Y. 889; *Munn v. Illinois*, 94 U. S. 141, 24 L. ed. 90; *Henderson v. Wickham*, 92 U. S. 259, 275, 23 L. ed. 543, 550; *Brimmer v. Reiman*, 188 U. S. 78, 84 L. ed. 862; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 83 L. ed. 970; *Bohan v. Port Jervis Gas Light Co.* 122 N. Y. 18, 9 L. R. A. 711; *Cooley*, Const. Lim. 6th ed. 207, 670.

As the plaintiff in the case at bar was virtually deprived of the right to build upon his lot by the statute in question, and as this circumstance obviously impaired its value and interfered with his power of disposition, it was to that extent void as to him, and created no incumbrance upon it.

It follows that the judgment of the general term was correct in its result, though we have not been able to concur in the grounds upon which it was made, and in affirming its action, we have preferred to place our reasons upon other grounds.

The judgment should be affirmed.

All concur.

NORTH CAROLINA SUPREME COURT.

C. M. HERNDON

IMPERIAL FIRE INSURANCE CO. OF LONDON, *Appt.*

(.....N. C.)

1. The right to file a petition to rehear a case in the supreme court, given by Code, § 966, does not extend to the right to require the court to consider the rehearing contrary to its rules.
2. The Legislature cannot give the right to a rehearing in the supreme court contrary to its rules where the Constitution creates the court and provides that the legislative, executive, and supreme judicial powers of the government shall be separate and distinct and also that the General Assembly may regulate methods of proceeding in "courts below the supreme court."

(December 22, 1892.)

PETITION for rehearing of an appeal from a judgment of the Superior Court for Durham County in favor of plaintiff in an action upon a policy of fire insurance, which had been affirmed by the Supreme Court. *Dismissed.*

The grounds of the motion sufficiently appear in the opinion.

Messrs. John W. Hinsdale and George V. Strong for petitioners.

Clark, J., delivered the opinion of the court:

This is a motion by defendant to rehear

this cause, argued before the court in *bank*, upon the ground that rule 53,* which requires the indorsement of a member of the court before a rehearing is granted, is contrary to law. The moving party contends that the Code, § 966, gives the losing party an absolute right to file a petition to rehear, and that it must be considered by the whole court. If it be conceded that this section is conclusive, and bears the construction placed upon it, the mover is out of court, on his own showing, as this motion is not made in vacation, nor within the first twenty days of this term. But, passing by that vital objection, if "filing," within the meaning of that statute, is to be construed as meaning that every petition to rehear must perforce be considered by every member of the court it would virtually almost double the business of this court. We pay counsel who appear here the compliment of believing their contention sound and just when they present a cause for our decision. If, when this court

*Among the requirements of that rule are the following: "Such petition shall be accompanied with the certificate of at least two members of the bar, who have no interest in the subject-matter, and have never been of counsel for either party to the suit, that they have carefully examined the case and the law bearing upon the same, and the authorities cited in the opinion, and that in their opinion the decision is erroneous, and in what respect it is erroneous. The petition shall be sent to the clerk of this court, who shall indorse thereon the time when it was received, and deliver the same to the justice designated by the petitioner; but the petition shall not be filed until he or one of his associate justices shall indorse thereon that the case is a proper one to be reheard."

NOTE.—For other cases in this series on the question of the constitutional independence of courts as against legislative interference, see *State v. Noble*, 4 L. R. A. 101, 118 Ind. 360; *Ex parte* 18 L. R. A.

Griffiths, 3 L. R. A. 368, 118 Ind. 88; *People v. Hayne*, 7 L. R. A. 948, 89 Cal. 111; *Reid v. Smoulter*, 5 L. R. A. 517, 128 Pa. 324.

comes to a different conclusion, the statute gives the losing party a right to file a petition to rehear, and to have that petition considered by the court as a body, and the court can in no way restrict such a right, there would be few cases in which such petitions would not be filed. Counsel in the argument generously conceded that, while the entire court must consider such petition, it would not necessarily be compelled to hear argument. But we fail to see the logic of that concession, if the filing of a petition, and the right to have it considered by the whole court, belong by statutory right to every one who loses a case in this court.

Section 966* of the Code was enacted long prior to the Constitution of 1868, which made a vital change in the powers of this court, as has been pointed out in several decisions of this court, and reaffirmed recently in *Horton v. Green*, 104 N. C. 400. The supreme court was originally created in 1818 by legislative enactment, and remained till 1868, as to its powers, its duties, its rules, even as to its very existence, subject to control by the Legislature, which could abolish or modify it, since it had created it. By the Constitution of 1868, art. 4, the supreme court was first established as an organic body, and its powers defined. In article 1, § 8, it is provided: "The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other." Article 4, § 12, of the Constitution provides that the General Assembly may "regulate by law, when necessary, the methods of proceeding, in the exercise of their powers, of all the courts below the supreme court, so far as the same may be done without conflict with other provisions of this Constitution." As was said by this court in *Horton v. Green*, *supra*, when construing these sections, "to the judgment and experience of this court alone is delegated, by the organic law, the power of establishing rules to regulate its procedure, and provide for the dispatch of business coming before it." When the first republican Constitution of North Carolina was framed, at Halifax, in 1776, a large element viewed with distrust the then untried experiment of a government of the people by themselves. As a consequence the whole government was vested in a Legislature, to whose supposed superior wisdom was confided the selection of the entire executive and judicial departments; and, as a further check, one branch of the Legislature was chosen, not by the people at large, but by those possessed of a certain amount of landed property. With the progress of ideas, the Constitution of 1835 intrusted the selection of the governor to the people. A subsequent amendment gave the Senate to the popular vote. The Constitution of 1868 gave the direct election of the judiciary and the heads of the several executive departments to the people, without the intermediary of a legis-

lative selection, and made the three departments of the government co-ordinate, but independent of each other. Each of the three is now equally based upon the broad basis of the popular will. This brief review of the development of popular government in North Carolina is not inappropriate. The members of this court receive, like the Legislature and the executive, their mandate from the people. The same organic law which gives the Legislature power to make rules and regulations for the orderly and regular dispatch of business in its sessions, free from the control or interference of the executive or of this court, gives the same power over its own procedure to this court, free from interference from either of the other co-ordinate branches of government. Neither body has shown any disposition to encroach upon the constitutional prerogatives of this court. But, as their right to do so has been raised by the argument in this case, it is due to the dignity of the court to pass upon the claim to legislative interference put forward by counsel.

Section 966 of the Code was originally adopted, as already stated, under the old Constitution, when the Legislature both created the court, and passed rules for its procedure. It was brought forward in the Code probably by inadvertence, since now the court owes its existence to the Constitution, and its rules are prescribed by itself. But so unobjectionable was this section in itself that the new court, though not recognizing legislative power to enact it, adopted it *verbatim*, and it now stands as rule 52 of the court. That it has never borne the construction placed upon it by counsel is shown by the fact that even under the old Constitution the court did restrict the right of rehearing, almost from the very beginning, by refusing to reconsider any case unless the petition was concurred in by two other members of the bar of this court, who had no interest in the cause, and who should certify that they had carefully examined the whole case, and that there was error in the opinion of the court. As in those early days the bar of the supreme court consisted of a very few lawyers, mostly gentlemen of long experience, this served as a reasonable restriction. With the opening of railroads, and the increase of the supreme court bar, it became less difficult to procure the signatures of two additional counsel. The court, in *Watson v. Dodd*, 72 N. C. 240, referred to the readiness with which "two amiable and accommodating gentlemen" would certify that there was error in an opinion which it had cost the five members of the court hours of thought and conscientious labor to elaborate. But notwithstanding this, and many similar reminders, the tide of applications to rehear swelled so rapidly that in 92 N. C. 850, (February, 1885,) years before any of the present members of the court occupied a seat on this bench, it became necessary to adopt the rule now complained of, "that no petition to rehear shall be docketed until one of the justices of the supreme court shall have indorsed thereon that in his opinion the case is a proper one to be heard." This

*That section provides that: "A petition to rehear may be filed at the same term, or during the vacation succeeding the term, of the court at which the judgment was rendered, or within twenty days after the commencement of the succeeding term," etc. [Ed.]

rule has since been modified, very properly, by requiring that the justice who makes such certificate shall be one of those who concurred in the opinion sought to be reheard, and giving the petitioner the right to direct the clerk to which justice to forward his application for a rehearing. Our attention was also called on the argument to the fact that the word "docketed" in the rule now reads "filed," but construed with the context the meaning is the same. Construing rules 52 and 53 together, we understand that now, as always, any one dissatisfied with a decision of this court can at the same term, or in vacation, or within the first twenty days of the next term, "file with the clerk" a petition to rehear. Formerly, before that petition could be considered at all by the court, the certificate of two disinterested counsel was required. That proving insufficient, in 1885 the present rule was adopted, requiring, in addition thereto, the certificate of one of the justices of the court. When that is obtained the case is "filed for hearing" or docketed. The restriction is a reasonable one, since, if the petitioner, making his own selection of the justice, cannot present a case which will satisfy one member of the court upon an *ex parte* brief, that the case is a proper one even to be reargued, he will hardly persuade the full bench, when there is opposing counsel, that there was error in the former opinion. These restrictions upon an unlimited freedom of rehearing have been proven by experience to be absolutely necessary. To five men is committed, in the last resort, the litigation of a state whose population already aggregates nearly two millions of people, and whose numbers, whose wealth, and, consequently, whose volume of litigation, will steadily increase. If the losing party in this court can, at his unrestricted will, command the consideration of his application for a second hearing by the entire bench, as is contended on the argument in this case, it will not be long before a first hearing in other cases equally deserving will become almost an impossibility. Other suitors are entitled to a prompt hearing, and in justice to them, and not for the ease and comfort of the court, we must adhere to the rule conceived and adopted by the prudent, able, and conservative judges—Smith, Ashe, and Merrimon—

who composed this court in 1885, that "no case can be filed [for rehearing] till indorsed by a justice of the court as a suitable and fit one to be reheard." Errors are committed by all courts, but they are by no means so numerous and alarming as they must seem to counsel who lose their causes. They must reflect that they have against them the opinion of the opposite counsel, and of the five disinterested lawyers who have heard the cause debated, (or at least a majority of them.) The court cannot spend its time in winnowing "chopped-over straw" when there is always a vast mass of new cases demanding prompt as well as careful consideration. The Constitution guarantees a right of appeal, but that does not give a right to a second hearing, any more than it does the right to a third or a tenth hearing. The petitioner has had his day in court. He is entitled, by constitutional right, to no more. When the court is satisfied by the certificate of two disinterested counsel, and by the further certificate of a member of the court who concurred in the opinion, and who has been selected by the petitioner to examine into his application, that the cause is a fit one to be reargued, it will defer the argument of appeals which as yet have had no hearing, and give time and place again to the argument of one which has already been heard and determined. But it is only under such circumstances that this will be done. This is due to the party who has gained the cause, and who has a reasonable claim to rely upon the calm and deliberate judgment of a court of last resort as a finality. It is due to the counsel and suitors in appeals yet unheard, who should not be postponed till other causes are argued again and again. And it is due, also, to the dignity of the court, that its decisions should not be lightly called in question by every loser of a case at its bar. To the calm, unbiased judgment of the court must be left the determination of what restrictions justice to others and to the applicant requires should be placed upon the grant of a rehearing. It knows none better now than the one in force in nearly, if not all, appellate courts, of requiring the indorsement of the applications by one of its own members.

Petition dismissed.

UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF NORTH CAROLINA.

Re Simon W. SANDERS.

(62 Fed. Rep. 802.)

A state statute prohibiting the sale of seed unless the year in which it is grown is plainly marked on each package except on a sale of seed in open bulk

by farmers to other farmers or gardeners is void as to seed brought from another state and sold in original packages.

(November 14, 1892.)

PETITION of Simon W. Sanders for a writ of habeas corpus to obtain his discharge

NOTE.—The law of interstate commerce as applied to sales by drummers or peddlers is shown by a note to *Re Spain* (N. C.) 14 L. R. A. 97, and by the later cases of *Titusville v. Brennan*, 14 L. R. A. 100; 143 Pa. 642, 24 Am. St. Rep. 580; *Gunn v. White Sewing Mach. Co.* (Ark.) 18 L. R. A. 203, 18 L. R. A.

For the law of interstate commerce as affecting sales of intoxicating liquors, see *State v. Winters*, 10 L. R. A. 616, and note, 44 Kan. 723; *Com. v. Zeit*, 11 L. R. A. 602, 188 Pa. 615.

For the effect of such law upon the similar subject of sales of oleomargarine, see *Re Gooch*, 10 L.

from the custody of the sheriff of New Hanover County. *Discharge granted.*

The facts are stated in the opinion.

Messrs. Alfred Russell and D. L. Russell for petitioner.

Mr. John D. Bellamy, Jr., for the State:

The Act is an exercise by the state of the police power to protect its citizens from fraud.

That the power to establish police regulations, in the American Constitutional system, has been left with the individual states cannot be disputed.

Cooley, Const. Lim. p. 706; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23; *License Cases*, 46 U. S. 5 How. 504, 12 L. ed. 256; *United States v. Dewitt*, 76 U. S. 9 Wall. 41, 19 L. ed. 593; *Henderson v. New York*, 93 U. S. 259, 23 L. ed. 543.

What is this power? It is the power vested in the Legislature, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of the same.

Cooley, Const. Lim. p. 705.

The power is located in the states and all that the Federal authority can do is to see that the states do not, under cover of this power, obstruct the exercise of the power confided to the nation.

Cooley, Const. Lim. p. 706.

If the Act complained of affects commerce, but does not regulate it, it is valid.

License Cases, 46 U. S. 5 How. 615, 13 L. ed. 306; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 455, 24 L. ed. 527; Cooley, Const. Lim. p. 707; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115.

It is a reasonable exercise of the police power of the state for a legislative Act of Kentucky to require all illuminating oils to be inspected and to have branded on the casks "Standard Oil" or "unsafe for illuminating purposes."

Patterson v. Kentucky, *supra*.

The court held in *Turner v. Maryland*, 107 U. S. 88, 27 L. ed. 870, that a statute of Maryland forbidding the exportation of tobacco except in hogshead inspected and passed as required by the Act, is valid.

The state has power to pass laws making it penal to introduce paupers and criminals within its borders.

Moore v. Illinois, 55 U. S. 14 How. 13, 14 L. ed. 306. See also *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253; *State v. Newton*, 50 N. J. L. 534; *Stole v. Thompson*, 44 Minn. 271; *Steiner v. Ray*, 84 Ala. 93, 5 Am. St. Rep. 332; *State v. Marshall*, 1 L. R. A. 51, 64 N. H. 549.

Every possible presumption is in favor of

the validity of a statute, and this continues beyond a rational doubt.

Sinking Fund Cases, 99 U. S. 718, 25 L. ed. 501. See also *Fletcher v. Peck*, 10 U. S. 6 Cranch, 128, 3 L. ed. 175; *Litlington County v. Darlington*, 101 U. S. 407, 25 L. ed. 1015; *Powell v. Pennsylvania*, *supra*.

Goff, Circuit Judge, delivered the following opinion:

Simon W. Sanders presents his application for the writ of habeas corpus. In substance, it alleges that petitioner is restrained of his liberty by the sheriff of New Hanover county, North Carolina, who detains petitioner by reason of a certain *mittimus* or warrant issued by a justice of the peace in and for said county and state, founded upon a judgment of conviction rendered by the justice for the violation of a certain statute of the state of North Carolina, passed by the General Assembly of that state on the 5th day of March, 1891, entitled "An Act to Protect Seed Buyers in North Carolina," being chapter 381 of the Acts of the General Assembly of North Carolina for the year 1891, in this: that petitioner, as the agent of D. M. Ferry & Co., a firm composed of citizens of the state of Michigan, and doing business in that state, exposed to sale and sold at Wilmington, in North Carolina, certain seeds, which were shipped to petitioner from the state of Michigan by said firm of D. M. Ferry & Co., to be sold by him as their agent. It also alleges that the seeds so sold by petitioner were in the original packages as received from the state of Michigan, and it admits that the packages were not marked as required by the statute alluded to. Petitioner claims that the Act of the General Assembly of North Carolina, by virtue of which he was convicted, in so far as it applies to the act done by him, is in violation of the Constitution of the United States, and that, therefore, no lawful conviction is possible under it, and that consequently he is restrained of his liberty wrongfully. The writ, as prayed for, was issued on the 8th day of March, 1892. The sheriff made return to the writ on the 24th day of March, 1893, admitting that he had petitioner in his custody, and that he held him in accordance with the terms of a warrant of commitment from a justice of the peace for the state and county mentioned. With his return the sheriff files a certified transcript of the record of the court of the justice, showing the trial, conviction, and commitment of the petitioner, from which it appears that the facts relative to the sale of the seed are correctly set forth in the petition filed in this manner. The sheriff, at the time he filed his return to the writ, produced before the court the petitioner, who was represented by counsel, and, there being

R. A. 330, 3 Inters. Com. Rep. 530, 44 Fed. Rep. 276; *Com. v. Huntley (Mass.)* 15 L. R. A. 330.

For other sales within the scope of interstate commerce as affected by state legislation, see *American Fertilizing Co. v. North Carolina Board of Agri.* 11 L. R. A. 179, 3 Inter. Com. Rep. 532, 43 Fed. Rep. 609.

On the question whether shipments between 18 L. R. A.

points in the same state lose their character of domestic commerce by passing out of the state during transportation, see *note* to *Campbell v. Chicago, M. & St. P. R. Co. (Iowa)* 17 L. R. A. 443.

As to shipments within a state as part of interstate or foreign transportation, see *note* to *Missouri Pac. R. Co. v. Sherwood (Tex.)* 17 L. R. A. 642.

no appearance for the sheriff nor for the state of North Carolina by counsel, the court ordered that the hearing of the matter involved in this proceeding be postponed until the next term of the circuit court of the United States at Wilmington, N. C., and committed the petitioner to the custody of the marshal of that district. At the spring term, 1892, of the circuit court at Wilmington the matters arising on the writ and return were argued by counsel for petitioner, for the sheriff, and the state of North Carolina, and submitted to the court.

The petitioner, as a member of the firm of S. W. Sanders & Co., of Wilmington, N. C., contracted with D. M. Ferry & Co., of Detroit, Mich., to sell for them garden, flower, and field seeds on certain terms and conditions set forth in a contract dated October 30, 1891. The seeds ordered were duly shipped by D. M. Ferry & Co., from Detroit, received by S. W. Sanders & Co., at Wilmington, and portions of them sold by petitioner. On the 5th day of March, 1891, the General Assembly of North Carolina passed an Act of which the following is a copy:

"An Act to Protect Seed Buyers in North Carolina. The General Assembly of North Carolina do enact: Section 1. That any person or persons doing business in the state, who shall sell seed, or offer for sale any vegetable or garden seed, that are not plainly marked upon each package or bag containing such seed the year in which said seed were grown, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than ten dollars or more than fifty dollars, or imprisoned not more than thirty days, for each and every offense; provided, that the provisions of the Act shall not apply to farmers selling seed in open bulk to other farmers or gardeners. Sec. 2. That any person or persons who shall, with intention to deceive, wrongfully mark or label, as to date, any package or bag containing garden or vegetable seed, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than ten or more than fifty dollars, or imprisoned not less than ten or more than thirty days. Sec. 3. That this Act shall be in force from and after the 1st day of September, 1891. Ratified this, the 5th day of March, 1891."

The seeds so sent by D. M. Ferry & Co., were in packages which were not marked with the year when the seeds were grown, as was required by this statute, and the sales made by the petitioner were in the original packages received from Michigan. Petitioner claims that this statute is a regulation of commerce among the states, the power to make which is not possessed by the Legislature of a state, but is, by article 1, § 8, cl. 8, of the Constitution of the United States, vested exclusively in the Congress provided for by that instrument. Counsel for the state of North Carolina contends that the Act mentioned, while it may affect commerce, is not a regulation thereof, but is simply the exercise by the state of its police power to protect its citizens from fraud. The clause of the Constitution above cited reads as follows: "The Congress shall have power to regulate

commerce with foreign nations and among the several states and with the Indian tribes." The need of a national regulation of commerce among the states was one of the most influential causes leading to the formation of the Constitution of the United States, the desire being to secure uniformity of the commercial regulations against discriminating or burdensome state legislation. It is now well established that Congress has the exclusive right to regulate commerce, and that the grant to Congress in the Constitution relating to that subject carried with it the whole matter, leaving nothing for the state to act upon in cases where the subject is national in character. *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23; *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015; *Chicago & N. W. R. Co. v. Fuller*, 84 U. S. 17 Wall. 560, 21 L. ed. 710; *Henderson v. Wickham*, 92 U. S. 259, 23 L. ed. 543; *Hannibal & St. J. R. Co. v. Huen*, 95 U. S. 465, 24 L. ed. 527; *Leisy v. Hardin*, 135 U. S. 108, 34 L. ed. 132.

Is this Act of the General Assembly of North Carolina, as applied to the sale in question, a regulation of interstate commerce? If so, it is void. The fact that Congress has not legislated on this particular subject—has not especially regulated this character of commerce—does not authorize the state Legislature to regulate it, but shows that Congress intends such sales to be free in all the states, and not to be restricted or burdened by any state statute. *Philadelphia & S. M. S. Co. v. Pennsylvania*, 122 U. S. 336, 30 L. ed. 120; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700.

In *Robbins v. Shelby County Tax. Dist.*, 120 U. S. 489, 30 L. ed. 684, the court says: "The power granted to Congress to regulate commerce among the states being exclusive when the subjects are national in their character, or admit only of one uniform system of regulation, the failure of Congress to exercise that power in any case is an expression of its will that the subject shall be left free from restrictions or impositions upon it by the several states."

The meaning of the decisions of the Supreme Court on this question is expressed by William Draper Lewis in his recent instructive work entitled "The Federal Power over Commerce, and Its Effect on State Action," (page 128):

"Whenever the subject effected by state laws is in its nature national, or requires one uniform rule or plan of regulation, then the inaction of Congress is evidence to the court of its intention that the commerce in this respect shall be free and untrammelled; but when the subject, from its local nature, does not seem to require a uniform rule of regulation, the inaction of Congress is evidence to the court that that body is willing that the states can effect such subjects in the legitimate exercise of their reserved powers."

In one of the early cases in which this clause of the Constitution received careful consideration, (*Brown v. Maryland*, 25 U. S. 12 Wheat. 447, 6 L. ed. 688,) Chief Justice Marshall, in delivering the opinion of the court, used this language: "What, then, is the just extent of a power to regulate com-

merce with foreign nations and among the several states? This question was considered in the case of *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23, in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. The power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior.

If this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse. One of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell."

If Congress should pass an Act requiring all seed sold in packages to be marked with the year in which the same were grown, and prohibiting the sale unless so marked, regardless of the country where grown, including imported and domestic seeds, as this Act does, it would be the exercise by Congress of the power granted by the Constitution, and a regulation of commerce among the states. The difficulty of honestly complying with such legislation would be presented to the consideration of that body as a reason why the statute should be amended or repealed. If this be true, (and can it be doubted that Congress has the constitutional right to legislate on this subject?) and if the conclusion I reach is correct, that Congress has exclusive jurisdiction of such regulation, does it not follow that this legislation by the General Assembly of North Carolina is unconstitutional and void? If the states can legislate, as to the matter of the North Carolina statute, because of the absence of legislation by Congress on the subject, as was claimed by counsel in the argument, would not the provisions of that Act be held to be so unreasonable, such a burden on the business of the country, and so interfere with the rights and privileges of the citizens thereof, as to render it void? It virtually prohibits the sale in North Carolina of seed imported from foreign countries, for the packages would not be marked, and our dealers could not truthfully mark them as required by that statute. It prevents the sale in North Carolina of seed lawfully carried into that state in the mails of the United States, sent by dealers residing and doing business in other states, who pay to the gov-

ernment of the United States, the postage or freight for the transportation of the same, under laws passed by Congress. It favors the grower and dealer in seeds doing business in North Carolina to the detriment of the growers and dealers of all the other states, for the farmers of North Carolina are, in effect, regarded as growers and dealers in seeds, and exempted from the requirements of the law, and it would follow that all persons desiring to purchase from them would be "farmers or gardeners." It would thereby permit a certain portion of the citizens of that state to engage in that business, and prohibit all the rest from so doing. Why should the farmers of North Carolina be permitted to sell seed in open bulk to other farmers or gardeners, and the petitioner, or D. M. Ferry & Co., or any citizen who desires to engage in that traffic, be prohibited from so doing? How does this protect seed buyers? What is meant by "open bulk?" The natural meaning of the words is, "in the mass; exposed to view; not tied or sealed up." Used in the connection they are in this Act, they do not relate to the quantity that may be sold, nor does the statute restrict it to an ounce or less, or require a bushel or more to be sold. Any quantity of any garden or vegetable seed, not in a package or bag, but in open bulk, may be sold by a farmer to other farmers or gardeners, without the mark relating to the year when grown. The effect of this is that all dealers must sell their seeds through farmers, or be excluded from the market. The farmer may sell seeds, free from any restrictions or marks, but any one else selling the same kind of seeds, even if from the same original mass or bulk, if the same be in packages or bags, must have plainly marked upon them the year when grown,—the words that give purity to the contents, and eliminate all fraud from the sale. This statute virtually prevents the importation into the state of North Carolina of all garden and vegetable seeds in paper packages or bags, for sale in the packages in which imported, and destroys that extensive and useful trade, so far as that state is concerned. If one state can do this, all can. If North Carolina can impose this burden, other states can and will impose similar or heavier ones, to the great damage of a commerce in which not only this petitioner and D. M. Ferry & Co. are interested, but in which many citizens of many of the states have invested their means, and to which they have devoted their time and energies. In *Ex parte Kieffer*, 40 Fed. Rep. 899, *Mr. Justice Brewer* says: "The moment you find any Act of the Legislature or any ordinance of a city which prevents the free exchange of lawful articles of commerce between the states, you find an Act or ordinance which contravenes the commercial clause of the United States Constitution."

It was argued that the statute in question is but the legitimate exercise of the police power of the state. What is the "police power," conceded to and proper to be exercised by the state? About this eminent jurists have differed, and have found it difficult to draw the line between it and the

powers granted to the general government. *Mr. Justice Strong*, in delivering the opinion of the court in *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527, said on this subject: "It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. As was said in *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 149: 'It extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property, within the state, according to *sic utere tuo ut alienum non laedas* which being of universal application, it must of course be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others.' It was further said that by the general police power of a state persons and property are subjected to all kinds of restraint and burdens in order to secure the general comfort, health, and prosperity of the state, of the perfect right of the Legislature to do which no question ever was, or, upon acknowledged general principles, ever can be, made so far as national persons are concerned."

It may also be admitted that the police power of a state justifies the adoption of precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted with contagious or infectious diseases; a right founded, as intimated in the *Passenger Cases*, 48 U. S. 7 How. 283, 12 L. ed. 702, by *Mr. Justice Grier*, in the sacred law of self-defense. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the state; for example, animals having contagious and infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are

self-defensive. I do not deem it necessary to review the cases on this subject. It was really disposed of in *Gibbons v. Ogden*, the reasoning of *Chief Justice Marshall* being, to my mind, conclusive, and, as expressed in said case, never having been departed from in matters where exclusive jurisdiction is given to Congress. As he well says: "The nullity of an Act inconsistent with the Constitution is produced by the declaration that the Constitution is supreme."

Mr. Justice Miller, in *Henderson v. Wickham*, 92 U. S. 529, 28 L. ed. 548, on this question says: "It is clear, from the nature of our complex form of government, that whenever the statute of a state invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the states."

I conclude that the police power of a state cannot be held to embrace a subject confided exclusively to Congress by the Constitution of the United States. If the subject-matter of state legislation is included in the exclusive grant of commercial power to Congress, then the state enactment is void, even if it passed in the exercise of the police power of the state. The authorities in support of this are numerous, and from them I cite *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649; *Leisy v. Hardin*, 185 U. S. 108, 34 L. ed. 182.

Other questions are submitted by counsel for petitioner, but holding as I do on the matters I have mentioned, I do not find it necessary to pass upon them.

For the reasons that I have given I conclude that the Act of the General Assembly of the state of North Carolina entitled "An Act to Protect Seed Buyers in North Carolina," being chapter 381 of the Acts for the year 1891, is inoperative and void, and that the petitioner is in custody in violation of the Constitution of the United States.

I therefore order that he be discharged from custody.

WISCONSIN SUPREME COURT.

Frederick KUEHN, Appt.,
v.

City of MILWAUKEE et al., Repts.

(.....Wis.....)

1. An injury to a public fishery in navigable waters which affects all alike who fish in that locality will not sustain a private suit by a fisherman who has no special privilege or right to fish at the place affected.
2. The fact that a fisherman's nets were damaged and fish which he had caught therein were killed on a single occa-

sion by garbage deposited by a city in a navigable lake which was driven into and upon his nets by the winds and waves, where there is nothing to show danger of a repetition of these injuries, will not give him a right to sue in equity to prevent such deposits of garbage whereby a public nuisance is created to the destruction of a common fishery.

(December 6, 1892.)

APPEAL by complainant from an order of the Circuit Court for Milwaukee County denying an injunction to restrain defendants from depositing garbage in Lake Michigan. *Affirmed.*

NOTE.—On the subject of private remedies for public nuisances, see *South Carolina S. B. Co. v. 18 L. R. A.*

South Carolina R. Co. 4 L. R. A. 209, and note, 30 S. C. 539.

See also 29 L. R. A. 700; 33 L. R. A. 541.

Statement by Lyon, Ch. J.:

This is an action in equity, brought by the plaintiff against the city of Milwaukee and one Richardson to restrain them from depositing in Lake Michigan the garbage collected in said city. Richardson was the contractor with the city to deposit such garbage in the lake. He made no answer to the complaint, and no further reference need be made to him. It is alleged in the complaint and certain affidavits presented by the plaintiff that plaintiff is, and for thirty years and more last past has been, a resident and taxpayer in the city of Milwaukee, and during all that time has pursued the avocation of a fisherman, occupying as his fishing grounds "a place about twenty or more miles square, situated east of the central part of the shore line of the city of Milwaukee." That on or about December 30, 1891, he located and placed his nets, as he was accustomed to do, "in the waters of Lake Michigan, at the point aforesaid," and the same remained there until January 5, 1892. The nets were located about ten miles from the shore. That at and before the above dates the city collected garbage accumulating therein, and dumped it into the lake near where the plaintiff's nets were located, and such garbage was driven by the winds and waves into and upon such nets, and greatly damaged the same, killing the fish that had been caught therein. And, further, that the depositing of such garbage in the lake drove the fish from such fishing grounds, and destroyed the plaintiff's business, as well as that of all others engaged there in fishing. The complaint contains many averments showing that the dumping of such garbage in the lake created a public nuisance. The answer of the city admits the dumping of the garbage in the lake, but alleges that it was only a temporary expedient to get rid of it until some better plan could be adopted and put in operation. It satisfactorily appears that, just before the plaintiff's nets were thus injured, the persons in charge of the city garbage boat were compelled by stress of weather to empty one boat load of garbage more directly east of the city, and nearer the shore, than usual, and in the neighborhood of plaintiff's nets. On the complaint and certain affidavits the plaintiff moved for a temporary injunction as prayed in the complaint. The answer of the city and several affidavits were read in opposition to the motion. For reasons stated in a written opinion on file, the circuit court denied the motion. In that opinion, after stating the facts, and holding that the dumping of the city garbage in the lake created a public nuisance of a most grievous character, the court proceeded to give the reasons for denying the motion, as follows: "But has the plaintiff shown himself entitled to have this nuisance abated at his instance? It is not necessary to go beyond this state for instruction upon this point. Our own supreme court has settled the law as to the cases in which a private citizen may sue to restrain a public nuisance, and in which he may not, with as much certainty as any court in the country. The plaintiff in such case must

18 I. R. A.

show not only that he is affected by the public nuisance, in common with the other citizens of the state or of the neighborhood. He must show, beyond that, that he is affected in some way different from other citizens, and the difference must be a difference in kind, and not a difference in degree: that is to say, his injury must differ from the injury generally suffered, not only as to the amount of injury, but as to the kind of injury, suffered. The plaintiff in this case shows that he is one of a large number of fishermen affected by this alleged nuisance, and it is abundantly clear that he has no special privilege or right to fish in Lake Michigan; that every other man who is so disposed may become a fisherman in the same lake, and in the same parts of the lake, where he plies his vocation. Furthermore, he shows that a very considerable number of men are so engaged. In what respect does his injury differ from that of the general public? He has no special interest, which others have not, affected by this nuisance. He has no property, which others have not, damaged by this nuisance. He sets up no riparian rights as an owner of a portion of the shore; and, in short, he shows no special injury to himself, or to his business, which is not common to all the fishermen engaged in fishing along the west shore of Lake Michigan, and in the neighborhood of the city of Milwaukee. It has been held that a party having the right to travel along the highway, the same having been obstructed, can bring no suit to abate or restrain that nuisance unless he is thereby prevented from having access to and from his own premises situated along that highway. No matter how much he may be under the necessity of traveling the highway, still he cannot bring this action unless he has occasion to use the highway in a way that others have no occasion, namely, in getting to and from his own premises. So, too, people affected by the pollution of the waters of the river can none of them bring a suit of this nature, unless it be one whose land or whose permanent business is located along the bank of the river, and is thus injured in a manner not common to the whole public. To be brief, however glad I would be to restrain the continuance of this great nuisance, which is already dangerous, and threatens to become intolerable, and however much I may sympathize with the solicitude of the general public to get rid of it, I must hold that this plaintiff has not shown himself qualified to prosecute this action, and must therefore refuse the injunction prayed for." The plaintiff appeals from the order denying such temporary injunction.

Mr. George E. Sutherland, for appellant:

By putting down his nets in these public fishing grounds plaintiff did not thereby abandon the property he had in his nets or lose his property right therein. They were still his nets. *Grace v. Willets*, 50 N. J. L. 414; *Colchester v. Brooks*, 7 Q. B. 339; *Suttler v. Van Dervoer*, 47 Hun, 866; *Metzger v. Post*, 44 N. J. L. 74, 43 Am. Rep. 841.

By occupying fishing grounds, plaintiff, by such occupancy, came to possess certain rights, certain interests, which others not occupying the fishing grounds did not possess.

By his occupancy the plaintiff acquired a qualified property in the thing occupied (2 Kent, Com. 847); and the destruction of this occupancy was a special damage.

The least injury to an individual, such as an expense of time, or money, or labor, entitles the plaintiff to maintain the action.

Ross v. Miles, 4 Maule & S. 101; *Mills v. Hall*, 9 Wend. 815, 24 Am. Dec. 160.

Mere nominal damage is sufficient.

Gould, Waters, p. 785, § 544; *Hudson River R. Co. v. Loeb*, 7 Robt. 428; *Knox v. New York*, 55 Barb. 405.

Every individual who receives actual damage from a nuisance, may maintain a private suit for his own injury, although there may be many others in the same situation.

Lansing v. Smith, 4 Wend. 25, 21 Am. Dec. 89; *First Baptist Church of Schenectady v. Schenectady & T. R. Co.* 5 Barb. 84; *Pierre v. Dart*, 7 Cow. 609; *Stetson v. Faxon*, 19 Pick. 147, 31 Am. Dec. 123; *Hughes v. Heiser*, 1 Binn. 463, 2 Am. Dec. 459; *Walker v. Shepardson*, 2 Wis. 384, 60 Am. Dec. 423; *Barnes v. Racine*, 4 Wis. 454; *Greene v. Nunnemacher*, 36 Wis. 50; *Pennoyer v. Allen*, 56 Wis. 502, 48 Am. Rep. 728; *Williams v. Smith*, 22 Wis. 694; *New York v. Baumberger*, 7 Robt. 219.

Rights may be acquired by the temporary occupancy of public waters.

Spokane Mill Co. v. Post, 50 Fed. Rep. 429; *Lincoln v. Davis*, 58 Mich. 875, 51 Am. Rep. 116; *People's Ice Co. v. Steamer "Excelsior"*, 44 Mich. 229, 38 Am. Rep. 246; *Woodman v. Pitman*, 79 Me. 456; *Hickey v. Hazard*, 8 Mo. App. 480; *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 380; *Brown v. Cunningham*, 12 L. R. A. 583, 82 Iowa, 512.

Injunction is the proper remedy to restrain the corruption of waters.

Gould, Waters, 2d ed. §§ 121, 545, 546; Wood, Nuisances, p. 888, § 777, and note; *Oldaker v. Hunt*, 31 Eng. L. & Eq. 503; *Haskell v. New Bedford*, 108 Mass. 206; *Brayton v. Fall River*, 118 Mass. 218, 18 Am. Rep. 470; *Boston Rolling Mills v. Cambridge*, 117 Mass. 398; *Seaman v. Lee*, 10 Hun. 607; *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50.

The injunction will be granted to prevent the corruption of water, "causing any injury to the plaintiff in any rightful use of the water . . . as by rendering it unfit for fish to live in" (Gould, Waters, p. 786, § 544); and the same rule holds whether the waters are navigable or unnavigable.

Gould, Waters, p. 787, § 544; *Atty.-Gen. v. Kingston-upon-Thames*, 84 L. J. Ch. 481. See also *Cobb v. Bennett*, 75 Pa. 826, 15 Am. Rep. 752.

This court has practically decided the principle for which we contend.

See *Enos v. Hamilton*, 27 Wis. 256; *The A. O. Conn. Co. v. Little*, 55 Wis. 580; *Cedar Lake Hotel Co. v. Cedar Creek Hydraulic Co.* 79 Wis. 297.

If the act done is in fact a nuisance, it is no excuse or justification that the object is a laudable one.

Aldred's Case, 9 Coke. Rep. 59 A; *Jones v. 18 L. R. A.*

Powell, Palm. 539; *Broder v. Saillard*, L. R. 3 Ch. Div. 692; *Pollock, Torts*, 383; *State v. Kaster*, 85 Iowa, 221; *Seacord v. People*, 121 Ill. 623; *Atty.-Gen. v. Leeds*, 89 L. J. Ch. 254; *Reg. v. Train*, 2 Best & S. 640; *Reg. v. Barry*, 9 L. R. 122; *Respublica v. Caldwell*, 1 U. S. 1 Dall. 150, 1 L. ed. 77. See also Gould, Waters, 2d ed. § 546; Wood, Nuisances, §§ 484, 435.

Messrs. Conrad Krez, City Atty., and *W. W. Seely, Asst. City Atty.*, for respondent:

Private convenience and personal gain, when the health of the whole city, like Milwaukee, is at stake, must give way, or at least be not permitted to enforce the exercise of a common right that will work oppression and injustice to all.

Sheldon v. Rockwell, 9 Wis. 166, 76 Am. Dec. 265.

If to grant the injunction would be productive of great injury to the defendant, and would result in no corresponding advantage to the plaintiff, relief will not be granted.

1 High, Inj. §§ 598, 742; *Torrey v. Camden & A. R. Co.* 18 N. J. Eq. 293.

Defendant disclaims the intention of continuing the nuisance, if it be a nuisance, and is using due diligence for its removal. Such being the case, the injunction was properly refused.

1 High, Inj. § 752; *King v. Morris & E. R. Co.* 18 N. J. Eq. 397.

The right to fish in Lake Michigan is a right common to all, and the plaintiff has no further or greater right in this regard than any or all of the citizens of Milwaukee.

Sloan v. Biemiller, 84 Ohio St. 492; *Lincoln v. Davis*, 58 Mich. 875, 51 Am. Rep. 116.

This being so, before an injunction can be sustained in behalf of the plaintiff, he must show a special injury to himself different in degree and kind from that suffered in common by the public, and peculiar to himself. This he has not done.

1 High, Inj. § 762, and cases cited; *Houck v. Wachter*, 84 Md. 265, 6 Am. Rep. 332; *Greens v. Nunnemacher*, 36 Wis. 50; *Enos v. Hamilton*, 27 Wis. 256; *Clark v. Chicago & N. W. R. Co.* 70 Wis. 598; *Barnes v. Racine*, 4 Wis. 454; *O'Brien v. Norwich & W. R. Co.* 17 Conn. 372; *Zettl v. West Bend*, 79 Wis. 816; Bigelow, Torts, p. 471; note to *Ross v. Miles*, 4 Maule & S. 101; *Hill v. Boston*, 123 Mass. 844, 23 Am. Rep. 332.

The material averments of fact upon which the plaintiff founds his claim for an injunction are denied in the answer. The injunction therefore should be refused.

Menasha v. Milwaukee & N. R. Co. 53 Wis. 414; *Schoeffler v. Schwartz*, 17 Wis. 31.

Lyon, Ch. J., delivered the opinion of the court:

We think the motion for a temporary injunction was properly denied, for the reasons stated in the above extract from the opinion of the learned circuit judge. Those reasons are so clearly and accurately stated therein that but little need be added. Any citizen of the state has a lawful right, in common with all other citizens, to fish in the waters of Lake Michigan. Because the right is common to the whole public, such waters

are a common fishery. *Wright v. Mulvaney*, 78 Wis. 89, 9 L. R. A. 807. Any act which interferes with the enjoyment of that right in any particular locality may be a nuisance; but, if it affects all alike who fish in that locality it is a public, and not a private, nuisance, and no private individual can maintain an action in equity to enjoin its continuance. This is elementary law, recognized and enforced by all courts. It is repeatedly asserted in the numerous cases cited by the learned counsel for plaintiff in support of his claim that an injunction ought to issue in this case. The injury here complained of is the damage to the nets of plaintiff, and the killing of the fish which had been caught therein, on the single occasion mentioned in the complaint, and the destruction of the fishing business in that locality. There is no averment that the plaintiff ever before placed his nets where he placed them on December 30, 1891, or that he ever intended to locate them again in that precise place, or that his nets had been thus damaged or fish therein killed at any other time, or that there was any danger of a repetition of injuries of the same character by like means. So far, then, as injury to such property is concerned, whatever remedy at law the plaintiff may have to recover damages therefor, it is clear he has none in equity.

Neither has he any such right to any specific portion of the lake as will support his action for an injunction. The field of his operations contained 400 square miles or more; and there is nothing in the motion

papers to show that he acquired, by occupancy or otherwise, or ever attempted to so acquire, any rights in any particular portion of such field which did not belong equally to every other citizen who, finding the particular place vacant, chose to locate his nets there. The only other injury of which the plaintiff complains is the destruction of the fishing industry in such twenty miles square of Lake Michigan. It is obvious that such alleged injury is common to every person engaged in fishing in that territory. The case shows that there are many such persons.

Many of the cases cited by counsel for plaintiff have been examined. It is believed that none of them conflict with the views herein expressed. They relate to the interruption of the use of navigable streams for the transportation of private property; to conflicting claims to ice formed in such streams; and to conflicting questions of riparian rights; and nearly all of them are actions at law for damages. As already observed, we find nothing in any of them in conflict with the rules of law above indicated, which controlled the decision of the circuit court. Such decision is the more satisfactory in view of the fact that the city has ceased entirely to dump its garbage into the lake, and has made other and permanent arrangements for the disposition of it. At least, it was so stated in the argument, and not denied.

The order of the Circuit Court denying the injunction is affirmed.

KENTUCKY COURT OF APPEALS.

L. C. NORMAN, State Auditor, *Appt.*,
v.

KENTUCKY BOARD OF MANAGERS of
the World's Columbian Exposition.

(.....Ky.....)

1. The state auditor has not only the right but the duty to question the validity of a legislative appropriation on the ground that it is unconstitutional when he is called upon for a warrant upon the treasurer under such appropriation.
2. An appropriation to exhibit the resources and progress of the state at the World's Columbian Exposition is for a public or governmental purpose.
3. Constitutional requirements as to a vote on the "final passage" of a bill apply to amendments concurred in after the bill has passed both Houses by the House in which the bill was originally passed.
4. A court takes judicial notice of and determines for itself the law.

NOTE.—For constitutionality of legislative appropriations for public exhibitions, see *Daggett v. Colgan*, 14 L. R. A. 474, 23 Cal. 53. See also note to the same case on the general subject of appropriations of public money.

For presumption of proper passage of statute, see note to *People v. McElroy* (Mich.) 2 L. R. A. 609, 18 L. R. A.

5. The presumption that a statute has been constitutionally enacted when it has been enrolled, signed by the presiding officer of each House and approved by the governor, is not conclusive in a proceeding by mandamus to enforce it where facts showing that the bill was not constitutionally passed are alleged by the answer and admitted by demurrer.

(Fryor, J., dissents.)

(December 9, 1892.)

APPEAL by defendant from a judgment of the Circuit Court for Franklin County in favor of complainants in a proceeding for a writ of mandamus to compel defendant to issue warrants on the state treasurer for the amounts of certain appropriations which had been made by the state Legislature for the use of complainants. *Reversed.*

The facts are stated in the opinion.

Messrs. Knott & Edelen, William Goebel, and Halm & Bruce for appellants.

Messrs. Humphrey & Davie and W. P. D. Bush for appellees.

Holt, *Ch. J.*, delivered the opinion of the court:

The questions in this case are of supreme importance. The president of the State Board of Managers of the World's Columbian Ex-

position presented a proper order to the appellant, the state auditor, for a warrant upon the state treasurer for a portion of the \$100,000 claimed to have been appropriated by an Act of the Legislature to make an exhibit of the resources of our state at the exposition. The auditor, acting no doubt from a conscientious desire to properly discharge his duty, and under the advice of the attorney-general, who is by law his legal adviser in such matters, refused it, and this is an action for a mandamus to compel him to give it.

It is said, *in limine*, that he has no personal interest in the matter, and, being a ministerial officer, cannot refuse to issue it upon the ground that the Legislature could not constitutionally make the appropriation, or that the Act was not constitutionally passed,—in short, that his only duty was obedience, and that he has no standing in court. It is a general rule that a court will not listen to one who says a legislative Act is unconstitutional unless his rights are involved, or he has a right to question it. Section 230 of our new Constitution, however, says: "No money shall be drawn from the state treasury except in pursuance of appropriations made by law;" and our statute forbids the issue by the auditor of a warrant upon the treasury "unless the money to pay the same has been appropriated by law." Gen. Stat. chap. 6, art 1, § 6. If the Act of the Legislature be void for want of power to pass it, or because it was not passed in the manner required by the Constitution, then it is not law; and the auditor is vested with such power, and occupies such a position, that it is not only his right, but his duty, whenever he is called upon to order the payment of money out of the treasury, to inquire whether it is being done legally. He is, in a certain sense, a trustee; and the public interest requires that his office should give him the right to question the validity of a legislative Act under which, by means of his warrant, the public money is to be expended.

The right to the mandamus is denied by him, first, upon the ground that the Legislature has no power to make the appropriation. It is urged that it is not for a public or governmental purpose. Our Constitution says: "Taxes shall be levied and collected for public purposes only." It is often difficult to draw the line which bounds constitutional taxation, or to determine whether the purpose is one in aid of which the taxing power may be invoked, or the money thus raised expended. If it be doubtful, and the Legislature has seen proper to exercise the power, the judiciary should not interfere. The doubt is then to be solved in favor of the legislative action. The object in this instance, however, is to exhibit the resources and progress of the state. It is not to promote the interest of one or a few individuals, and perhaps incidentally that of the public; but the purpose is public in character, and calculated and intended to benefit the entire state. Our Legislature has repeatedly, heretofore, and running through many years, appropriated money for like purposes, and its power to do so is now for the first time ques-

tioned. It was done in 1876 for the Centennial Exposition at Philadelphia, and later for the one at New Orleans. This was well known to the framers of our present Constitution, adopted in 1891; and, had it been intended to forbid the exercise of the power by the Legislature for such purposes, it would no doubt have been done, in unmistakable terms. In our opinion, it contains no such provision. It is not a loaning of the credit of the state, and therefore forbidden by it. The commissioners selected to expend the money are merely the state's agents to do so, and provide the exhibit for the benefit of its people. The Legislature had the power to provide the means for such a purpose, but in doing so was bound to act in conformity to the Constitution.

The troublesome question in the case is whether it has done so, and what are the duty and power of this court as the parties present themselves. The auditor claims that it has not, and this is the second ground of his defense. Section 46 of our Constitution provides: "No bill shall become a law unless, on its final passage, it receives the votes of at least two fifths of the members elected to each House, and a majority of the members voting, the vote to be taken by yeas and nays, and entered in the journal: provided, any Act or resolution for the appropriation of money or the creation of debt shall, on its final passage, receive the votes of a majority of all the members elected to each House." The Act originated in Senate, and passed that body, upon a yeas and nays vote, entered upon its journal, by the required majority. It then went to the other House, where, after being amended, it passed, upon a like vote, entered upon its journal, by a like majority. It then came back to the Senate, where the amendments were concurred in without a yeas and nays vote, and without the vote of a majority of the members elected. It is conceded by the counsel for the appellees, and seems plain, that this mode of proceeding did not conform to the Constitution. It complied with it in neither letter nor spirit. The object of the section above cited was to have the assent of a majority of all the members elected to each House to all the provisions of the Act, and that this should appear by a yeas and nays vote entered upon its journal. If a bill, after passing one House in the proper manner, and then, after amendment, passing the other House in like manner, could come back to the House in which it originated, and be adopted by a majority of those voting, or a quorum, it would defeat this object, and render the section ineffectual. Let us look at it practically. An appropriation bill of \$100 originates in the Senate, and is properly passed. It goes to the House, where it is amended by making the sum \$10,000, and is then properly passed by it. It returns to the Senate for concurrence, and is adopted, as amended, by a majority of those present, without a yeas and nays vote. Can it be well contended that this would be a compliance with the Constitution? If so, then there being thirty-eight senators, it would require twenty, or a majority of them to pass a bill for a trifle; but, after being

amended in the House so as to perhaps bankrupt the treasury, it could be concurred in by the Senate by the votes of eleven members, or a majority of a quorum; and in case of the House, with its 100 members, it would require fifty-one to pass the bill, if it originated there, but only twenty-six, or a majority of a quorum, to concur in it after it had been changed in like manner by the Senate. Further illustration seems needless.

It is true it has been held that the "final passage" of a bill means when it first passes the body, and not when it returns to it, after amendment, for adoption; and it is said that the constitutional provision as to the number of votes, and the entry of the yeas and nays vote on the journal, does not apply to amendments, or the reports of conference committees. If so, then no matter how material the change, a majority vote of a quorum may pass the bill. The words "final passage," as used in our Constitution, mean final passage. They do not mean some passage before the final one, but the last one. They do not mean the passage of a part of a bill, or what is first introduced, and which may, by reason of amendment, become the least important. If so, then the body may pass what is practically a new bill in a manner counter to both the letter and spirit of the Constitution. When the bill was voted on in the Senate, as amended, and after its return from the House, there never was any further action by the Senate. It was the final vote, and therefore its final passage; and, being so, a majority vote of all the members elected, with an entry by yeas and nays vote upon the journal, was necessary to its constitutional enactment. The bill, as approved by the speakers of the two Houses and by the governor, never was passed by the Senate, by a majority of all its members, nor by a yeas and nays vote.

It is said, however, upon the one side, that, having been enrolled, signed by the presiding officer of each House, and approved by the governor, the Act must be conclusively presumed to have been constitutionally enacted; that public policy requires this rule, else confusion will result, by our statute law being reduced from a state of certainty to one of doubt. Upon the other side, it is urged, with equal ability, that a prima facie case only is thereby presented, and that resort may be had to the journals of the Legislature, which are required by the Constitution to be kept, and are kept, under the supervision of all the members, as to the truth of the matter. Each position is supported by numerous authorities, and, whether the one rule or the other obtains, more or less abuse and danger may result. There is some dynamite either way, but perhaps not as much in the latter as some apprehend, as the party questioning the enrolled and approved Act must at the outset overcome a prima facie case. The first view is the English one, where there is no written constitution. It has been followed by our supreme court, and by at least nine of the supreme courts of the states. The weight of authority in this country, as declared in perhaps as many as nineteen states, is, however, the other way. All agree that the en-

rolled and approved bill cannot be impeached by loose papers or parol evidence. Public policy forbids it. Too much mischief would result. A review or citation of the numerous cases is unnecessary. They have been examined. The most, if not all, of them will be found cited in the notes on page 185 of Cooley's Constitutional Limitations, and to the case of *Field v. Clark*, 143 U. S. 62, 86 L. ed. 801. It is not necessary, however, to a proper determination of this case, to decide this question. It would, at most, be settling a mere rule of evidence, not prescribed by constitution or statute, and subject to exception and modification by the courts. If it had heretofore been prescribed, it would not control this case. Here no property rights have become fixed, no interests vested, but two parties, each the agent of the state, are contending for the control of a fund, and we must consider this case as it is presented.

The court is asked to exercise its power, and compel the auditor to comply with an Act of the Legislature which the Constitution requires should be passed in a certain way. If the answer of the auditor merely averred that it was not a law, or denied its existence, or that it had not been constitutionally passed, this would be merely pleading a legal conclusion. It would need no denial. The failure to do so would not be an admission of its truth. A court takes judicial notice of, and determines for itself, the law. You cannot aver or prove a public statute. Thus, although a pleading may purport to state its terms or effect, but do so incorrectly, a demurrer does not admit the averment. *Pennie v. Reis*, 182 U. S. 464, 33 L. ed. 426; *Interstate Land Co. v. Maxwell Land Grant Co.* 139 U. S. 569, 35 L. ed. 278. The court tries the question as one of law, and a demurrer admits as true only averments of facts well pleaded, and not legal conclusions. The answer of the auditor, however, sets out the facts connected with the passage of the Act. It states what was done, and what was not done. It avers the facts connected with its passage, and files as a part of it a copy made by the public printer of the journal of the Senate relating to it. These facts as to the manner of its passage were admitted by a general demurrer. They show the Act, when it came back to the Senate after amendment, was not voted for by a majority of all the senators, and that a yeas and nays vote was not taken. It was not, therefore, constitutionally passed; and yet the court is asked by the appellees to use its power to enforce it by mandamus, when by their demurrer to the answer, and failure to plead, they are to be regarded as agreeing that this is true. A court, when asked to exercise its power by means of mandamus, should regard the substance, and not the shadow. Its use is confined to those cases where the law has given no specific remedy, and where, in justice and good government, there ought to be one. It is summary in character, and may be resorted to when injustice is about to be done. A court should, in its discretion, grant it only when it is essential to this end. The petitioner must have a clear right, and no other appropriate remedy to prevent injustice and

wrong. It is defined in our Civil Code as an order "to perform an act, or omit to do an act, the performance or omission of which is enjoined by law," and is the instrument of a court of law, much as an injunction is that of a court of equity. Cases may be found where it has been refused, in the exercise of a proper discretion, although the petitioner had a clear legal right and it is to be granted or withheld, in the discretion of the court, as the purposes of justice may require. This being the end and object of the writ, it should not be granted to afford relief which the party claims by virtue of an Act confessed by him to be unconstitutional. The attitude of appellees, and the nature of the relief asked, must be considered. Although the appellees, like the auditor, represent the state, yet they demur to the answers, saying, "You cannot go behind the enrolled bill, nor consider the admitted facts set out in the answer;" the intended effect of this being to prevent a decision as to the validity of the Act. Their action cannot be disregarded when asking this writ. The provision of the Constitution is mandatory; and, when this court is called upon to exercise a power, respect for a co-ordinate department of the government cannot be suffered to override the fundamental law, by virtue of which both act and exist. A constitutional rule is not only for the Legislature, but this and all other courts. We must exercise our power with fidelity to it; and, when we are urged to hold that the signatures to the Act import what is confessed by the party asking relief to be untrue, and to enforce as law an act plainly in violation of the Constitution, the court, in the exercise of its discretion in the use of this writ, should withhold it. Our personal wishes in the matter cannot be consulted. If the people desire this appropriation made, the Legislature will doubtless do so; but nothing connected with the matter is more important to all than that it shall be done according to law. It is manifest the answer cannot be truthfully denied. This was, in substance, admitted upon the argument of the cause by the appellee's counsel. Under this state of case, *it is proper to reverse the judgment*, with directions to dismiss the petition, and it is so ordered.

Lewis and Bennett, JJ., concur in the decision.

Bennett, J., concurring:

The appellees, as World's Fair commissioners, filed their petition in the Franklin circuit court, against the appellant, as auditor, to compel him to issue his warrant upon the treasury for the sum of \$25,000, upon their vouchers, approved by the governor, for that sum, alleging that the auditor was directed to issue the warrant by the Act of the Legislature making the appropriation. The auditor, in his answer, alleged that the bill making the appropriation of \$100,000 to the World's Fair originated in the Senate, and passed that body upon the call of the yeas and nays, which were entered in the journal by a constitutional majority; that the House refused to pass the bill as it came from the

Senate but passed it with amendments, and then the bill and house amendments were sent to the Senate, and that body concurred in the house amendments, but not by a constitutional majority, nor by the yeas and nays entered in the journal; that the bill was therefore unconstitutional and void. The appellants, by their demurrer to the answer, admitted the allegations of fact to be true, and insisted that, notwithstanding the truth of the allegations, the bill being *prima facie* regular and valid, the auditor, whose duty was in this particular mandatory, was a ministerial officer, and could not refuse obedience to the law's mandate because there was some latent infirmity in the bill that rendered it invalid. The chancellor, upon the hearing upon the agreed facts, adjudged that the auditor, acting in a ministerial capacity, should issue his warrant, because he had no right, as a ministerial officer, to question the constitutionality of the bill; it being *prima facie* valid. The auditor appeals.

The auditor relies upon section 46 of the Constitution, which reads as follows: "No bill shall be considered for final passage unless the same has been reported by a committee, and printed for the use of the members. Every bill shall be read at length on three different days in each House; but the second and third readings may be dispensed with by a majority of all the members elected to the House in which the bill is pending. . . . No bill shall become a law unless, on its final passage, it receives the votes of at least two fifths of the members elected to each House, and a majority of the members voting, the vote to be taken by yeas and nays, and entered in the journal: provided, any Act or resolution for the appropriation of money, or the creation of a debt, shall, on its final passage, receive a majority of all the members elected to each House."

There is a history of abuses and wrongs in the legislative department, under the old Constitution, that caused the section *supra* to be ingrafted in the Constitution, and adopted by the people, to wit, it had become a frequent practice under the old Constitution, to pass bills as reported by the committee, by their titles, and by a *vice voce* vote; the bills never having been read for the information of the members, only the few and faithful understanding that they contained large appropriations, grants, monopolies, and other iniquities. It was intended by said section to prevent the repetition of these methods, and to secure honest and enlightened legislation. Therefore it was provided that the bill should be printed for the use of the members; that it should be read at length on three different days in each House, unless the second and third readings were dispensed with by a majority of all the members elected to the House in which the bill is pending. But the reading of the bill at least once cannot be dispensed with. Then, if the members feel fully advised, they may dispense with the other two. Also, no general bill can become a law unless it receives on its final passage the votes of at least two fifths of all the members elected to each House, and that number must be a ma-

majority of those voting, and the vote must be taken by the yeas and nays, and entered in the journal. Also, a bill for the appropriation of money or the creation of a debt must receive, on its final passage, a majority of all the members of each House, the vote to be taken by yeas and nays, and entered in the journal. Now, there can be no doubt that each of these provisions, requiring, on the final passage of the bill, at least two fifths or a majority of the votes, as the case may be, of all the members elected to each House, to be taken by yeas and nays, and entered in the journal, is mandatory, and, unless each of them is complied with, the bill is not constitutionally enacted. This court, in the case of *Varney v. Justice*, 88 Ky. 601, says, in reference to the mandatory character of constitutional provisions: When the "language [of the Constitution] gives a direction as to the manner of exercising a power, it was intended that the power should be exercised in the manner directed, and in no other manner. It is an instrument of words, granting powers, restraining powers, and reserving rights. These words are fundamental words, meaning the thing itself; they breathe no spirit except the spirit to be found in them. To say that these words are directory merely, is to license a violation of the instrument every day and every hour." Now, as the appropriation to the World's Fair is an appropriation in the sense of the Constitution, the bill, in order to be constitutionally passed, should receive, on its final passage fifty-one votes in the House, supposing the whole number of members to be one hundred, and twenty in the Senate, supposing the whole number of senators to be thirty-eight. So the question is, What is the final passage of a bill? And does the final passage of a bill include the adoption of an amendment by either House that is sent to it by the other House? It seems to be clear that the final passage of a bill is the vote by which the bill becomes a law, when signed by both speakers and the governor; and that this definition includes all amendments there can be no manner of doubt, as one illustration will show: Say the House appropriates \$50, and the bill is sent to the Senate for concurrence in the appropriation, but it does not concur in that appropriation, but increases it to \$100, and sends it back to the House for its concurrence in that sum. The bill is not as yet a law. The Senate has refused to concur in the house bill, but increases the sum, and asks the House to concur in appropriating that sum. Unless the House does concur, the bill is not a law. Therefore, it takes the action of the House to appropriate \$100, and it is then finally passed, and becomes a law, appropriating \$100. It is then enrolled as one bill. No amendment appears. So to say that the last action of the House is not the final passage of the bill is clearly a mistake. Such a construction would restore, in full panoply, the evils that existed under the old Constitution, instead of suppressing them forever; for not less than fifty-one members of the House could vote away \$50 of the people's money; but the Senate, by amendment, could

raise that sum to \$50,000 and the House, by a mere majority of a quorum, could concur in the amendment, thus defeating and nullifying the provision *supra*.

The next question is, Can the auditor, conceding his duty, under the bill, to be purely ministerial, raise the question as to the validity of the bill, or be justified in refusing to issue the warrant? It seems that, when a law commands an officer to do a certain thing, it is mandatory, and the officer cannot rightfully refuse obedience, if the law is *prima facie* regular and valid. Public policy requires that this rule be strictly adhered to; for to allow a ministerial officer to call in question a law *prima facie* valid, that it is made his duty to execute, would license him to interrupt and defeat the administration of the government, at his pleasure. The clerk of this court, if such principle was tolerated, might refuse to-day to read or sign the orders, because in his opinion the law requiring him to perform that duty was invalid by reason of some latent infirmity in it. Mr. Mechem on Public Officers (sec. 523) states the rule correctly upon this subject, as follows: "It is not within the scope of the duties of a ministerial officer to pass upon the validity of laws, instructions, or proceedings *prima facie* valid, and requiring his action. His only duty in such a case is obedience; and, as will be seen hereafter, he cannot excuse himself by undertaking to show the unconstitutionality or other invalidity of the law, or the irregularity of the proceedings." The rule thus announced is fully sustained by the leading cases of the United States, and is eminently conservative. This court has, time and again, recognized the right of the auditor to resist the mandate of the Legislature upon the ground that it had no constitutional authority to require it; but in all such cases, as admitted by one of the counsel for appellant, the infirmity was suggested by the bill itself. But the question here is unlike any that has been reported. Here, on the one side, is the auditor, the financial officer of the state, required to pay to the agents of the state certain moneys to be expended in a certain way,—not to pay debts or to discharge obligations incurred. No rights of third persons have intervened, but the contest is between the officers, as to whether the money should be handed over to be expended in behalf of the state; and the auditor refuses to pay it upon the ground that the bill, although regular and valid upon its face, is, on account of the failure to do certain things required by the Constitution, unconstitutional and void. The agents admit, upon demurrer, the facts, and one of their counsel admits, in his argument before the court, that the bill, by reason of the said noncompliance with the provisions of the Constitution in the particulars pointed out by the auditor, and as suggested by the governor in his veto of a similar bill, is unconstitutional and void. So for us to say to the auditor that he must pay out the people's money, notwithstanding the bill to do so is unconstitutional and void, and no rights of third parties have intervened, making it just

and equitable to do so, would be a travesty upon justice, and self-stultification. All the members of the court agreeing that the bill is unconstitutional, and three agreeing that the auditor, under the circumstances, has the right to withhold his warrant on that account, the judgment ought to be reversed, with directions to dismiss the petition.

Pryor, J., dissenting:

On the 9th of February, 1892, and during the present legislative session, a bill was introduced in the Senate entitled "A Bill to Provide for the Collection and Exhibition of the Resources and Evidences of the Progress of the State of Kentucky at the World's Fair Columbian Exposition of 1893." The bill contained an appropriation of \$100,000 for that purpose, and placed that sum under the control of a board of managers, who were required to execute a bond for the faithful discharge of their duties, and to draw the money from the treasury of the state, upon the warrant of the auditor, on proper vouchers first approved by the governor, etc. The bill passed the Senate in the manner required by the Constitution, and, that fact having been announced to the House, that body considered and passed the bill in like manner, with an amendment, and then returned the bill to the Senate, where it originated, when that body suspended the rules, and concurred in the amendment; but on this amendment no vote was taken by a call of the yeas and nays, and, in so far as appears from the senate journal, without a majority voting for the bill as amended. The 40th section of the Constitution provides that "each House of the General Assembly shall keep and publish daily a journal of its proceedings, and the yeas and nays of the members on any question shall, at the desire of any two of the members elected, be entered on the journal." The 46th section provides that "no bill shall be considered for final passage unless the same has been reported by a committee, and printed for the use of the members. Every bill shall be read at length on three different days in each House, but the second and third readings may be dispensed with by a majority of all the members elected to the House in which the bill is pending. But, whenever a committee refuses or fails to report a bill submitted to it in a reasonable time, the same may be called up by any member, and be considered in the same manner it would have been considered if it had been reported. No bill shall become a law unless, on its final passage, it receives the votes of at least two fifths of the members elected to each House, and a majority of the members voting; the vote to be taken by yeas and nays, and entered in the journal: provided, any Act or resolution for the appropriation of money or the creation of debt shall, on its final passage, receive the votes of a majority of all the members elected to each House." It appears, therefore, that the bill, as it originated in the Senate, was passed by the constitutional vote, and in the manner prescribed by the Constitution, and, when sent to the House, the bill, as amended, passed that body as required by the Constitu-

tion, but on its return to the Senate, as amended, there was no call of the yeas and nays by that body, but a concurrence only in the amendment: and what the vote was, does not appear. Section 56 of the Constitution provides that "no bill shall become a law until the same shall have been signed by the presiding officer of each of the two Houses, in open session; and, before such officer shall have affixed his signature to any bill, he shall suspend all other business, declare that such bill will now be read, and that he will sign the same, to the end that it may become a law. The bill shall then be read at length, and compared; and, if correctly enrolled, he shall, in the presence of the House, in open session, and before any other business is entertained, affix his signature, which fact shall be noted in the journal, and the bill immediately sent to the other House. When it reaches the other House, the presiding officer thereof shall immediately suspend all other business, announce the reception of the bill, and the same proceeding shall thereupon be observed, in every respect, as in the House in which it was first signed; . . . and thereupon the clerk of the latter House shall immediately present the same to the governor for his signature and approval." The governor, on the presentation of a bill to him after it has received the signature of each speaker, either approves the bill, or returns it, with his objection, to the House in which it originated, or, if he fails to return the bill within ten days, (Sundays excepted,) it becomes a law, unless a legislative adjournment prevents it; and in that event he must disapprove it within ten days after the adjournment, by having his veto spread upon the register kept by the secretary of state. The bill in question was approved by the governor, and has been deposited with the archives of state as the enrolled bill, and as the law of the land. I have been thus careful in setting forth these various provisions of the Constitution, as from them originates this litigation between the auditor and the board of managers of the fund appropriated.

It is insisted by the one side that by section 46 of the Constitution, just quoted, the "final passage of a bill" means the vote on the bill after it has been perfected by amendments or otherwise, and in a condition to become a law; that is, "final passage" means the last vote on the bill. On the other hand, it is maintained that when a bill has passed either House by a two-fifths vote, or by a majority vote of all the members when money is appropriated, it must be regarded as the final passage of the bill; that is, there can only be one passage of a bill, and that is its final passage, and subsequent amendments, whether formal or substantial, can be adopted by the vote of a majority of a quorum. The board, by its president, W. L. Dulaney, in accordance with the provisions of the bill, presented to the auditor his vouchers, properly approved by the governor, and demanded a part of the sum appropriated to defray expenditures connected with Kentucky's exhibit at the World's Fair; and the auditor refused payment on the ground that the bill was unconstitutional, for two reasons: *First,*

the bill having been amended by the House, a mere concurrence in the amendment by the Senate, without a call of the yeas and nays, showing that a majority of the Senate voted for the bill as amended, is in violation of section 46 of the Constitution; *second*, the Legislature had no power, even by a majority vote, to make such an appropriation. The auditor having challenged in this manner the validity of the bill, the board of managers instituted these proceedings in the Franklin circuit court for a mandamus requiring him to issue his warrant on the treasury for the sums specified in the vouchers presented to him. The answer filed by the auditor sets forth in detail the legislative proceedings as to the manner in which the bill was passed; that the journal of the Senate fails to show the yeas and nays vote on the bill as amended by the House, or that a majority of the senators voted for the bill as amended. A demurrer was sustained to the answer, and the case comes to this court with the admission made by the demurrer, and also, as a matter of fact, that the journals will show that no vote was taken in the Senate by a call of the yeas and nays on the bill as amended by the House, and nothing on the face of the senate journal showing that a majority of the Senate voted for the amendment.

It was argued that the auditor, being a ministerial officer, could not raise the constitutional question as to the manner in which the Act passed. It is true that neither he nor his bondsmen would have been liable if payment had been made, and the Act held (as it has been) unconstitutional; but I think it equally clear, under numerous decisions of this court that it is not only his right, but his duty, to contest every claim in regard to which he is required to draw his warrant on the treasury, when, in his opinion, it is not properly verified, or has not been allowed or appropriated according to law. He is the trustee of the state's funds, and to such an extent that not one cent can be drawn from the treasury without his warrant; and his persistency in refusing to pay this claim not only attests his fidelity and efficiency as an official, but his defense, in which he is sustained by my associates, has saved to the state an expenditure from the treasury, under a void unconstitutional enactment, the sum of \$100,000.

I do not believe his defense in response to the petition for a mandamus is available, and shall proceed to give my reasons for dissenting from the principal opinion.

I shall assume without any discussion, as the entire questions have been considered in consultation, that the Legislature had the power, under the Constitution, to pass the bill, and the only objection to its validity as a law is that the bill was not passed in the manner provided by the Constitution. It is contended by my associates that the demurrer, as well as the agreed facts, admit the bill was not passed in conformity to the Constitution, and by this admission the appellees have in some manner deprived themselves of the right to a mandamus. In other words, that a party may come into court,

and, in a litigation involving the construction of constitutional provisions, by admitting that a bill was not read for the first time, or that the yeas and nays were not called as provided by the Constitution, he admits the unconstitutionality of the Act, and will not be heard to say that the journals of either House, showing that fact, are no evidence, as against the enrolled bill. The appellees only admitted the truth, and, if a denial had been made as to what the journals would show in that particular, it would have been false; for they do show that the yeas and nays were not called when the amendment in the House was concurred in by the Senate. Therefore, the question is, Can the journals be introduced as evidence to contradict or to nullify the enrolled bill? It is plain that the constitutionality of an Act cannot be determined by the admissions of a party, and when brought in question, where evidence is offered to show the Act to be void, the highest and best evidence must be adduced; and, if the journal of the Senate is incompetent for that purpose, the admission that it is competent would not make it so.

Mr. Justice Cooley says the court will not act upon the admission of parties that an Act was not passed in accordance with the Constitution. Const. Lim. 6th ed. p. 168, *note*. See also *Legg v. Annapolis*, 42 Md. 203, for a discussion of this question. If the issue had been made by a denial, the auditor would have offered to introduce the journals; and, upon the objection of the appellees as to the competency of the testimony, the identical question would have been made that was raised by the demurrer. If the appellees had not filed a demurrer, nor replied to the answer of the auditor, and submitted the case in that condition, the court would have been compelled to hold that the answer constituted no defense. The appellees have done nothing to waive their legal right. They come into court with a clear legal right to demand of the auditor this money, and it is the auditor setting up a defense based upon incompetent testimony which is taken hold of by my associates as evidencing such an unconscientious claim as to justify them in denying a remedy for the enforcement of a clear legal right; and to do this they go back, not at the instance of the appellees, but at the instance of the auditor, to see whether the journals establish the truth of the facts alleged by the defense,—facts the appellees admit to exist; and admitting the truth in regard to a matter over which they had no control, and that is incompetent testimony for any purpose on this issue, they are denied a remedy to which they would have been entitled but for this incompetent testimony. This is based on the idea that the appellees have an interest in this controversy; and, if this be true, they have no standing in court, and the case should be dismissed on that ground. I can see nothing in the argument sustaining this view, and it is at last a decision, in effect, that you may declare a law invalid by reason of the Legislature failing to pass a law in the manner required by the Constitution; and the question arises, Is the validity of the Ac-

to be determined by the enrolled bill, or by the journals of the Senate, showing the manner of its passage? It is contended, on the one hand, that where the journals show that the Constitution has not been complied with on the passage of a bill, the bill is a nullity; and, on the other, it is argued that the manner of passing bills is exclusively within the province of the Legislature, in the exercise of the power conferred by the Constitution, and that when a bill is authenticated in the manner provided by section 56 of the Constitution, and promulgated as the law, it is conclusive evidence of its existence as a law, although the requirements of the Constitution as to the manner of its passage may not have been complied with. It is not claimed that the two speakers can sign a bill, either in or out of session, and have it approved by the governor, and that this makes it a law, although it may never have been introduced. To do this you must impute corruption and fraud to both speakers and the executive—a case that would never arise, and too futile in its suggestions to deserve notice in an opinion.

Shall the courts, when a bill has been signed by the speaker of each House, and declared a law in the presence of the members of each body, approved by the governor, and filed with the archives of state as the law of the land, look to this enrolled bill as conclusive of the fact that the bill was properly passed, and leave the co-ordinate branch of the government, whose duty it is to pass laws, when acting within the scope of its power, responsible to its constituency for the manner of its exercise? The case of *Auditor v. Haycraft*, 14 Bush, 284, is relied on by each party as sustaining the view they respectively present. The writer of this dissent wrote the opinion of the court in that case. The pleadings in that case raise no such question, and all the court said was that "no inquiry will or can be instituted, as the case is presented, for the purpose of ascertaining the manner in which the enactment was passed." "There has been no pleading filed by the state or auditor presenting any such issue, and we must therefore adjudge it was constitutionally enacted, and cannot take judicial notice at the mere suggestion of counsel, as to the votes cast for or against the measure on its final passage. If a bill of this character did not receive the vote of a majority of the members, the only mode of reaching the question is by an allegation of fact in an appropriate pleading, and the journals offered as evidence to sustain the defense." This was not done in that case, nor the journals offered so that an objection might be made to them as evidence; and, from a casual reading of the opinion, it will be seen the question was not decided or discussed.

The importance of this question cannot be overestimated; and this court is not urged, for the first time in the judicial proceedings of the state, by appropriate pleadings, to adjudge an Act unconstitutional, by reference to the legislative journals, when we have before us the enrolled bill, authenticated as the Constitution requires. If the validity

of the bill was assailed for the want of power on the part of the Legislature to enact it, a judicial question would at once arise; and I would not feel that I was invading the domain of a co-ordinate branch of the government, as supreme in its jurisdiction as the judiciary, when determining the extent of legislative power. It is manifest that there is a marked distinction between determining a law to be in violation of the Constitution, and in adjudging that it has not been passed in the mode required by that instrument. In defining the powers of government, the Constitution gives to the Legislature the sole power to make the laws, and to judge of their expediency, and upon the judicial department devolves the duty of interpreting those laws, when made; and I can perceive but little necessity for a distribution of the powers of government, if the judiciary can be called on to determine, in the first place, whether an Act was passed in accordance with the mode prescribed by the Constitution, and then determine the power of the Legislature to enact the law. This bill has been promulgated by the Legislature, with its validity as a law attested by the signature of the speaker of each House, and its approval by the governor. It may be properly said that judicial opinions, from able lawyers and courts, as to the power of a court to go behind an enrolled bill in order to determine the manner of its passage, are such as to cause a doubt as to any conclusion the judicial mind may reach on the question, but, when the cases decided are carefully analyzed, it will be found that the decided weight of authority is that an enrolled bill, attested, as in this case, in the manner provided by the Constitution, becomes a perfect law, and its validity cannot be questioned except on the ground that the Legislature had no power to enact it. The cases opposed to this view are based, some of them, on the idea that certain provisions of their state Constitutions are mandatory, and others not; many of them following the earlier cases rendered by the Supreme Court of New York, that have been overruled, and the cases from the supreme court of Illinois, that by its recent utterance intimates strongly that the enrolled bill is the best evidence of what is the statute law of the state. It is difficult to perceive why every provision of a Constitution is not mandatory, and to be so adjudged, unless it is made directory, in express terms; and if left open to judicial interpretation, as ordinary legislative enactments, then the provision in question becomes either mandatory or directory, as it may appear to the mind of the judge called upon to interpret it, and with such uncertainty there would be no uniformity in the construction of constitutional provisions. Mr. Justice Cooley, in his work on Constitutional Limitations, says: "But the courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those

unvarying rules, by which all departments of the government must at all times shape their conduct; and if it descend to prescribe mere rules of order, in unessential matters, it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation." Regarding, therefore, every provision of a constitution mandatory, it furnishes no reason for holding that the journals of either House are the best evidence to the courts and the people of the validity of the bill. Some test, however, must be had, and the citizen, who is presumed to know the law, must have the means of knowing when a law has been enacted; and while no case, reported or unreported, in this state is to be found, deciding this question, there has, in effect, been a practical construction as to what constitutes the evidence of the passage of laws, by the manner in which our statutes are published and verified by the enrolled bill. Our statute laws have been embodied for years in what is known as the "Revised and General Statutes" and published "Acts of the Legislature." When the law, as found in the statute book, is claimed not to be the law enacted by the Legislature, resort is had to the enrolled bill; and I venture the assertion that the able revisers of our statutes and codes of practice never at any time consulted the legislative journals, with a view of ascertaining whether the enactments they were publishing as laws to guide the people had been constitutionally passed, and for the reason the enrolled bill was the best evidence of that fact; and, although there has been no decision on the question, this raises a strong presumption as to the manner in which such constitutional provisions have been interpreted.

What is the evidence upon which this court is asked to pronounce this law unconstitutional? Section 40 of the Constitution provides: "Each House of the General Assembly shall keep and publish daily a journal of its proceedings; and the yeas and nays of the members on any question shall, at the desire of any two of the members elected, be entered on the journal." This journal is kept by the clerk or his assistant; is not signed, or required to be signed, by any one. Its second and third readings are dispensed with in almost every instance where a motion is made. It is not required to be attested in any manner whatever. Can it be that the framers of the Constitution contemplated that journals kept in this way are to be regarded as records containing such absolute verity as to be looked to by the courts for the purpose of nullifying a legislative enactment that has been attested and approved in the mode prescribed by section 56 of the Organic Law? This bill was signed by the presiding officer of each House, in open session; and, before the speaker signed the bill, he suspended all other business, declared that such bill "will now be read," and he "will sign the same, to the end that it may become a law." It is then read and compared, and found to be correct. He affixes his signature, in the presence of the House, in open session. And, when this

is done, to say that such solemn acts, after the bill has been filed with the secretary of state as the law, are to be disregarded by reason of entries in the legislative journals, "would shake," as *Chief Justice Beasley* said in deciding a similar question, "the stability of all written law to its very foundations." *State v. Young*, 82 N. J. L. 37. If a court can leave the enrolled bill, and search for evidence in the journals to nullify it, this rule of evidence would apply, not only to the passage of laws enacted since the present Constitution was adopted, but the manner of passing every statute since the Constitution of 1849 would be subjected to judicial investigation; and whether involving the right of property, or enacted for the punishment of crime, with an issue raised as to the manner of its passage, the court would be compelled to look into the journals of either House, or allow the litigant to do so, for the purpose of determining whether or not the enactment was passed in the mode prescribed by the organic law. The Constitution of 1849 contains this provision: "No bill shall have the force of a law until, on three several days, it be read over in each House of the General Assembly, and free discussion allowed thereon, unless, in cases of urgency, four fifths of the House where the bill shall be depending may deem it expedient to dispense with this rule." If, therefore, the journals of the Legislature, under the Constitution of 1849-50, fail to show that the bill was not read three several days, and the reading had not been dispensed with, it is not a law, or, if the journals show affirmatively that the bill was only read two days, and the third reading not dispensed with, the same disastrous results must follow; and, according to the majority opinion, if, under the present Constitution, the governor and the House had coincided with the views of the Senate, all the bills where the yeas and nays had not been called on the original bills, or the bills as amended, would necessarily, when assailed, be adjudged null and void, although authenticated as the Constitution requires.

The fear of the consequences resulting from such a rule does not alone induce me to regard the enrolled bill conclusive as to the valid passage of a bill. It is because it is a certain and fixed test, and is the highest evidence of what the Legislature has done. The laws embodied in our statutes come from the enrolled bills. All the rights of the citizen, derived under statutory enactments, depend on the verity of the enrolled bills. The published laws are verified by them, and every statutory right becomes endangered when you present other evidence to show that an enrolled bill is not the law. Many of the decisions on this question evidence great ability, and, with provisions in their constitutions in many respects similar to ours, they hold, in discussing the right to go back to the journals of either House, that the enrolled bill is conclusive. In the case of *State v. Young*, reported in 82 N. J. L. 37, the court, in speaking of the journals as evidence, said: "In the nature of things, they must be constructed out of loose and

hasty memoranda, made in the pressure of business and amid the distractions of a numerous assembly. There is required not a single guarantee to their accuracy or to their truth. No one need vouch for them, and it is not enjoined that they should be either approved, copied or recorded." Again: "The Legislature has . . . adopted a method of certifying its own acts in a authentic form. . . . To the correctness of the present bill, for example, we have the signature of the presiding officer of each House. In its present form, it was exhibited to the governor as the bill which had been enacted, and as such received his approval, as is evidenced by his signature. It was then immediately made public by being filed in the office of the secretary of state. These are the sanctions which the Legislature has provided for the authentication of its own acts, both to the public and to the judicial tribunals, and the question is therefore presented, whether such authentication must not be deemed conclusive. . . . This question, in my opinion, must be answered in the affirmative. How can it be otherwise? The body that passes a law must of necessity promulgate it in some form." And, continuing, the court said: "In the frame of our state government the recipients and organs of this threefold power are the Legislature, the executive, and judiciary, and they are co-ordinate—in all things equal and independent; each, within its sphere, is the trusted agent of the public. With what propriety, then, is it claimed that the judicial branch can erect itself into the custodian of the good faith of the legislative department? . . . But the proposition is, whether, when the Legislature has certified to a mere matter of fact, relating to its own conduct and within its own cognizance, the courts of the state are at liberty to inquire into or dispute the veracity of that certificate. I can discover nothing in the provisions of the Constitution, or in the general principles of government, which will justify the assumption of such superior authority."

In the case of *State v. Swift*, reported in 10 Nev. 176, 21 Am. Rep. 721, from the state of Nevada, where a provision of the state Constitution is analogous to ours, providing "that the reading of a bill by sections on its final passage shall in no case be dispensed with, and the vote on the final passage of every bill or joint resolution shall be taken by yeas and nays, to be entered on the journals of each House," etc., the court held that the official copy of a statute duly enrolled and authenticated is conclusive evidence of the law, and the court cannot resort to the journals of the Legislature, nor to any other extrinsic evidence, to ascertain whether the statute was duly enacted. That court, in response to the argument in favor of receiving the journals as evidence, said: "The hope of doing good [that is, by correcting mistakes in enrolled bills by the journals] by the course suggested is more than overbalanced by the danger of doing harm, and therefore presents no equivalent for the incalculable disadvantage of reducing the statute law from a state of certainty to one of

everlasting doubt." To the same effect is the case of *People v. Devlin*, 33 N. Y. 269, 88 Am. Dec. 877.

In an opinion delivered by *Mr Justice Harlan*, of the Supreme Court and concurred in by his associates, (the case, of *Field v. Clark*, 148 U. S. 649, 36 L. ed. 294,) many of the cases on this question were referred to; and in an able and exhaustive discussion of the points involved in that case, the court held: "The signing by the speaker of the House of Representatives, and by the president of the Senate, in open session, of an enrolled bill, is an official attestation by the two Houses of such bill as one that has passed Congress. It is a declaration by the two Houses, through their presiding officers, to the president, that the bill thus attested has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable." In response to the argument that was made in that case, and also urged before us, that some supervision was necessary, otherwise the officers of the respective Houses and the members might purposely defeat the popular will, the court said: "But this possibility is too remote to be seriously considered in the present inquiry. . . . Judicial action based upon such a suggestion is forbidden by the respect due to a co-ordinate branch of the government. The evils that may result from the recognition of the principle that an enrolled Act in the custody of the secretary of state, attested by the signatures of the presiding officers of the two Houses of Congress, and the approval of the president, is conclusive evidence that it was passed by Congress according to the forms of the Constitution, would be far less than those that would certainly result from a rule making the validity of congressional enactments depend on the manner in which the journals of the respective Houses are kept by the subordinate officers charged with the duty of keeping them." The court also said: "In regard to certain matters expressly required by the Constitution to be entered on the journal,—to what extent the validity of legislative action may be affected by the failure to have those matters entered on the journal—we need not inquire. No such question is presented for determination." It is therefore argued that the precise question presented here was not before the court in *Field v. Clark*. Still it is evident the court was not inclined to recognize the doctrine found in the Illinois and other cases as sound. The provision of the Constitution of Illinois is "that all bills, before they can become laws, shall be read three several times in each House, and shall be passed by a vote of a majority of all the members elect." The supreme court of that state, in *People v. Starns*, 35 Ill. 121, said: "According to the theory of our legislation, when a bill

has become a law, there must be record evidence of every material requirement from its introduction until it becomes a law, and this evidence is found upon the journals of the two Houses,"—the court further saying: "We are not, however, prepared to say that a different rule might not have subverted the public interest equally well; leaving the Legislature and the executive to guard the public interest in this regard, or to become responsible for its neglect." *Mr. Justice Harlan*, in reviewing the various decisions on this subject, quoted the language of the Illinois court, in which the soundness of the rule established in that state is questioned, and approved the doctrine of the state courts making the enrolled bill conclusive evidence of the law. The case from the Mississippi Supreme Court of *Ex parte Wren*, 68 Miss. 512, 56 Am. Rep. 825, is also referred to in the case of *Field v. Clark*, in which *Mr. Justice Campbell* said, after reviewing the adjudged cases: "Every other view subordinates the Legislature, and disregards that coequal position in our system of the three departments of government. If the validity of every Act published as law is to be tested by examining its history, as shown by the journals of the two Houses of the Legislature, there will be an amount of litigation, difficulty, and painful uncertainty appalling in its contemplation, and multiplying a hundred-fold the uncertainty of the law." "If the court may go beyond the enrolled bill, and try its validity by the record contained in the journals, it must perform this task as often as called on, and every court must do it. A justice of the peace must do it; and we will have the spectacle of examination of journals by justices of the peace, and statutes declared not to be law, as the result of their journalistic history. Let the courts accept, as statutes duly enacted, such bills as are delivered by the Legislature as their Acts, authenticated as such in the prescribed mode." In *Weeks v. Smith*, 81 Me. 547, it was said: "No man should be required to hunt through the journals of a Legislature to determine whether a statute properly certified by the speaker of the House and the president of the Senate, and approved by the governor, is a statute or not."

It is insisted that section 46 of the Constitution, containing the provision that "no bill shall become a law unless, on its final passage, it receives the votes of at least two fifths of the members elected to each House, the vote to be taken by the yeas and nays on the journals, and a majority of all the members where an appropriation of money is made," opens the door to an investigation of the journals by the courts. I see no distinction between a provision of a Constitution requiring a call of the yeas and nays by the legislative body upon the final passage of a bill, and the provision to the effect that the first reading shall not be dispensed with. They are all mandatory provisions, regulating the mode in which the Legislature shall enact laws the construction of which belongs to the two Houses and the executive, and not to the courts, and es-

pecially when the Constitution contains a provision directing the mode of authentication by which the courts and the people are to be governed. By the statute of our state, for a deed of a married woman to be effectual, the clerk is required to examine her separately and apart from her husband, and, although he may have examined her in the presence of her husband, the courts, by reason of an express statute, will not allow the clerk or the married woman to show that he did not comply with the law when he has certified that he did, in the absence of fraud on the part of the grantee, and for the reason that such a rule of evidence would make the title to land too uncertain; and while the statute, as to the clerk, is mandatory, just as the provision of the Constitution in regard to the enactment of laws is mandatory to the Legislature, when the bill is certified or authenticated in the mode required, you cannot go behind it. The enrolled bill should be held conclusive. The building may be defective in its construction, but, when received from the hands of the architect, will be allowed to stand. Section 56 of the Constitution is plain and unmistakable as to the manner in which a bill is to be authenticated and promulgated as the law, and affords the means for every one ascertaining what the law is. When we find an Act filed with the secretary of state, authenticated by the signatures of the speakers and the approval of the governor, every citizen can rely on its efficacy, if within the power of the Legislature to enact it; and no evidence of any character, assailing its validity, should be listened to. It will be found that courts entertaining opposite views on this question are constantly perplexed in their efforts to sustain the validity of laws with a view of preserving rights acquired under statutes, where the mode of passing them was not as prescribed by the Constitution. In the cases of *Hall v. Steele*, 83 Ala. 562; *Giddens v. Martin*, 51 Ark. 559; *State v. Algood*, 87 Tenn. 163; *State v. Hastings*, 24 Minn. 78; and in the courts of Kansas and Colorado,—it has been held that the journals may be looked into with a view of assailing the enrolled bill, but, when they are silent on the question as to the manner of passing the bill, the court will presume that they were passed in accordance with the Constitution; and in some of the state courts, in order to avoid the disastrous consequences resulting from contradicting the enrolled bill, a legislative estoppel in some cases has been applied, to the effect that subsequent legislation in the nature of amendments cured a void legislative enactment. The highest authority adverse to the rule here recognized is *Mr. Justice Cooley*, in his work on Constitutional Limitations, following the decisions of the courts of his own state. The supreme court of that state has gone so far as to hold that when there is no entry on the journals, and no resolution authorizing such entry, an entry found in the bound volume of the house journal will be presumed to have been properly made; two of the judges (Long and Grant) dissenting. *Detroit v. Board of Assessors of Detroit* (Mich.) 51 N.

W. Rep. 787. I cannot assent to such a doctrine.

Nor should the bill before us be held unconstitutional upon the idea that no one is injured by a reversal of this case; that it is only one agent of the state government trying to keep the money in the treasury, and another trying to get it out. It is either a law or not a law. If a law, the appellees have the legal right to the money, and to compel the auditor to pay it. There can be no exception to the rule. It is true they are the agents to disburse this fund, but the ears of the court are not closed to the fact that the managers have been engaged in preparing the exhibits for the World's Fair. They have doubtless expended their own means in making such preparations as were necessary for that purpose.

They had the right to act under the law, and the approval of the governor of their vouchers for \$25,000 raises a strong presumption that they have made expenditures. The executive was right in approving the vouchers, because he knew the board of managers had acted in good faith. Still, from the majority opinion, if expenditures have been made, as the act was void, it affords them no protection. Can this be? Are the courts of this state to search the journals to find out whether or not statutory rights can be enforced? Such a rule not only makes the forms of legislation, but all legislative expediency, the subject of judicial approval. It invites the judge from the bench, that he may become a partisan to the passage or rejection of bills, where partisan influence and

excitement prevail. It is an encroachment upon the exercise of legislative power. Its effect will be to sweep from the statute books bills of the highest importance, passed during this legislative session, and open the door to an assault on all past legislation. It is a legal dynamite, hidden from the public view, ready, when the occasion requires, to be used in the destruction of any statute. In the language of a great judge (*Judge Black*) in an opinion given on a similar question, "I fear to turn loose a principle which might devour the whole statute book."

1 Ops. Atty-Gen. U. S. p.—.

While I do not differ from my associates as to what is the final passage of a bill, it is a question that was not debated by counsel; and, from my view of this case, the opinion, at best, would only be advisory in its character, and given to a representative body that has not sought it. I again repeat that this court is only determining what evidence we will look to in order to ascertain whether the Act in question is or not a law. It is one entirely distinct from the legislative power in passing bills, or that of the governor in pointing out defects and constitutional omissions in the attempt to pass them.

I feel the importance of a court of last resort concurring on all constitutional questions, but the magnitude of the question involved, and the danger, as I conceive, flowing from the construction given the Constitution by my associates, compel me to dissent from their views of the main question involved.

INDIANA SUPREME COURT.

Benjamin S. PARKER *et al.*, *Appts.*,

v.

STATE of Indiana, *ex rel.* Simon T. POWELL.

(.....Ind.....)

1. The constitutionality of a legislative Apportionment Act is a judicial question and not one which the court cannot consider on the ground that it is a political question.
2. Judicial notice will be taken of the geography of a state and also of the enumeration of inhabitants taken pursuant to law.
3. No scheme for senatorial districts can be lawfully devised in which a county having less than the unit of population for a senatorial district can legally be entitled to vote for two senators where the constitutional provisions require equality in representation.

4. A county having more than the representative unit of population cannot be denied the right to a separate representative.

5. Counties fully represented cannot be used in the apportionment of districts for the purpose of joining counties which are not otherwise contiguous.

6. The rule of practical construction is of no value in construing a Constitution when it is plain that the practice has been in open violation of that instrument.

7. One elected or appointed to an office under an unconstitutional statute before it is adjudged to be so is an officer *de facto*.

8. The constitutionality of a statute will not be considered in a case which can be decided upon its merits without such consideration.

On rehearing.

9. The attorney-general is only an

NOTE.—The validity of legislative Apportionment Acts has been more discussed, and the law upon the subject more fully developed, during the current judicial year than in all time preceding. The assumption by legislatures of practically unlimited and arbitrary power in the furtherance of partisan interests has received some wholesome checks by the courts without regard to political affiliations of the judges.

The above case very clearly presents the constitutional

questions involved and shows that the rights of citizens to practical equality in the choice of representatives are fully protected by the fundamental law. For the recent Wisconsin, Michigan and New York cases on the same subject, see *State v. Cunningham*, 15 L. R. A. 561, and *note*, 81 Wis. 440; *State v. Cunningham* (Wis.) 17 L. R. A. 145; *Giddings v. Blacker* (Mich.) 16 L. R. A. 402; *Houghton County v. Blacker* (Mich.) 16 L. R. A. 423; *People v. Rice* (N. Y.) 16 L. R. A. 536.

See also 20 L. R. A. 81; 22 L. R. A. 548; 25 L. R. A. 143; 31 L. R. A. 726; 39 L. R. A. 794; 44 L. R. A. 485; 47 L. R. A. 622.

amicus curiæ when invited by the court to appear in an action involving an important constitutional question which is brought in the name of the state on the relation of a person who seeks thereby to enforce a private right, and he is not a party or intervenor who is entitled, as such, to file a petition for a rehearing.

10. A rehearing cannot be considered if no brief is filed in its support.

11. One to whom the decision is not adverse cannot petition for a rehearing.

(McCabe, J., dissents.)

(December 17, 1892.)

APPEAL by defendant from a judgment of the Circuit Court for Henry County in favor of petitioner in a proceeding by mandamus to compel defendants as election officers to take the necessary steps to hold the election of 1892 for state senators and representatives under the Apportionment Act of 1879, rather than that of 1891. *Reversed.*

The facts are stated in the opinions.

Messrs. J. H. Mellett and W. E. Niblack for appellants.

Messrs. Mark E. Forkner and A. W. Wishard, with Messrs. Winter & Elam, for appellee:

The action was properly begun by the petition of the state on relation of a citizen and voter of the county of Henry.

Hamilton v. State, 3 Ind. 452; *State v. Hamilton*, 5 Ind. 810; *Clarke County Comrs. v. State*, 61 Ind. 75; *Decatur County v. State*, 86 Ind. 8; *State v. Madison County Comrs.* 92 Ind. 188; *State v. Marshall County Judge*, 7 Iowa, 186; *State v. Bailey*, 7 Iowa, 390.

Where the object is the enforcement of a public right the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested as a citizen in having the laws executed and the right in question enforced.

Pike County v. People, 11 Ill. 202; *People v. Collins*, 19 Wend. 56; *People v. Halsey*, 87 N. Y. 844; *People v. Brooklyn*, 77 N. Y. 511; *People v. Sullivan County Board of Suprs.* 56 N. Y. 249; *Union Pac. R. Co. v. Hall*, 91 U. S. 355, 23 L. ed. 432; *Hyatt v. Allen*, 54 Cal. 353; *Pumphrey v. Baltimore*, 47 Md. 145; *State v. Weld*, 89 Minn. 426; *State v. Columbus Board of Education*, 35 Ohio St. 368; *State v. Saline County Ct.* 51 Mo. 350; *Atty-Gen. v. Boston*, 123 Mass. 460; High, Extr. Legal Rem. § 481; *Giddings v. Blacker* (Mich.) 16 L. R. A. 402; *State v. Cunningham*, 15 L. R. A. 561, 81 Wis. 440.

The law with us must conform in the first place to the Constitution of the United States, and then to the subordinate Constitution of the particular state, and if it infringes upon the provisions of either, it is so far void. By the course of judicial decisions reaching from the earliest history of the American government to the present day it has been adjudged that courts of justice have the right and are in duty bound to test every law by the Constitution, as the fundamental and paramount law of the land, governing all derivative power and the 13 L. R. A.

exercise thereof. The judicial department with us has the proper power under the Constitution to declare the constitutionality of a law, and every Act of the Legislature contrary to the true intent and meaning of the Constitution will be declared by the courts null and void and of no effect whatever.

Houston v. Moore, 18 U. S. 5 Wheat. 1, 5 L. ed. 19; *Cooley*, Const. Lim. 5th ed. pp. 93, 94; *Wolcott v. Wigton*, 7 Ind. 44.

What is called the discretion of the Legislature is the same thing, whether the laws it enacts deal with what are called political questions or questions not so denominated. The distinction between mandatory and directory statutes is well stated by the Supreme Court of Wisconsin in *State v. Lean*, 9 Wis. 279.

The court says "that where there is no substantial reason why the thing to be done might not as well be done after the time prescribed as before—no presumption that by allowing it to be so done it may work an injury or wrong—nothing in the act itself, or in other acts relating to the same subject-matter, indicating that the Legislature did not intend that it should rather be done after the time prescribed, than not to be done at all; there the courts assume that the intent was that if not done within the time prescribed it might be done afterwards. But, when any of these reasons intervene, there the limit is established."

The Supreme Court of Maine, dealing with a question similar to the one now in hand, and answering questions propounded by the Senate clearly define the limits of legislative discretion in apportioning members of the General Assembly according to population. In the able opinion of Shepley, J., is found the following language: "Again, the Constitution requires that the senators 'shall be apportioned according to the number of inhabitants,' and it may not in all cases be possible exactly to conform to this rule . . . and here, also, it may be said there must exist a discretion to be exercised by the Legislature making an apportionment. That power which a legislative body is compelled to exercise by such a moral necessity, cannot properly be considered as discretionary. If, however, it be so designated, it is a discretion like that last named, limited in the same manner and not subject to be abused. There can be no warrant for the exercise of this kind of discretion, if it may be so called, beyond what is required by the case to be provided for. If the Legislature has any other discretion, it is necessarily an unlimited one in practice, however it may be attempted to limit it in theory, and the provisions of the Constitution relating to this matter must become in practice merely directory. And an apportionment must then be considered as constitutional, although the county lines should be wholly disregarded, and the number of inhabitants required to elect a senator should be very unequal. It is not intended to intimate that any one contends for a construction that would knowingly authorize such results; but it is believed that such is the legitimate and practical tendency of admitting any other discretion than that which arises out of an absolute moral necessity. Any other discretion would in effect repeal or annihilate that clause in the Constitution which prescribes

the rule for an apportionment, and would therefore violate one of the fundamental rules of interpretation, that effect is to be given to all the language if it be possible. And without permitting that clause to have effect upon the legislation, the Constitution would no longer secure the same rights that are now believed to be secured; nor would it practically be the same instrument of government." *Opinions of Justices*, 18 Me. 472, 473.

See also *State v. Dudley*, 1 Ohio St. 437; *State v. VanDuyn*, 24 Neb. 586; *People v. Canaday*, 73 N. C. 198, 21 Am. Rep. 465; *Opinion of Justices*, 8 Me. 477; *Opinion of Justices*, 88 Me. 587; *Opinion of Justices*, 7 Mass. 523; *Opinion of Justices*, 15 Mass. 587; *Opinion of Justices*, 8 Pick. 517; *Henshaw v. Foster*, 9 Pick. 312; *Copen v. Foster*, 12 Pick. 485, 23 Am. Dec. 632; *Opinion of Justices*, 23 Pick. 547; *Opinion of Justices*, 6 Cush. 575; *Warren v. Charlestown*, 2 Gray, 84; *Opinion of Justices*, 10 Gray, 618; *Stone v. Charlestown*, 114 Mass. 214; *State v. Riordan*, 24 Wis. 484.

The doctrine of these cases finds no stronger support anywhere than in the decisions of the Supreme Court of Indiana.

Quinn v. State, 35 Ind. 485; *Williams v. Stein*, 33 Ind. 89, 10 Am. Rep. 97; *Feideman v. State*, 98 Ind. 516; *State v. Denny*, 4 L. R. A. 79, 118 Ind. 893; *Branville v. State*, 4 L. R. A. 98, 118 Ind. 426; *State v. Blend*, 121 Ind. 514; *Morris v. Powell*, 9 L. R. A. 326, 125 Ind. 281.

The courts are the only tribunals that can finally determine the constitutionality of such laws as those we are now considering, and their power to do so is precisely the same as in the case of other laws. Such laws affect the fundamental principles and organization of our government, and it was clearly intended that the power to enact them should be limited and restrained by the organic law of the state. The authority and convincing reasoning of the cases to which we have referred is not shaken by the case of *Wiss v. Bigger*, 79 Va. 26.

Nor is the doctrine for which we contend at all assailed by the case of *State v. Campbell*, 48 Ohio St. 435.

This latter case is really an authority for the proposition for which we contend.

State v. Francis, 26 Kan. 724.

The principles settled by the adjudications to which we have referred have recently been directly applied to cases of the precise character of the one in hand.

State v. Cunningham, 15 L. R. A. 561, 81 Wis. 440; *Giddings v. Blacker* (Mich.) 16 L. R. A. 402; *Houghton County v. Blacker* (Mich.) 16 L. R. A. 432.

The Acts of 1885 and 1891, which we have been considering, being unconstitutional and void, the Apportionment Law of 1879 is in force. An unconstitutional law containing a repealing clause does not repeal former laws mentioned in such repealing clause, or laws that would be repealed by implication if the unconstitutional legislation was valid.

State v. Blend, 121 Ind. 514.

Mr. Alonzo G. Smith, Atty-Gen., filed a brief on behalf of the State.

Coffey, J., delivered the opinion of the court:

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This was an action by the state of Indiana, on the relation of Simon T. Powell, a legal voter of Henry county, against the appellants, Benjamin S. Parker, as clerk of the circuit court of that county, William Reinwalt, as sheriff, and Richmond Wischart, as auditor, to compel them by writ of mandamus, as such officers, to take the necessary steps to hold the election of 1892 for senators and representatives under the Act of the General Assembly for the apportionment of senators and representatives approved March 8, 1879, and to enjoin them from proceeding under the Act of the General Assembly for the apportionment of senators and representatives passed, notwithstanding the governor's veto, March 5, 1891. It is alleged that the appellants, as such officers, are threatening and are about to issue and give the necessary notices and take the necessary steps to hold the election of November, 1892, for senators and representatives under the apportionment made by the latter Act, claiming and asserting that the first-named Act was repealed by the Act of the General Assembly of the state for the apportionment of senators and representatives approved March 6, 1885. It is alleged that the Act of March 6, 1885, as well as the Act of March 5, 1891, is void, being in conflict with the Constitution of the state. The matters wherein each of these acts are supposed to be in conflict with the Constitution are fully and minutely set forth in the complaint. As to the Act of March 5, 1891, it is alleged that in the year 1889—the year prescribed by the Constitution therefor—an enumeration of all the male inhabitants over the age of twenty-one years in the state was taken under the authority and by the direction of the General Assembly, as required by the Constitution, which enumeration showed the number of male inhabitants in each township and county, as well as the total number in the state, over twenty-one years of age. The complaint then sets out the enumeration by counties, showing the total number to be 551,048. It is alleged that it was provided by the Act of March 5, 1891, that the General Assembly of the state should consist of fifty senators and 100 representatives, and that it became the duty of the then sitting General Assembly, under the Constitution of the state, to apportion the number of senators and representatives to the ensuing General Assembly, based upon the enumeration of the year 1889, so that each senatorial district should contain 11,025 male inhabitants above the age of twenty-one years, as nearly as reasonably possible, and that each representative district should contain 5,510 male inhabitants above the age of twenty-one years, as nearly as reasonably possible. The complaint sets out the apportionment for senatorial and representative purposes as fixed by the Act of March 5, 1891, together with the number of male inhabitants over the age of twenty-one years in each district, as shown by the enumeration of 1889. It is then alleged that by this Act forty-three counties are formed into twenty-two districts, to each of which one senator is apportioned. Eleven of these districts, composed of twenty-three counties,

contain, by the enumeration of 1889, 148,496 male inhabitants over the age of twenty-one years, while the other eleven of said districts, composed of twenty counties, contain only 99,609 such inhabitants. That no other senatorial representation is given by the Act to any of the counties contained in the first-mentioned eleven districts, and by such apportionment the senatorial representation of 27,276 male inhabitants over twenty-one years of age of said districts, being two senators, with a fraction over of 5,236, is wrongfully denied to the counties contained in said districts and given to the counties contained in the other eleven, whereby their representation, which of right should be but nine senators, is increased to eleven, and the representation of the counties contained in the first-mentioned eleven districts is reduced to eleven, when of right it should be thirteen. That the county of Brown, which, by the enumeration of 1889, contained only 2,832 male inhabitants over the age of twenty-one years, is placed in two senatorial districts, namely, one composed of the counties of Brown, Monroe, and Bartholomew, and one composed of the counties of Brown, Morgan, and Johnson; while the county of Clark, which, by the enumeration, contains only 7,804 male inhabitants over the age of twenty-one years, is also placed in two senatorial districts, namely, one composed of the counties of Clark, Scott, and Jennings, and one composed of the counties of Clark and Jefferson, whereby each of said counties of Brown and Clark is given senatorial representation greatly in excess of that to which they are entitled. It is further alleged that under the enumeration of 1889 Jay county was shown to have 5,823 male inhabitants over the age of twenty-one years, being 315 more than the representative unit, and that by the Act of March 5, 1891, it was denied a representative, and was united with the counties of Adams and Blackford for the election of one joint representative, such district having an excess over the unit of representation of 2,007, and with said county of Adams for the election of one other joint representative, such district having an excess over the unit of representation of 5,077. That by the Act of March 5, 1891, sixty-one counties are formed into forty representative districts, to each of which one representative is apportioned. These districts, so far as composed of counties entitled to any representation thereiz, are made up of counties otherwise wholly unrepresented in the apportionment for representation, and counties having an excess over the unit of representation, which excess is otherwise unrepresented, and is alone represented in said districts. Twenty of said districts, composed of thirty-one counties, contain, as shown by the enumeration of 1889, 199,955 male inhabitants over the age for twenty-one years who have no representation for representatives in the General Assembly under this Act except the twenty representatives apportioned to said districts; while the other twenty of said districts composed of thirty counties, contain, as shown by the enumeration, only 85,764 such inhabitants, otherwise unrepresented,

by reason of which apportionment 29,755 male inhabitants over the age of twenty-one years in said first-mentioned districts, who are entitled to five representatives, with a fraction over of 2,205 of the representative unit, are entirely deprived of such representation, and four of such representatives are given, without right, to the second-mentioned districts, whereby their representation is increased to twenty, when of right it should be only fifteen, and that of the first-mentioned districts is reduced to twenty, when of right it should be twenty-five. These several districts and the counties of which they are composed together with the number of male inhabitants in each, as shown by the enumeration of 1889, are set out in detail. It is then alleged that included in the second-mentioned districts are nine counties, each of which is given a separate representative, although each of said counties lacks more than 1,000 of possessing the unit of representation under the enumeration of 1889, while Jay county, with 315 in excess of such unit, is denied separate representation. That five counties are each given a separate representative independent of the districts above mentioned, while each of said counties lacks the unit of representation as follows: Tipton, lacking 1,125; Harrison, 613; Putnam, 17; Ripley, 637; and Franklin, 819,—are each again represented in four of said mentioned twenty districts. Said Tipton county is in the district composed of the counties of Clinton, Tipton, and Madison; Harrison county in the district composed of the counties of Floyd, Harrison, and Crawford; Putnam county in the district composed of the counties of Putnam, Clay, and Montgomery; in which districts said counties respectively serve the purpose of making the other counties in said districts contiguous, which otherwise they would not be; and that said Ripley and Franklin counties are represented in the district composed of the counties of Ripley, Franklin, and Union. The complaint also contains allegations in relation to the Act approved March 6, 1885, similar in character to those set out above; but, in view of the conclusion we have reached in this case, we deem it unnecessary to set them out in this opinion. Prayer for an alternative writ of mandamus requiring the appellants to show cause why they should not proceed to hold the election for senators and representatives at the election to be held on the 8th day of November, 1892, under the apportionment as fixed by the Act of 1879, and that they be enjoined from proceeding under the Act of 1891, or the Act of 1885. Upon this complaint the court issued the alternative writ as prayed, to which writ the court overruled a demurrer interposed by the appellants, to which they excepted, and, failing and refusing to answer or plead further, a peremptory writ was ordered, and a decree entered enjoining the appellants from proceeding under either the Act of 1885 or the Act of 1891, above referred to.

The only causes of demurrer which need be considered in this opinion are two, namely: *First*, that the court has no jurisdiction of the subject-matter of the action; *second*, that

the facts stated in the alternative writ of mandamus, and the complaint filed in the cause, are not sufficient to constitute a cause of action. It is not claimed that the circuit court has no jurisdiction to issue writs of mandamus and to grant injunctions in all proper cases, nor is it claimed that this suit was not properly brought by the state on the relation of Powell against the appellants, but the contention is that the suit involves a political question, over which the courts have no jurisdiction. If this contention can be sustained, that is the end of the controversy, for this court will not attempt an adjudication in a matter over which it has no jurisdiction. A political question is one over which the courts decline to take cognizance, in view of the line of demarkation between the judicial branch of the government on the one hand and the executive and legislative branches on the other. *Am. & Eng. Encyclop. Law*, title, *Political Questions*. Such questions most generally arise when there is an attempt made to prevent the incumbents of either the legislative or executive department of the government from the performance of some act which such incumbent claims the right to perform by virtue of his office, or to compel him to perform some act which he declines or refuses to perform. Many illustrations of the rules by which such questions are governed are to be found in the adjudicated cases, among which are the cases of *Mississippi v. Johnson*, 71 U. S. 4 Wall. 475, 18 L. ed. 437; *Georgia v. Stanton*, 73 U. S. 6 Wall. 50, 18 L. ed. 721; and *Marbury v. Madison*, 5 U. S. 1 Cranch, 137, 2 L. ed. 60, cited by the appellants. In the latter case, John Adams, as president of the United States, in the last days of his administration, appointed Marbury to an office, and caused his commission to be made out, signed, sealed, and authenticated by the secretary of state, but the same had not been delivered when the administration expired. The new secretary, upon taking his office, refused to deliver the commission. Marbury thereupon applied to the Supreme Court of the United States for a mandamus to compel such delivery, and in argument it was contended on behalf of the defendant that the question presented was a political matter, for the sole determination of the president and his secretary, and in no sense a judicial question. It was declared by Chief Justice Marshall, in an elaborate opinion covering the whole ground, that the case presented a judicial, and not a political, question. The case of *Mississippi v. Johnson*, *supra*, was an effort on behalf of the state of Mississippi to enjoin Andrew Johnson, as president of the United States, and his officers and agents, appointed for the purpose, and especially E. O. C. Ord, assigned as military commander of the district of which that state constituted a part, from executing or in any manner carrying out two Acts of Congress, known as the "Reconstruction Acts," upon the ground that such Acts were unconstitutional. It was held that the bill tendered for that purpose presented a political question only, of which the court declined to assume jurisdiction; but the chief justice,

in the course of the opinion delivered by him in the case, took occasion to remark that "the Congress is the legislative department of the government; the president the executive department. Neither can be restrained in its action by the judicial department, though the acts of both, when performed, are, in proper cases, the subject of its cognizance." The case of *Georgia v. Stanton*, *supra*, was an action on behalf of that state to enjoin Stanton, as secretary of war, Grant, as general of the army, and Pope, major general, assigned to the third military district, consisting of the state of Georgia and other states, from carrying into effect the same Acts of Congress involved in the case of *Mississippi v. Johnson*. It was again held that the bill presented a political question only of which the courts could not assume jurisdiction. But in cases like the one now under consideration, where there is no effort to control in any manner the action of either of the other departments of the government, and where it is sought simply to determine the validity of an Act of the legislative department the decided weight of authority is, we think, to the effect that the question presented is not political, but judicial, and that the courts have jurisdiction. This question has been so fully discussed and decided by the Supreme Court of Wisconsin in the recent case of *State v. Cunningham* (Wis.) 17 L. R. A. 145; in the case of *State v. Cunningham*, 81 Wis. 440, 15 L. R. A. 561; and in the case of *Giddings v. Blacker* (Mich.) 16 L. R. A. 402,—that it would seem unnecessary to review it. It was determined in these several cases, which were all actions calling in question the validity of Apportionment Acts, that the question presented was a judicial question, of which the courts had jurisdiction, and such Acts were adjudged by the court to be invalid by reason of being in conflict with the Constitutions under which the Legislature attempted to apportion the state for legislative purposes. In holding that the court had jurisdiction, the courts did nothing more than follow a long line of precedents to their logical results, as shown by the authorities cited in support of their opinions. It has always been held by this court that it is its bounden duty, in all proper cases, to pass upon the validity of the Acts of the General Assembly, and to declare them void when in conflict with the Constitution of the state. Thus, as early as the case of *Rice v. State*, 7 Ind. 834, Justice Perkins said: "There are some propositions that may be regarded, we think, at this date, as being settled. Among them are these: That the Constitution of the state, relative to the Acts of the Legislature, is the paramount or supreme law. That, when the two conflict, the Acts of the Legislature must yield as utterly void. That it is the duty of the courts in every case arising before them for decision, to decide and declare the law governing the case. The duty of the courts to give construction to laws and to declare void or disregard, because not laws, those legislative Acts in conflict with the Constitution, grows, of necessity, out of the other

duty of declaring what the law is." To the same effect are *Campbell v. Driggins*, 88 Ind. 473, and *Cooley Const. Lim.* 45.

It is conceded, however, by the appellants as we understand them that there might arise a case in which the courts would have jurisdiction to declare a law apportioning the state for legislative purposes void, ss, where the General Assembly should form districts of counties not contiguous. If the courts have jurisdiction to declare an Apportionment Act void because it violates one provision of the Constitution, we are unable to perceive why they have not such jurisdiction where it violates some other provision. The Constitution forbids the formation of senatorial or representative districts of counties not contiguous. It is conceded that an Act which violates this provision would be declared void for that reason, and that the courts would have jurisdiction, in a proper case, to adjudicate the matter. If the General Assembly should district the state in such a manner as to apportion to the south half ninety representatives and to the north half ten only, no one would doubt that this would be as plain a violation of the Constitution as where it forms districts of counties not contiguous. What good reason can be given for holding that the courts may take jurisdiction in the one case and denying such jurisdiction in the other? It will not do to say that the courts have no jurisdiction in the latter case because the General Assembly has a discretion in the matter of districting the state, for it cannot be successfully maintained that the incumbents of any department of the government have a discretion to disregard the Constitution of the state. We think if the courts have jurisdiction in the one case they also have it in the other. We do not mean by this to be understood as holding that the courts have the power to interfere in any matter confided to the discretion of either the legislative or executive departments of the government. No court in the Union has maintained more vigorously than this the independence of the three several departments of the state government. *State v. Noble*, 118 Ind. 850, 4 L. R. A. 101; *Hovey v. State*, 127 Ind. 588, 11 L. R. A. 763. But it is safe to say that, where the act of either of the three departments is in violation of the Constitution of the state, such act is not within the discretion confided to that department. That the General Assembly has some discretion in the matter of districting the state for legislative purposes there can be no doubt, and there can be as little doubt that, where it acts within this discretion, the courts have no power to interfere. If it should be found, upon examination, that the several Acts of the General Assembly of which complaint is made in this action are within the discretion confided to the legislative department of the state, that will be the end of this investigation; for we have no power, much less the inclination, to interfere with such discretion. Nor are we able to perceive how such cases as that of *Smith v. Myers*, 109 Ind. 1, and *Hovey v. State*, 127 Ind. 588, 11 L. R. A. 763, can affect the question now under consideration. If this were a case in which

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the appellee sought to compel the General Assembly to district the state in a particular manner, or even to act at all in any manner whatever, then this line of authorities would be applicable, and by reason of the independence of the several departments of the state government we would hold without hesitation that we had no jurisdiction over the matter. The courts have no power to district the state for legislative purposes. That duty belongs to another department. The most the courts can do is, in a proper case, to pass upon the validity of a law enacted for that purpose, and, if such law is found to be in conflict with the Constitution of the state, declare it invalid, leaving the Legislature free to enact one that does conform to the Constitution. This is quite a different thing, we think, from undertaking to control legislative action or discretion. Our opinion is that the question presented by the record in this case is judicial, and not political. The case of *People v. Rice* (N. Y.) 16 L. R. A. 886, recently decided by the Court of Appeals of the state of New York, was an action brought to test the constitutionality of an Act of the General Assembly of that state dividing it into districts for senatorial and representative purposes. The court assumed that the questions presented were judicial, and not political, and proceeded to adjudicate upon the validity of the law. The conclusion at which we have arrived in this case is in accord with all the authority to which our attention has been called, except the case of *Wise v. Biggs*, 79 Va. 269, in which the validity of an Act of the General Assembly of that state, creating districts for representatives in Congress was called in question. All that was said by the learned judge who wrote the opinion in that case at all pertinent to the question involved in this case was that "the laying off and defining of the congressional districts is the exercise of a political and discretionary power of the Legislature, for which they are amenable to the people, whose representatives they are." This would be literally true in the absence of some constitutional provision requiring the districts to be formed in some particular manner. The opinion cites no authority to the rule thus announced, nor does the judge who delivered it give any argument in its support; but, if it is to be construed as holding that all Apportionment Acts are but the exercise of a political or discretionary power, it is in conflict with the great weight of authority, and cannot be followed.

We approach the other questions in the case with much reluctance, and with a full sense of their gravity. Courts always approach questions involving the validity of statutes reluctantly, and out of this reluctance have grown two well-known rules: *First*, that the court will never decide a question involving the constitutionality of a statute if the merits of the case in which it is involved can be determined without such decision; and, *second*, the court will never declare a statute unconstitutional where there is any doubt upon the subject. To doubt the validity of a statute is to resolve in favor

of its constitutionality. *Warren v. Britton*, 84 Ind. 14; *Campbell v. Dwiggin*, 88 Ind. 473; *Mays v. Tippy*, 91 Ind. 102. The chief object of this suit is to secure a decision upon the question of the constitutionality of the several Acts of the General Assembly referred to in the complaint. The question is presented in the same manner as the question was presented in the case of *Giddings v. Blacker*, *supra*, and in the case of *People v. Rice*, *supra*. The case of *Giddings v. Blacker*, was an action to enjoin the secretary of state of the state of Michigan from taking the necessary steps to hold an election for state senators under an Apportionment Act approved in the year 1891, upon the ground that such Act was unconstitutional, and to compel him by mandamus to proceed under an Apportionment Act approved in the year 1885. The case of *People v. Rice*, was an action to enjoin the proper officers of the state of New York from proceeding to the election of senators and representatives under an Apportionment Act approved in the year 1892, upon the ground that such Apportionment Act was unconstitutional, and to compel them by mandamus to proceed to such election under an Apportionment Act approved in the year 1879. In each of these cases it seems not to have been doubted that the question of the validity of these several Acts was presented in such a form as to require a decision upon that point. So in this case we are unable to perceive how the merits of the controversy are to be determined without a decision upon the question of the validity of the Apportionment Law of this state passed in the year 1891. Should we reach the conclusion that this Act is not unconstitutional, it will not be necessary to pass upon the validity of the other Acts; but should we decide it invalid, then, in determining whether the appellee was entitled to the relief demanded, it would become necessary to pass upon the validity of the Act of 1879; and, if that is found valid, the question of the constitutionality of the Act of 1885 arises. If the Act of 1891 and the Act of 1879 are both unconstitutional, the appellee was not entitled to the relief sought, and the question of the validity of Act of 1885 is not involved in such a way as to require a decision upon the question of its constitutionality. Assuming, therefore, that the question is presented in such a manner as to require a decision, we proceed to an examination into the several provisions of what is known as the "Apportionment Act of 1891," and to a comparison of such provisions with the sections of our state Constitution with which it is claimed they conflict. Before such comparison can be had it is necessary to set out and analyze the provisions of the Constitution upon the subject of apportioning the state for legislative purposes.

Section 2, art. 4, provides that the Senate shall not exceed fifty, nor the House of Representatives 100, members, and that they shall be chosen by the electors of the respective counties or district into which the state may from time to time be divided. Section 4 of the same article provides that the General Assembly shall, at its second session after the adoption of the Constitution, and every

six years thereafter, cause an enumeration to be made of all the male inhabitants over the age of twenty-one years. Section 5 provides that the number of senators and representatives shall, at the session next following each period of making such enumeration be fixed by law, and apportioned among the several counties according to the number of male inhabitants above twenty-one years of age in each, provided that the first and second elections of members of the General Assembly under the Constitution shall be according to the apportionment last made by the General Assembly before the adoption of this Constitution. Section 6 provides that "a senatorial or representative district, where more than one county shall constitute a district, shall be composed of contiguous counties; and no county, for senatorial apportionment, shall ever be divided." We think it was the intention of the constitutional convention to secure to the electors of the state, by the provision above referred to, an equal voice, as nearly as possible, in the selection of those who should make the laws by which they were to be governed. The General Assembly has no discretion, in our opinion, to make an apportionment in disregard of the enumeration provided for by the Constitution. The enumeration required is not of the citizens generally, but of the inhabitants authorized to vote; and, unless the General Assembly is to be governed by the enumeration, when made, in the matter of districting the state for legislative purposes, the enumeration is a useless ceremony, and an unnecessary expense. The purpose in requiring the enumeration is to fix the number of voters in each county at the time the apportionment is made, in order that the Legislature may form districts so as to secure to each voter, as nearly as may be, an equal voice with every other voter in the state in the selection of senators and representatives. The cardinal principle of free representative government, that the electors shall have equal weight in exercising the right of suffrage, is recognized and secured. Representation according to the population is the rule fixed by these several provisions of our Constitution, and the General Assembly has no more discretion, in our opinion, to disregard this rule, than it has to disregard any other plain provision found in that instrument. The enumeration at the short period of six years was intended to secure a readjustment and correction of the inequalities that might arise from the growth and shifting of the population within that period. In argument it seems to be agreed that it was the intention to provide that in making an apportionment among the several counties for legislative purposes the integrity of the counties, when possible, should be preserved. This we think, is true, and when that is done it is plain that exact equality cannot be secured. But because exact equality is not possible the General Assembly is not excused from making such an apportionment as will approximate that equality required by the organic law of the state. A question somewhat similar to the one now under discussion arose in the Congress of the United States in the year 1832, relative to the

construction to be placed upon section 2, art. 1, of the Constitution of the United States, which provides that "representatives and direct taxes shall be apportioned among the several states which may be included within this Union according to their respective numbers," etc. The committee to whom was referred the question as to what the constitutional method of apportioning unassigned representatives as between the states having fractions of population less than a full ratio was of the unanimous opinion that the loss of members arising from the residuary numbers should be made by assigning as many additional members as are necessary for that purpose to the states having the largest fractional remainders. Upon that occasion Mr. Webster said: "The Constitution, therefore, must be understood not as enjoining an absolute relative equality, because that would be demanding an impossibility, but as requiring Congress to make an apportionment of representatives among the several states according to their respective numbers, as nearly as may be. That which cannot be done perfectly must be done in a manner as near perfection as can be. If exactness cannot, from the nature of things, be attained then the nearest practicable approach to exactness ought to be made. Congress is not absolved from all rule merely because the rule of perfect justice cannot be applied. In such a case, approximation becomes a rule. It takes the place of the other rule, which would be preferable, but which is found inapplicable, and becomes itself an obligation of binding force. The nearest approximation to exact truth or exact right, when that exact truth or exact right cannot be reached, prevails in other cases, not as matter of discretion, but as an intelligible and definite rule, dictated by justice, and conforming to the common sense of mankind; a rule of no less binding force in cases to which it is applicable, and no more to be departed from, than any other rule." The rule recommended by this committee was subsequently adopted by Congress, so that representatives are now apportioned among the several states of the Union under it as a fixed and binding obligation. The rule here announced is, we think, the true one. When it is found that exact equality cannot be attained, where the integrity of the counties is preserved, approximation becomes a rule as binding upon the General Assembly as any other rule fixed by the Constitution. It is said, however, that as to the fractions of the representative unit the Constitution is silent, and that, therefore, the General Assembly has a discretion to provide for the representation of such fractions, or to leave them unrepresented. That is true in a limited sense only. The Constitution requires that the state shall be reapportioned every six years according to the male inhabitants over the age of twenty-one years in each county. It contemplates the formation of districts, each embracing, as nearly as possible, an equal number of the electors of the state. But the rule requiring an approximation to equality forbids the formation of districts containing large fractions unrepresented, where it is

possible to avoid it, while other districts are largely overrepresented. That the General Assembly has much discretion in the disposition of the fractions of the unit of representation cannot be doubted, but it is not a discretion beyond control. In so far as the Constitution secures equality in representation, it is not silent as to the disposition of fractions, and the Legislature must dispose of them with a view of securing that end; otherwise an apportionment could be made which would give to one portion of the state nearly double the representation given to other portions. Constitutional provisions are seldom, if ever, to be construed as merely directory. It may be that a General Assembly could make a valid apportionment when none existed at a time different from that fixed in the Constitution, for the reason, as held in the case of *People v. Rice, supra*, that there is a continuing obligation resting upon it to do so; but, however this may be, we have no doubt that our constitutional provisions relating to the manner of making an apportionment of the state for legislative purposes are mandatory. Cooley, Const. Lim. 6th ed. 98.

With these constitutional rules constantly in mind we proceed to test the Act of the Legislature under immediate consideration by them, with a view of determining its constitutionality. It is alleged in the complaint, and admitted to be true by the demurrer, that under the apportionment for legislative purposes as fixed by this Act forty-three counties of the state are formed into twenty-two districts, to each of which one senator is apportioned. Eleven of these districts, composed of twenty-three counties, contain, by the enumeration of 1889, 148,496 male inhabitants over the age of twenty-one years, while the other eleven composed of twenty counties, contain only 99,609 such inhabitants. It is thus shown that in a voting population of 248,105 there is a difference in favor of eleven districts as against the other eleven named of 48,887. We must take notice of the geography of the state, as well as of the enumeration of 1889, taken pursuant to law; and with such notice we doubt whether any one can be found so bold as to maintain that this apportionment approximates equality, or that equality cannot be much more nearly attained. It further appears that the counties of Brown and Clark are each contained in two separate senatorial districts. Brown county is in the senatorial district composed of the counties of Brown, Monroe, and Bartholomew. It is also in the senatorial district composed of the counties of Brown, Morgan and Johnson. Clark county is in the senatorial district composed of the counties of Clark, Scott, and Jennings. It is also in the senatorial district composed of the counties of Clark and Jefferson. The number of male inhabitants over the age of twenty-one years in Brown county, as shown by the enumeration of 1889, is only 2,832, while the number of such inhabitants in Clark county, as shown by the same enumeration, is only 7,304. The senatorial unit or number required to entitle a district to one senator, under this law, is 11,020.

Brown county, under the apportionment as fixed by this law, with a voting population of 8,688 less than the senatorial unit, votes for two senators; while Clark county, with a voting population of 8,716 less than the unit, does the same thing. Many other counties in the state, with four times the voting population contained in Brown county, vote for one only. In our opinion, under the constitutional provisions above referred to, requiring equality in representation, no scheme for senatorial districts could be devised in which a county with a population no larger than contained in Brown county could legally be entitled to vote for two senators. When a county of that size has been assigned to a senatorial district, and given a voice in the election of one senator, it ceases, in our opinion, to be a factor in any legitimate scheme of apportionment for senatorial purposes. At the time our Constitution was formed the convention had before it the history of the famous Apportioning Law of Massachusetts, passed on the 11th day of February, 1812, from which the word "gerrymander" originated. It is fair to presume that they had learned of the evils resulting from such a law, and that "the death and burial of this monster in the year of 1814 was celebrated throughout the country in prose and verse."

By the provisions of our Constitution prohibiting the division of counties in the formation of senatorial districts, and requiring equality in representation, it is plain, we think, that the convention intended to put it beyond the power of the General Assembly to form districts upon the principle contained in the Massachusetts law. The two senatorial districts of which Brown county forms a part are constructed upon the same principle as the Apportionment Law above mentioned, with the single exception that the integrity of counties is preserved. If Brown county, with its small population, may be included in two senatorial districts, it may be included in four, and thus given a voice in the selection of four senators. The same is true of Clark county. With a large number of other counties in the state, containing much larger population restricted to a vote for one senator only, this cannot be said to be equality. The counties of Brown and Clark are entitled to an equal voice in the selection of senators, considering their population, with other counties in the state, and no more. So much of the Act as gives to each of these two counties a voice in two separate senatorial districts is, in our opinion, in plain violation of the provisions of our Constitution. Under this law, the unit for a representative is 5,510. Jay county, as shown by the enumeration of 1889, has 5,823 male inhabitants over the age of twenty-one years. It is denied a separate representative. As we have seen, it is agreed in argument that the constitutional provisions above set out were intended to secure the integrity of the counties. Jay county, having more than the representative unit was, we think, entitled to a separate representative, and it was not within the power of the General

Assembly to deprive it of such representative. This would seem too plain for argument. The three representative districts composed respectively of the counties of Clinton, Tipton, and Madison, the counties of Floyd, Harrison, and Crawford, and of the counties of Putnam, Clay, and Montgomery, cannot be sustained. Each of the counties of Tipton, Harrison, and Putnam has less than the unit of representation, and each is given a separate representative. They were not entitled to further consideration or representation. The formation of these districts was an attempt to do indirectly that which could not be done directly, namely, form districts of counties not contiguous. By the same process, if it were permissible, the county of Marion could be made contiguous to the county of Vanderburgh, and that, too, notwithstanding every county intervening between the two is fully represented. Counties fully represented cannot, in our opinion, be used for the purpose of joining counties which are not otherwise contiguous. There are found in this Act many other violations of the rule of equality in representation as fixed by the Constitution, especially in the formation of representative districts, but we deem it unnecessary to extend this opinion by setting them out. We have been asked to examine and compare the Act now under consideration with other Acts of the General Assembly dividing the state into districts for legislative purposes, which we have cheerfully done. Such examination only serves to confirm a well-known historical fact; that is, that as each party succeeded to power in the state it endeavored to so district it for legislative purposes as to retain that power, and that, too, very often in total disregard of the Constitution of the state, demanding equality in representation. The rule of practical construction is of no value when it is plain that the practice has been in open violation of the instrument which the court is called upon to construe.

Our conclusion is that the Act of the General Assembly passed on the 5th day of March, 1891, notwithstanding the governor's veto, purporting to redistrict the state for legislative purposes, is in conflict with the Constitution of the state, and for that reason is void. Nor do we apprehend that from this conclusion the disastrous consequences predicated in argument will follow. The office of senator, as well as the office of representative, is not a statutory office, but an office created by the Constitution of the state. It is true that the number is fixed by Act of General Assembly, but this is also true of the circuit judges in the state. This fact does not change the nature of the office, and it is, for this reason, none the less a constitutional office. It seems to be well settled that, where one is elected or appointed to an office under an unconstitutional statute, before it is adjudged to be so, he is an officer *de facto*. Throop, Pub. Off. §§ 628-637; Mechem, Pub. Off. § 818; *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409; *Brown v. O'Connell*, 36 Conn. 432, 4 Am. Rep. 89; *Meagher v. Storey Co.* 5 Nev. 244; *Ex parte*

Strang, 21 Ohio St. 610; *Com. v. McCombe*, 56 Pa. 436; *State v. Bloom*, 17 Wis. 521; *Kirker v. Cincinnati*, 48 Ohio St. 507.

The rule that the acts of an officer *de facto*, performed before ouster, are, as to the public, as valid as the acts of an officer *de jure*, is too familiar to the profession to need the citation of authority. The public is not to suffer because those discharging the functions of an officer may have a defective title, or no title at all. *Case v. State*, 69 Ind. 46; *Blackman v. State*, 12 Ind. 556; *Bansmer v. Mace*, 18 Ind. 27, 81 Am. Dec. 344; *Mowbray v. State*, 88 Ind. 824. If at the next ensuing election the state is without a valid law creating senatorial and representative districts under the enumeration of 1889, the responsibility must rest with the legislative, and not with the judicial, department of state government. The Apportionment Act of 1879 requires separate consideration, for the reason that its provisions are, in many respects, quite different from the Act of 1891. While it differs materially from the latter in many respects, an examination will disclose the fact that it disregards, unnecessarily, the principle of equality in representation required by our Constitution. It is subject to many of the constitutional objections urged against the Act of 1891, but, as it is not at all likely there will ever be another effort to enforce it, no useful purpose would be subserved by setting them out in detail. It is sufficient to say that, in our opinion, the Act of 1879 is void for the same reason given as to the invalidity of the Act of 1891. The complaint in this case proceeds upon the theory that the appellee is entitled to have senators and representatives elected under the Act of 1879. He must succeed upon this theory, if he succeeds at all. *Indianapolis First Bank v. Root*, 107 Ind. 224; *Western U. Teleg. Co. v. Young*, 93 Ind. 118; *Chicago, St. L. & P. R. Co. v. Bills*, 104 Ind. 18. The demurrer filed by the appellants necessarily calls in question his right to the relief sought. As the Act of 1879 is unconstitutional, the appellee was not entitled to the relief he sought in this action, and for that reason the court erred, we think, in overruling the demurrer filed by the appellants. This being true, the Apportionment Law of 1885 is not in question in such a manner as to require a decision as to whether it is valid or invalid. The court being able to decide the case upon its merits without a consideration of the Act of 1885, the rule that the courts will not consider a question of the constitutionality of the statute except when it is necessary to a decision of the cause under consideration applies in this case with all its force. The Apportionment Law of 1885, under which the intervenor, Chandler, was elected as a member of the state Senate, not being involved in this suit, he has no personal interest in this controversy. The adjudication in this case can in no wise affect his right to hold the office to which he was elected.

For the error of the court in overruling the demurrer of the appellants to the alternative writ of mandate, the judgment of the Henry circuit court must be reversed.

18 L. R. A.

Judgment reversed, with directions to the circuit court to sustain the demurrer of the appellants to the alternative writ of mandate.

Elliott, J.:

In much of the reasoning of the principal opinion I unreservedly concur, and to many of the propositions unqualifiedly assent, but from so much of the opinion as proceeds upon the theory that questions, as to the construction of the constitutional provisions relative to the apportionment of the state for legislative purposes, and as to the validity of the Act of 1891, are properly before us, I am compelled to dissent. It is proper to say at the outset that I neither affirm nor deny the correctness of the construction placed upon the Constitution, nor do I either affirm or deny the validity of the conclusion that the Act of 1891 violates the provisions of that instrument. I simply affirm that long-settled principles forbid us from giving judgment upon such questions. It is my purpose to state and develop, as briefly as the nature of the questions which I conceive are properly before us will permit, the reasons which control my judgment, using only such authorities as are near at hand, and not attempting to elaborate the propositions I state by extended argument or illustration.

1. The relator's complaint rests entirely upon the theory that the Act of 1879 is valid; but, if he is right in the grounds upon which he assails the subsequent Acts, that Act is as bad as any of the others; hence he has no standing in court, as he himself makes evident; and when we have adjudged that he has no standing in court, we have decided all questions properly in the case, except jurisdictional ones, so that we cannot properly or authoritatively give judgment upon the validity of subsequent legislative enactments. The relator is involved in a fatal dilemma. If the Acts of 1885 and 1891 are valid, he can have no relief; if they are void, so, also, is that of 1879; so that, whether the Acts of 1885 and 1891 are valid or void, he can have no relief, and in either event he must utterly fail. The Act of 1879 being void, according to the relator's own theory, he has, as he himself demonstrates, no fulcrum capable of supporting a lever for the overthrow of subsequent legislative enactments, and hence all that we can decide beyond jurisdictional questions, without transgressing settled principles, is that, by his own averments, his case is foundationless. Such a decision ends the case, and we cannot with propriety consider other questions, except jurisdictional ones, and certainly not high and grave constitutional questions. If the system which the relator avers is in conflict with the Constitution is to be smitten to its death by the courts, it must be at the suit of one who assails all the legislative Acts founded on that system, for it cannot be done at the suit of a party who demands that one of the Acts resting on that system be upheld and the others destroyed. The relator is the actor, and is bound to make a case rendering it imperatively necessary to decide the constitutional questions he assumes to present, and he must succeed

upon the strength of his own case or fail, for he cannot succeed upon the weakness of his adversary's. The Act of 1879, is, according to his own theory, as full of evil as those he assaults, so that, if one goes down, so must all; and with the fall of the Act of 1879 ends the relator's case. It would be strange, indeed, if one of several Acts resting upon the same system should be upheld and the others cast down; and stranger still if that should be done where the one rescued from condemnation contains more of evil than those condemned. One who secures or demands a benefit under an unconstitutional Act is estopped to assert its invalidity. *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187. See also authorities collected in Elliott, *Roads & Streets*, note 2, p. 422. "Like reason doth make like law," and the reason of the cases referred to warrants the conclusion that the relator cannot be heard to deny the validity of the Acts of 1885 and 1891, while demanding relief upon an earlier Act, subject to the same objections as the Acts he seeks to have overthrown. It cannot be necessary to decide upon the validity of any of the Acts, since all that is proper to do is to accept the relator's own theory, and to do this is to end the pending case.

2. Courts will not send against public officers the extraordinary writ of injunction or of mandamus unless the complainant makes it appear that the writ will be effective in the particular case in which it is demanded. A writ issued in a case where it cannot be effective goes forth without power, and comes back unobeyed. Courts do not require parties to do fruitless acts, and they will not themselves do what they will not require of parties. A writ that will be unavailing will not be issued, since to issue it would be an idle ceremony. *Smith v. Myers*, 109 Ind. 1, 6. I fully concur in the conclusion contained in the very able opinion of my Brother Coffey, that the relator is not entitled to the writ of mandamus, because he himself adopts a theory which affirms that the legislative enactment on which he rests his complaint is void; but I think that when the conclusion that he is not entitled to the writ is reached it follows, as an inevitable sequence, that questions involved in the contention that the Acts of 1885 and 1891 are void cannot be considered or decided, inasmuch as the decision of such questions is not necessary to a final disposition of the case.

3. If the relator has a right to a decision upon the constitutionality of the Act of 1891, and if that Act be adjudged void, then it is necessary to determine what one of the Apportionment Acts enacted since the adoption of the present Constitution is valid; but, the relator having placed his asserted right of action solely upon the Act of 1879, and having by his own theory shown that Act to be void, he has no right to demand that the court point out what Act is valid, or declare under what Act legislative elections shall be held. The relator cannot successfully give a protean character to his complaint, and assert that, if it is not good because founded on the Act of 1879, it may

nevertheless be good upon the ground that somewhere (where he does not say) in the long series of Apportionment Acts there is to be found an Act authorizing an effective legislative election. A complainant must construct his pleading on a definite theory, and on that theory it must state a cause of action, or it will be incurably bad. The complaint in this case is, as we all agree, bad upon the theory that the relator has a right to a writ coercing the election officers to proceed under the Act of 1879, so that it is self-destructive; and when this is adjudged there is no necessity for considering questions affecting the validity of the Acts of 1885 or 1891. If, however, it be conceded that it is necessary to decide such questions, and to adjudge either of those Acts void, then it is indispensably necessary to designate a valid law, either in the statute or the Constitution, under which legislators can be chosen; for it is inconceivable that no law exists providing for legislative elections. If the hypothesis involved in the provisional concession be granted to be correct, and the court assumes to enter the field covering the Acts of 1885 and 1891, it must, as a matter of judicial knowledge, take notice of all the statutes upon the subject, and fix upon a valid one, if any such can be found, or else declare that no such Act exists, and travel back to the apportionment made by our present Constitution, for it can hardly be possible that the court can enter the field containing the Acts of 1885 and 1891, strike down the latter Act, and yet not determine under which law the legislators can be elected. As well send men out upon an unknown sea without a compass as to adjudge the Act of 1891 void, and yet not adjudge what law is valid; for without the designation of a valid Act the electors and their officers would be entirely without guidance, and utterly at a loss to know under what law to proceed. It cannot be reasonably expected that the electors or their officers can find such a law where the search of the highest court of the state proves unavailing. But the concessions which require the hypothesis indicated, and lead to the consequences suggested, cannot, as I am convinced, be made, for the relator, having singled out as the sole support of his case one Act of the Legislature, has not the semblance of right to require the court to hunt for some other Act, and pronounce it valid. There is neither principle nor precedent that will authorize, much less justify, us in entering the field in which lie the Acts of 1885 and 1891. It is evident that when it is adjudged, as it certainly must be, that the relator's own theory gives the death blow to his asserted right of action, a final disposition of the case is made, and hence we cannot, without a direct violation of the well-known rule outlined in my fourth proposition, consider any of the questions made upon the Acts of 1885 or 1891.

4. The inexorable rule is that constitutional questions will never be decided unless their decision is indispensably necessary to a final disposition of the case actually before the court. The general doctrine outlined in

the proposition stated is asserted in the principal opinion, but the course of my discussion requires its restatement, although, as to the existence of the general principle, there is substantial harmony of opinion. I am, however, forced to the conclusion that the principle has not been given its necessary effect or just application. The principle is deeply rooted in the law, and has stood unchallenged by denial and unshadowed by doubt since the first authoritative declaration by the Supreme Court of the United States of the power and duty of the judiciary to give judgment upon the constitutionality of legislative enactments. Cooley, Const. Lim. 8th ed. 196. This principle as firmly fetters the action of the courts as does the Constitution the action of the Legislature. The principle is one which, for obvious reasons, that have been often given, is to be implicitly obeyed; and to obey it in this case it is absolutely necessary to decline to consider questions involving the validity of the Acts of 1885 and 1891, as well as questions respecting the construction of the provisions of the Constitution governing the subject of the apportionment of the state for legislative purposes. An incidental rule necessarily involved in this principle, and clearly resulting from it, is this: Constitutional questions will not be decided unless the party demanding their decision makes it evident that he has a right to require the court to decide them. To me it seems very clear that the relator has shown no such right. He falls far short, indeed, of showing such a right, for he has shown that there is no necessity for deciding the constitutional questions he professes to present, and shown, too, that his own standing is such that those questions cannot be considered without violating fundamental principles.

5. The decision of the question involved in the contention that the court has no power to give judgment upon an Act making an apportionment for legislative purposes is essential, inasmuch as the decision of that general question determines the right of the court to assume jurisdiction. The court must meet and decide the general question stated, for if it has no right to assume jurisdiction it can do nothing more than direct a dismissal of the suit, for it is established and elementary law that where there is no jurisdiction of the general subject there can be no effective judgment beyond a mere direction to the trial court to dismiss the proceeding. *Robertson v. State*, 109 Ind. 79.

6. The court has power to give judgment upon the constitutionality of an Apportionment Act when the question of its constitutionality is necessary to a decision of the case at its bar, and the question is presented by a party in a position to present it, and who does so present it as to make it the duty of the court to decide it. The power to adjudge invalid such legislative Acts as violate the provisions of the Constitution is an element of sovereignty, and is vested in the judiciary. It would be the surrender of a high constitutional power, that neither principle nor precedent will justify or excuse, to decline to give judgment upon the valid-

ity of an Apportionment Act, when properly presented, and necessary to a decision of a case brought to the bar of the court. Such a surrender would involve a breach of duty so flagrant that the most stinging rebuke would fall far short of an adequate condemnation of a court that would so grossly violate the trust imposed upon it by the Constitution. In a government of distributed powers, such as ours is, the power to adjudge Acts void that conflict with the Constitution must necessarily reside elsewhere than in the lawmaking department; otherwise all governmental power would be unified and solidified in that department, and it would be the uncontrolled and absolute master and arbiter in all governmental affairs. If there be no such power in the judiciary, the constitutions of the nation and state are in their widest scope and minutest details mere mockeries. But the power does reside in the judiciary, and it was placed there in the strongest terms by men who knew the science of government in all its parts; and there it will remain as long as free government endures. One of the first things a student of our system of government learns is that it is a system of checks and balances. One of the principal checks upon legislative power is the authority of the court to enforce obedience to the mandates of the Constitution by adjudging void enactments which conflict with its provisions. History proves and experience demonstrates the necessity of such a check, for without it the legislative department arrogates to itself every substantial governmental function and power that it can grasp. Reckoned as the lives of nations are reckoned, it is but a short time since Edmund Burke, in his splendid eulogy on the English governmental system, declared that there were three constitutional departments, forming, as he said, "the triple cord which no man can break; the solemn, sworn, constitutional, frankpledge of this nation; the firm guaranties of each others' being and each others' rights; the joint and several securities, each in its place and order." When Edmund Burke spoke of the system existing at the time he wrote he was right, but his forecast of the future was wrong, for man has broken the "triple cord," and the England of our day has only one department of government. Parliament is supreme, and elsewhere there is not a spark of real power. The officers of the kingdom, from the wearer of the crown down to the tipstaff, are mere servants and departments of parliament. The change wrought by legislative usurpation and encroachment justifies the statement of Mr. Bagehot that "a legislative chamber is greedy and covetous. It acquires as much, it concedes as little, as possible. The passions of its members are its rulers; the law-making faculty, the most comprehensive of the imperial faculties, is its instrument. It will take the administration if it can take it." Eng. Const. Am. ed. 95. The great men who framed our constitutional system knew and provided against the dangers of legislative usurpation of power, and the wisest among them united in devising checks upon it. The declarations of Madison and

Washington are strong and clear, and no reader of history can misunderstand their meaning, or doubt their purpose. Jefferson thus expressed his conviction: "An elective despotism was not the government we fought for, but one which should not only be founded on free principles, but one in which the powers of government should be so divided and balanced among several bodies of magistracy as that no one should transcend their legal limits without being effectually checked and restrained by others." "To preserve these checks," said a greater thinker than Jefferson, "must be as necessary as to institute them." Washington's Farewell Address.

The assertion of the power of the judiciary in the principal opinion is not, as I believe, too strong, for I do not doubt the power or the duty of the court to preserve these checks by standing immovably against legislative encroachment, nor do I doubt that the duty is as clear where Apportionment Acts are involved as in cases concerning other Acts. To me it seems that the duty is, if possible, higher and sterner in such cases than in any others, for, if unconstitutional Apportionment Acts are conceded to be beyond the domain of the judiciary, then the legislative power is absolutely unlimited and unfettered, and a legislative body would be at full and unrestrained liberty to enact measures perpetuating its own existence and augmenting its own power. Constitutional limitations are imposed to prevent unrestrained legislative action, and are intended to guard against legislative usurpation. They operate upon all subjects of legislation except subjects of which the legislative department is expressly or by clear implication given exclusive control. Questions of a judicial nature are in a very few instances made exclusively legislative by the Constitution, and as such instances the judiciary cannot interfere with the legislative decision: but there is not the remotest suggestion in that instrument that the validity of an Apportionment Act is a question for the decision of the Legislature; on the contrary, the whole force of that instrument is directed against the assumption by the Legislature of authority over such question. An Apportionment Act, which violates the provisions of the Constitution, can no more become a law than can an unconstitutional Act upon any other subject; nor has it any peculiar virtue or sanctity that lifts it above the power of the judiciary. The Constitution is the touchstone for all legislative enactments, no matter what subject they may embrace or what object they may be intended to attain. An Act that fails when brought to this universal touchstone must be condemned, whether it be an Act providing for the election of legislators or an Act providing for the election of petty township officers. The Constitution makes no discrimination between classes of general legislative enactments, and until the people, in the mode they have themselves prescribed, change their Constitution, no earthly power can make such a discrimination, and place some general enactments within the domain of the

judiciary and take others out of it. In affirming, as I do, quite as fully and strongly as is done in the principal opinion, the power and duty of the court to entertain jurisdiction of questions affecting the validity of Apportionment Acts, when duly presented and absolutely necessary to a decision of the particular case, I do not by any means concede that such questions can be considered where they are not properly presented by a party having a right to present them; nor do I by even the remotest implication concede that such questions can be considered in a case that can be disposed of upon other grounds; for it is one theory to affirm that general jurisdiction exists and quite another and radically different thing to affirm that, because jurisdiction of the general subject exists, specific constitutional questions can be decided. I concur in the conclusion that the judgment below must be reversed, but, as I have endeavored to show, the grounds upon which my opinion rests are in some respects different from those of the court.

Olds, J.:

I concur in the principal opinion in this case. In my opinion, it properly and legitimately expresses an opinion on the question of the constitutionality of the two Acts of the Legislature, viz., the Acts of 1879 and 1891. To decide the case it is absolutely necessary to determine the constitutionality of these Acts, or at least one of them. While it is true the appellee must fail whether the Acts are valid and constitutional or unconstitutional and void, yet to dispose of the case the court must determine whether these Acts are valid or void; and, being compelled to determine the question as to their validity, the court should in all fairness express an opinion disclosing upon what theory the opinion rests,—whether upon the grounds that the Acts, or either one or both of them, are valid or void.

A petition for rehearing was subsequently filed in response to which on January 27, 1893, **Howard, J.**, delivered the following opinion:

The attorney-general has filed a petition, which is supported by briefs, for the rehearing of this cause. His petition, as the chief law-officer of the state, and because of the importance of the questions involved, is entitled to the gravest consideration.

A petition for rehearing is a request to the court to revise its own action, by correcting errors and modifying or setting aside its judgment. The Statute, section 662, Rev. Stat. 1881, provides that at any time within sixty days after the determination of a cause, either party may file a petition for a rehearing. The question at the outset therefore is, whether the attorney-general is himself a party to this action, or whether he represents such party.

Besides the special duties of the attorney-general provided for in various statutes, his general duties are named in sections 5659 and 5666 of the Revised Statutes of 1881. Section 5659 provides that "such attorney-gen-

eral shall prosecute and defend all suits that may be instituted by or against the state of Indiana, the prosecuting or defending of which is not already provided for by law, whenever notified ten days of the pendency thereof by the clerk of the court in which such suits are pending, and whenever required by the governor or a majority of the officers of state, in writing, to be furnished him within a reasonable time, for the purpose therein contemplated. And he shall prosecute and defend all criminal or state prosecutions that are now or hereafter may be pending in the supreme court of the state of Indiana."

This is not a suit by or against the state, although it is prosecuted by a relator in the name of the state. It is a suit for mandate, which is already provided for by law. Neither has the governor, nor a majority of the state officers, nor any clerk of a court, required or notified him to prosecute or defend in the case. Neither is it a case in which any criminal or state prosecution is pending in the supreme court. Section 5666 provides that "the attorney-general shall be required to attend to the interests of the state in all suits, actions, or claims in which the state is or may become interested in the supreme court of this state." By this section he is made the law officer of the state in all matters before the supreme court in which the state has interests involved. This raises the question as to the interests of the state in this action, and particularly as to whether she is a party to it. The interests of the state here concern the constitutionality of a law affecting the membership of the legislative department of the state government. We can hardly conceive of any suit before the court which could be of greater interest to the state, and it is eminently proper that the attorney-general should attend to those interests. This the court recognized in granting leave to the attorney-general to appear in the case in the order heretofore made as follows: "It further appearing to the court that the matters involved in said cause are such as affect the entire people of the state, and are of great importance, it is ordered that leave be granted to the attorney-general of the state to appear in behalf of the people and to take such steps as he may deem necessary to aid the court in reaching a just determination thereof."

This order of the court and the active participation of the attorney-general in the proceedings in appeal are in full harmony with the spirit of the statute. But did this appearance, or the order of the court, or the grave interests of the people in the case constitute the state a party? The order of the court could not make one a party who was not already a party in reality. It could only admit one to be a party who was already in fact and in law a necessary or a proper party to the suit. Could the important interests of the people make the state such a party. The people of the state are vitally interested in the decision of the constitutionality of every general law that comes before the court, but we should not for this reason say that the state should be a party to every suit that

involved the constitutionality of a law of the state. It is the duty of the attorney-general to attend to the interests of the state when involved in a matter before the court. He comes there as an officer of the state to advise one of the three departments of the state government in such manner "as he may deem necessary to aid the court in reaching a just determination" of the matters that concern the interests of the state. The parties are already before the court, but as we think neither the state itself, nor the attorney-general as representing the state, is any more a party than if the matter were one to be decided by the executive or the legislative department of the government. Each department, in its own sphere, is the state, and as such guards the rights of the state, not as those of a stranger or mere suitor before it, but as those of the body politic of which it is itself a part.

It can hardly be said that by reason of the decision rendered in the matters in controversy between the parties the interests of the state and the people have not received due consideration. The attorney-general as a sworn officer of the state has done his duty as he saw it, and advised the court with great learning and ability. And it must be remembered, besides, that those constituting the court were themselves also sworn officers of the state, and as a court, even constituted an integral part of the state government. Whether they decided the matter before them as the attorney-general thought right, or whether they decided them as the court as now constituted would have done, does not affect the question as to whether the decision so rendered can now be reviewed by the court, in this case, and as to the issues between the parties.

We are of opinion that in such appearance the attorney-general is, in the strictest legal sense, a friend of the court, and not a party, nor the representative of any party to the suit before it. He has aided the court in its labors to reach a just decision of the case. That decision, whether right or wrong, has been reached, and his friendly office is ended. The parties have litigated the matters at issue between them, and have withdrawn in so far as they can from the jurisdiction of the court. We think he cannot petition for a rehearing of the matters that have been tried and decided between them. Counsel for appellee in one of their briefs call the attorney-general an intervenor in this case, but from what has been said of his office before the court he cannot be an intervenor. As the law officer of the state he has aided and advised the court, even as he might have given his legal opinion to the governor when requested. But no judgment could be rendered for or against him, or for or against the state, as might be done in case of an intervenor.

But although we do not think that the attorney-general can petition in this case, as a party, for a rehearing, yet we have no doubt that the case, like all others, is still before the court in case error or mistake has been made. The court may correct its own record, either on its own motion, or on being advised of the mistake by any party in in-

terest. In the case of *Huntington County Comrs. v. Brown*, 14 Ind. 191, a petition for rehearing was filed more than sixty days after the decision. The court could not grant a rehearing, but it appearing that a decision had been rendered against one who had not been before the court, the court on its own motion granted a rule upon the other party to show cause why the decision should not be revoked.

In *Taylor v. Elliott*, 52 Ind. 588, this court fully considered and decided its power to modify, correct, or set aside its own decision in a proper case.

In *Crowell v. Jaqua*, 114 Ind. 246, this court set aside one opinion on account of inadvertent error, and substituted another in its place.

In Elliott's Appellate Procedure, § 550, the power of the court to correct its own errors is expressly maintained. Of this power there can be no doubt, but that is not the question before us. There is no mistake of fact, no inadvertence, "no errors into which the court may have fallen," but a deliberate decision of issues upon facts admitted by the parties. These parties have departed from the jurisdiction of the court, under the rules of the court as established in pursuance of the provisions of the statute, and we do not think that the issues litigated between them can have a rehearing in this court.

The intervenor, Morgan Chandler, has also filed his petition for rehearing of the cause, but he has filed no brief in its support, and under the rules of the court it cannot therefore be considered.

We are besides of opinion that as there was no decision adverse to him, he cannot have anything upon which to base his petition for rehearing.

It is therefore ordered and adjudged by the court that the petitions for a rehearing now on file in this cause be, and the same are hereby rejected.

Coffey, Ch. J., concurring:

On the 8d day of January, 1893, a petition for a rehearing in this cause was filed on behalf of the attorney-general of the state. Before any consideration of such petition we are met by the grave question as to whether we have any jurisdiction in the case. If we have jurisdiction, no great public inconvenience is likely to arise by reason of any action taken by the court in the cause, but on the other hand, if we have no jurisdiction, any action we may take will be a mere nullity. The granting of a rehearing under such circumstances would not annul the former adjudication holding the Apportionment Acts of 1879 and 1891 invalid. The evil consequences likely to follow upon the attempted enforcement of laws which stand authoritatively adjudged invalid can readily be foreseen. As to the manner in which, or in what tribunal the question of the validity of such an attempt may arise no one at this time can foretell; but that it would arise in some form, in the event we should assume to act without jurisdiction, is reasonably certain. The question of jurisdiction over the case necessarily arises upon the record.

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Section 662, Rev. Stat. 1881, provides that, "when any cause is determined in the supreme court, the clerk shall forthwith notify the clerk of the court below that it is determined, and whether reversed or affirmed, in whole or in part, or dismissed. At any time within sixty days after such determination, either party may file a petition for a rehearing, and if not so filed, the decision and instructions of the supreme court shall be certified to the court below, unless otherwise ordered by the court."

Rule 38 of this court provides that, "opinions and judgments shall not be certified to the court below by the clerk of this court, except in criminal cases, until the expiration of sixty days, unless by order of this court, or on the filing of waiver of petition for rehearing, which order of court, or filing of waiver shall be certified by the clerk with the opinion."

The opinion of the court in this cause was filed on the 17th day of December, 1892, and on the 22d day of the same month the parties to this litigation, acting under the above statute and rule, filed in the clerk's office of this court the following waiver of the right to file a petition for rehearing, viz.: "Come now the parties, both appellants and appellee, and each severally and separately waive and relinquish the right to file a petition for a rehearing in this cause and accept as final and conclusive the opinion of the court heretofore rendered in this cause, and now ask that the court will order and direct the clerk of this court to immediately certify said cause and opinion to the clerk of the Henry circuit court, from which court the appeal in this cause was taken."

This waiver was signed by the attorneys of record for each of the parties, and was not only filed in the clerk's office, but the parties, in addition to such filing, procured an order of the court thereon requiring the clerk of this court to certify the cause according to this request and agreement of the parties.

The cause, pursuant to this agreement and waiver, and the order of the court, was accordingly certified by the clerk of this court to the clerk of the Henry county circuit court. That this was a legitimate mode of taking the case from this court seems not to be doubted, and that the cause, as well as the parties to the suit, are now beyond the power and control of this court I think is equally certain, unless some party remains here not having joined in the waiver, who is entitled to file a petition for a rehearing.

No petition is filed by the state, and if such petition was on file it would be a sufficient answer to it to say that it was not entitled to a rehearing without the consent of the relator to whom it has extended the use of its name for the enforcement of a private right, even if it had not joined in the waiver, which it has done.

A petition has been filed by Mr. Chandler, an intervenor, but it is not claimed that he is entitled to a rehearing. If such claim were made it would be sufficient answer to it to say that he has not filed a brief in support of his petition, and for this reason, under

the well-known rules of this court, it is waived.

The only petition in the cause under which it is claimed we have the power to grant a rehearing is filed by the attorney-general of the state. During the progress of the cause in this court the following order was made, namely: "It further appearing to the court that the matters involved in said cause are such as affect the entire people of the state, and are of great importance, it is ordered that leave be granted to the attorney-general of the state to appear in behalf of the people and to take such steps as he may deem necessary to aid the court in reaching a just determination thereof."

It is now claimed by the attorney-general that by virtue of this order he became a party to this suit. Unless this claim can be maintained, of course his petition is not entitled to consideration, for, as will be seen by reading the statute, no provision is made for filing a petition for a rehearing by any person other than a party.

The contention that the attorney-general is a party to this suit would seem to be so destitute of plausibility as not to require a moment's consideration, were it not for the apparent earnestness with which he seeks to maintain it.

In the *vis prius* courts parties are known as plaintiffs and defendants. In this court they are known as appellants and appellees. If the attorney-general is a party to this suit, which is he, an appellant or an appellee? With whom is he litigating? What judgment shall be rendered either for or against him. He is not an intervenor, for no person can be such unless he has a personal interest in the controversy and it will certainly not be contended that the above order embraces a right to set up a personal interest.

It was perfectly proper, I think, for the court, in view of the public interest involved in this case, to invite the attorney-general, the chief law officer of the state, to aid it,

with his extensive knowledge of the law, in arriving at a correct conclusion, not in private consultation, but in open argument and by briefs. As he was the representative of the whole people of the state, the court had the right to assume that he would stand impartial as between the parties and that he would honestly and faithfully, as a public officer, give to the court his views upon the new and intricate questions involved. That he did by the able brief filed by him give the court much aid is not to be denied. But it was not as a party to the suit that he was permitted to file briefs and argue the case. His relation to the court was simply that of an *amicus curiæ*. It is not the function of an *amicus curiæ* to take upon himself the management of a cause. Anderson's Law Dict. title, *Amicus Curia*. The powers and duties of an *amicus curiæ* are well understood by the profession. In the case of *Irwin v. Armuth*, 129 Ind. 340, it was said: "An *amicus curiæ* may appear, and, with the permission of the court, introduce evidence for his own benefit, but he cannot except to any ruling made by the court, as he has no right to complain if the court refuses to accept his suggestions."

This cause was certified to the Henry circuit court on the 22d day of December last. It may be that the judgment has been rendered by that court in accordance with the opinion and directions of this court. If so, can we now, by any action we may take, affect that judgment? I think not. In my opinion, the moment this cause was certified to the Henry circuit court by order of this court, we lost jurisdiction over it as fully as we would have lost it had the sixty days allowed to file petitions for a rehearing fully expired. For these reasons, I am of the opinion that we have no jurisdiction, and that we have no power to consider the petition for a rehearing filed by the attorney-general.

McCabe, J., dissents.

WEST VIRGINIA SUPREME COURT OF APPEALS.

W. Irvine CROSS, *Pf. in Err.*,
v.

WEST VIRGINIA CENTRAL &
PITTSBURGH R. CO.

(.....W. Va.)

*1. The stockholders of the West Virginia Central & Pittsburgh Railway

*Headnotes by BRANNON, J.

Company have power to pass by-laws prescribing reasonable qualifications of its directors.

2. A joint-stock corporation has power by by-law to declare that no person who is attorney against it in a suit shall be eligible as a director.

(December 17, 1902.)

ERROR to the Circuit Court for Mineral County to review a judgment in favor of

NOTE.—Regulation by by-laws of elections by private corporations.

In *Reg. v. Saddlers' Co.*, 32 L. J. Q. B. 837, the house of lords in affirming a decision by the queen's bench reported in 3 El. & El. 42, decided that a by-law of a saddler's company declaring that "a person who has been a bankrupt or become otherwise insolvent" shall not be eligible as a member of the "court of assistants" of the company unless he has paid his debts in full or established a fair and honest character by seven years' subsequent conduct, is valid. This decision is the nearest that has been found to that of the main case.

orable character by seven years' subsequent conduct, is valid. This decision is the nearest that has been found to that of the main case.

In *Newling v. Francis*, 3 T. R. 189, it was held that a corporation may make by-laws to regulate elections. This was a case of a municipal corporation as in fact are nearly all early English cases about the powers of corporations.

In *Juker v. Com.*, 20 Pa. 434, it was held that the mode of conducting the annual elections of a religious corporation was a proper subject for a by-

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defendant in a proceeding for a writ of mandamus to compel the recognition of plaintiff as a director of defendant company. *Affirmed.* The facts are stated in the opinion.

Messrs. Flournoy & Price for plaintiff in error.

Messrs. W. C. Clayton and C. W. Dailey for defendant in error.

Brannon, J., delivered the opinion of the court:

In March, 1892, W. Irvine Cross presented to the judge of the circuit court of Mineral county his petition alleging that he had been elected a director of the West Virginia Central & Pittsburgh Railway Company by a larger vote in stockholders' meeting than W. W. Taylor, but that Taylor had been declared elected, and was then holding said office; and upon the prayer of said petition for a writ of mandamus to be directed to said Taylor, commanding him to vacate said office of director, and surrender it to said Cross, and to said company, commanding it to receive and recognize said Cross as such director, and also to Henry G. Davis, Steven B. Elkins, John A. Hambleton, James G. Blaine, and Thomas B. Davis, the other directors, commanding them to receive and recognize said Cross as such director, a mandamus *nisi* was awarded. The company filed a return, and Thomas B. Davis filed a return to said alternative writ of mandamus, and the relator, Cross, demurred thereto, and, said demurrers being overruled, and no reply of fact being made, the court refused to award a

peremptory mandamus, and dismissed the alternative writ, and Cross brought this writ of error to reverse such decision. The returns place the refusal to admit Cross as a director upon a by-law of the company providing that no person shall be a director unless he own 200 shares of stock in the company, and that no one shall be a director who is engaged as counsel or attorney in any suit or proceeding against the company; and the returns allege that he is ineligible on both grounds. This by-law is assailed as invalid. It is claimed that there is no law authorizing the stockholders to pass it. This company exists under a special Act chartering it, passed in 1866, and under an Act passed in 1881, amending it, both reserving power to alter or amend the charter; and under an Act passed in 1871 it was given further time to organize, and it was organized in that year. An important question here is, Is this company subject to chapter 53 of the Code? Sections 9 and 10 of the Code, as it went into force April 1, 1869, read thus: "(9) Every joint-stock company heretofore organized, and which has commenced its proper corporate business, under special charter or general law, shall remain subject to the laws now in force applicable thereto, unless it accepts the provisions of this chapter, or shall be declared subjected thereto by Act of the Legislature. (10) Every joint-stock company which shall be hereafter organized, or commerce its proper corporate business, whether under special charter or general law, or which shall accept the provisions of this

law and in the absence of such by-law could be controlled by usage.

Stockholders have a right to determine what shall constitute a quorum for the transaction of business at their meetings, and they may adopt a by-law requiring that a majority of the stock must be represented in order to do any other business than merely to organize and adjourn. *Ellsworth Woolen Mfg. Co. v. Faunce*, 79 Me. 440.

A by-law authorizing an election to fill a vacancy by a less number than a majority is void where a majority is required by statute for the transaction of business, although it is also provided by statute that vacancies may be filled "in such manner as may be provided by the by-laws." *State v. Curtis*, 9 Nev. 329.

In *Com. v. Gill*, 8 Whart. 223, it was held that by-laws passed by the directors of a savings institution providing that a person holding one share of stock shall be a member but should cease to be such on transfer of the stock, and that proof of the membership should be furnished by appearing as a stockholder on the books, were illegal on the ground that the institution was in the nature of a charity and that the charter did not give the directors power to admit members but made a distinction between members and stockholders and did not entitle stockholders as such to participate in the management but confided that trust to the original incorporators and such as might afterwards be chosen. The by-laws being contrary to the charter were of course void.

The general power of religious corporations to make by-laws includes power to make a by-law giving the president authority to appoint inspectors of election and also a by-law prohibiting tickets from being counted if they have anything on them besides the names. *Com. v. Woelper*, 3 Serg. & R. 29.

A by-law made by stockholders may regulate the

mode of calling meetings for the purpose of electing officers if it is not repugnant to the charter or to any law of the state. *Taylor v. Griswold*, 14 N. J. L. 222.

But a by-law restricting the authority of directors to call a special meeting at any other time than when requested by ten members would be so unreasonable that it can be created if at all only by the most clear and explicit language. *Citizens Mut. F. Ins. Co. v. Sortwell*, 8 Allen, 217.

The by-law of a board of directors may authorize the ordinary business to be transacted by a quorum of directors which is much less than a majority of the whole number. *Hoyt v. Thompson*, 19 N. Y. 207; *Hoyt v. Sheldon*, 3 Bosw. 267; *Smith v. Law*, 21 N. Y. 296.

In *Hoyt v. Thompson* and *Hoyt v. Sheldon* the by-law made five directors including the president or seven directors without him a quorum although the whole number of directors was twenty-three.

In *Smith v. Law* three was made a quorum although the whole number was nine.

The fact that a meeting of a newly elected board of directors was not held at the place fixed by a by-law was one of the important facts on which the court held that the board thus organizing did not become a board of directors *de facto* although there was a quorum of the *de jure* directors present. Other important facts were that the meeting was held without notice to other directors who had possession of the seal, books, papers, and property of the corporation and who disputed the authority of those thus assuming to organize. *Waterman v. Chicago & I. R. Co.* 15 L. R. A. 418, 139 Ill. 658.

As to right to vote.

The statutory qualifications of the members of a religious society to entitle them to vote can neither be abridged nor extended by any by-law. *People v. Phillips*, 1 Denio, 388.

chapter, or be declared subject thereto by Act of the Legislature, shall, so far as it is not otherwise expressly provided, have the rights, powers, and privileges, and be subject to the regulations, restrictions, and liabilities, specified in this and the preceding chapter." Under said section 10 this company became subject to chapter 53, and section 49 of that chapter expressly gives the stockholders power to prescribe the qualifications of directors. Why should not the owners of the property and business of a corporation—the stockholders—be allowed to define the qualifications of directors, the governing power of the corporation, except so far as the Legislature prescribes? It may be plausibly argued that so enlarged are the powers and so minute the details of chapter 50, Acts 1881, changing the name of the company, that that Act is to be regarded, at least for such a question as this, the charter and law of being of the company; and, if so, it would fall under said chapter 53, making regulations for joint-stock companies, whether incorporated under special charter or general law. I do not, however, deem it necessary to decide this. It is argued that not section 49, chap. 53, applies to this company as to election of directors, but its special charter Acts. Grant this for argument. It is said, then, that this by-law, in prescribing said qualification for directors, violates the charter Acts. Let us see. Section 1 of both the Acts of 1866 and 1881 gives to the stockholders "power and authority to make and pass such by-laws, rules,

and regulations for the management and government of the affairs of said corporation and its officers, directors, and agents as may be deemed necessary or proper, which may be also amended, changed, or repealed at any and all regular meetings of the stockholders." Here is a very comprehensive grant of power. Argument to define its breadth would but cloud, when the letter, spirit, and purpose of the grant are plain. Why would a by-law prescribing reasonable qualification of directors be repugnant to this provision? In addition to the foregoing view, it is not going far to say, though not necessary to say so, except as an additional argument, that section 67, chap. 54, Code, brings this company under that chapter, just as much as if it had been formed under that chapter; and then the first section of that chapter provides that companies incorporated under it shall also be subject to the provisions of chapter 53, so far as applicable, showing a purpose on the part of the Legislature to apply the provisions of chapter 53, as well as those of chapter 54, to all joint stock companies, where applicable. Now, certainly, section 49, which provides as to the board of directors, and how elected, and as to qualifications, is applicable, in its nature, to companies formed under or brought under chapter 54. Section 38 of chapter 54 relates to the same subject, but there is no inconsistency. Section 49, chap. 53, gives power to stockholders by by-law to fix the number of directors, the manner of their election and removal, and

A by-law authorizing any stockholder to challenge votes and providing that if his challenge be supported by affidavits or other probable cause to the satisfaction of the inspectors they may reject a vote offered unless oath is made in answer to the challenge and the answer deemed sufficient by them will not justify rejecting the vote of any person who has held a share in his own name for the time required to entitle him to vote. *People v. Kip*, 4 Cow. 832, note.

A resolution of directors authorizing a person to vote on stock transferred by the corporation to him as trustee by way of security for a debt is void where a statute gives the power to vote to stockholders, as the corporation is itself the real owner of such stock. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

A resolution of the directors that stockholders shall vote for but one person at a time in voting for directors is void where it is provided by the state Constitution that "every stockholder shall have the right to vote in person or by proxy the number of shares of stock owned by him for as many persons as there are directors or managers to be elected, or to cumulate said shares and give one candidate as many votes as the number of directors multiplied by the number of his shares shall equal, or distribute them on the same principle among as many candidates as he shall think fit." This constitutional provision means that he may cast his ballot, singly, cumulatively, or distributively at one time and the by-law therefore is in conflict with it. *Wright v. Central California C. Water Co.* 67 Cal. 532.

Cumulative voting was held illegal, however, in *State v. Stookley*, 45 Ohio St. 304, where there was no provision for it by statute but the statute merely provided that a stockholder shall have a vote for each share of stock and that a plurality of votes shall elect. No by-law appears to have been involved in this case but a by-law authorizing 18 L. R. A.

cumulative voting would seem to be void as in conflict with the statute.

As to proxies.

In *Phillips v. Wickham*, 1 Paige, 591, 2 L. ed. 764, the chancellor says of the right to vote by proxy: "It is possible that it might be delegated in some cases by the by-laws of a corporation where express authority was given to make such by-laws."

In *State v. Tudor*, 5 Day, 229, 5 Am. Dec. 162, a by-law adopted by a corporation allowing votes by proxy was held lawful under the general power to establish by-laws not contrary to the charter or the laws of the state.

But in *Taylor v. Griswold*, 14 N. J. L. 222, it was held that the right of making a by-law authorizing proxies is not incident to a corporation and that it is not given by general authority to "make such by-laws for their government as they shall deem proper, not repugnant to the charter or the laws of the state." The court added that even if such power was allowable in a purely private corporation it was not so in the case of a bridge company the business of which is really *publici juris*. But there is no chance to distinguish this case from the Connecticut case preceding on any such ground, as that also was the case of a bridge company.

In *People v. Croesley*, 69 Ill. 194, a by-law authorizing proxies is again upheld. It was in this case adopted by the annual meeting of a benevolent society under a state Constitution which directed the Legislature to provide for voting by the stockholders of a private corporation "in person or by proxy." The court held that even if the constitutional provisions did not apply to the class of corporations involved in that case it showed that proxies were not contrary to the spirit of the laws.

As to who are directors *de facto*, see note to *Waterman v. Chicago & I. R. Co.* (Ill.) 15 L. R. A. 413.

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the mode of filling vacancies. So does section 49, and not in an inconsistent manner. Section 38, chap. 54, does not make any provision as to qualification of directors, further than they must be stockholders; but section 49, chap. 53, gives the stockholders power to give qualifications, requiring, however, that they be stockholders. These two sections can both coexist, to be read as *in pari materia*. Section 49, chap. 53, is simply supplementary to section 38 of chapter 54, and supplies a want wherein it is lacking in a very important respect; that is, it makes provision as to qualification of directors. There is confessedly some confusion in our lengthy and elaborate law touching corporations, perhaps necessarily incident to dealing with such a subject, and traceable to amendments from time to time; but it seems to have been the legislative intent to make chapters 53 and 54 apply to all joint-stock companies, so far as applicable; and, this being so, they are to be read and harmonized upon the principles of construction applicable to statutes *in pari materia*. They contain elaborate details in a comprehensive system of statute law on one single subject,—corporations. *State v. Cain*, 8 W. Va. 788; *Curran v. Owens*, 15 W. Va. 227.

Now, as to that clause of the by-law excluding any one from the directory employed in suits against the company. We think it is within the power of the stockholders to pass it. Cannot the stockholders see that the important functions of directors, which may bring the company to either prosperity or ruin, shall be performed not by enemies,—those hostile in their interest to the company's best interest? Must the attorney against the company be allowed, without any power in the company to prevent it, to sit in the directors' meeting when considering its defense, and have access to all records and papers, get the secrets, and go straight from the meeting and use them to the destruction of the company? Perhaps the vote of one director, who is at the same time interested in a suit involving the property, the business, even the existence, of the company, may effectually accomplish the object of that suit. A person cannot serve two hostile and adverse masters without detriment to one of them. A judge cannot be impartial if personally interested in the cause. No more can a director. Human nature is too weak for this. Take whatever statute provision you please giving power to stockholders to choose directors, and in none will you find any express prohibition against a discretion to select directors having the company's interest at heart; and it would simply be going far to deny by mere implication the existence of such a salutary power. The owners of the franchise and property of the corporation—the stockholders—ought to be accorded this power to defend their own interest. It is self-defense only.

Next, assuming the validity of the clause of the by-law in question excluding such attorney from the directory, we are asked to say that the suit in which the relator, Cross, is engaged as attorney is not such a suit as is contem-

plated by said by-law, inasmuch as it is really not adverse to the company's interest. In the first place, I remark that this court ought not to look with a very critical scrutiny to say, in advance of the decision of the suit that it is not adverse to the interest of the company, taking away from the directory all right of judgment on that point. But look at the bill in the suit referred to, pending in Baltimore,—*Shaw v. Henry G. Davis and others*. The West Virginia Central & Pittsburgh Railway Company is a defendant. The contents of the bill need not be further stated than to say that it alleges that Henry G. Davis, Thomas B. Davis, and Stephen B. Elkins own a majority of the stock of that company, and are directors; that they own stock in and control a corporation called the Piedmont & Cumberland Railway Company, operating a railroad from a terminus of the West Virginia Central & Pittsburgh Railroad to Cumberland; that assets of the West Virginia Central & Pittsburgh Railway Company were used in its construction; that said Henry G. Davis and Thomas B. Davis and Stephen B. Elkins, by means of their influence as president and directors of the West Virginia Central & Pittsburgh Railway Company, were about to induce and cause that company to enter into a lease of the Piedmont & Cumberland Railroad, which would be against the interest and to the loss of the West Virginia Central & Pittsburgh Railroad Company; and the bill prayed that said Henry G. and Thomas B. Davis and Stephen B. Elkins disclose their interests in the Piedmont & Cumberland Railway Company, that the latter company discover what money of the former company had been used in its construction; and that the West Virginia Central & Pittsburgh Railway Company be enjoined from consummating said lease. It is said this suit is for the benefit of the West Virginia Central & Pittsburgh Railway Company. That may be in the end. It may be that an accounting to it by the other company will prove beneficial. But it may be also that the prevention of the lease, by which the company would get an outlet from its eastern terminus for its coal and other business, would be highly injurious to it. It may, on the other hand, be that the lease would be a burden upon it. Without all the light, how can we say that the prevention of a lease which may be beneficial or hurtful will certainly be hurtful to the company? That depends on facts to be shown by evidence. The Maryland court in charge of the case might determine to the reverse. We can safely say that this court would be going far to hold that this suit in none of its prayers will prejudice the West Virginia Central & Pittsburgh Railway Company.

It is assigned, but not insisted upon in argument, as error that the court quashed the return of service as to Henry G. Davis. It showed service by delivery of copy at his place of business to a person found there, who is manager of his business. Plainly the return is not good.

Judgment affirmed.

IDAHO SUPREME COURT.

Washington ELLIOT, *Appt.*,
v.

J. N. HALL *et al.*, *Respts.*

(.....Idaho.....)

- * When the statute makes the wages or earnings of a debtor exempt from levy of execution or attachment, such exemption continues while such wages or earnings are under control of the debtor, although temporarily in the hands of another.

(December 1, 1892.)

A PPEAL by plaintiff from a judgment of the District Court for Elmore County in favor of defendants in an action brought to recover certain money alleged to have been exempt from execution which had been seized by defendants on an execution against plaintiff. *Reversed.*

The facts are stated in the opinion.

Messrs. Wyman & Wyman, for appellant:

Statutes granting exemptions, being in furtherance of humanity and the protection of the family, should be liberally construed.

Freeman, Executions, § 208; *Re McManus*, 10 L. R. A. 567, 87 Cal. 293; *Montague v. Richardson*, 24 Conn. 847, 63 Am. Dec. 178; *Kuntz v. Kinney*, 83 Wis. 514; *Kenyon v. Baker*, 16 Mich. 378, 97 Am. Dec. 158; *Beran v. Hayden*, 13 Iowa, 122.

Trevitic was the bailee of the plaintiff in this matter and drew the wages as his agent, to be delivered on demand, and the title to the money was not changed in any manner by reason of the order, but remained in the plaintiff.

It cannot be claimed that this was a fraudulent conveyance of property, for there was no conveyance or attempt to convey, and for the further reason that there can be no fraudulent conveyance of exempt property.

Freeman, Executions, § 185; *Derby v. Weyrich*, 8 Neb. 174; *Union Pac. R. Co. v. Smersh*, 22 Neb. 751.

There was no commingling or attempt at

*Headnote by HUSTON, J.

commingling. Trevitic's office was to collect the money from plaintiff's employer and deliver it to plaintiff. It was seized upon *in transitu* and the record fails utterly to show anything like commingling.

But even if there had been a commingling, it cannot be held to lose for plaintiff his exemption, for the judgment creditor is in no event injured.

Rutter v. Shumway, 16 Colo. 95; *Howard v. Tandy*, 79 Tex. 450.

Mr. J. W. Badger, for respondents:

The proceeds of exempt property are not exempt. Transposition of exempt property destroys or loses the exemption.

Brckett v. Watkins, 21 Wend. 68, modifying *Hall v. Penney*, 11 Wend. 44, 25 Am. Dec. 601; *Mandlow v. Burton*, 1 Ind. 39; 1 Freeman, Execution, 2d ed. § 247; *Wooster v. Page*, 54 N. H. 125, 20 Am. Rep. 128.

If personal property exempt be fraudulently assigned to defraud creditors of the debtor, and be thereafter levied upon by such creditor, the debtor is not entitled to claim the same as exempt.

State v. Koch, 40 Mo. App. 685.

If exempt property or goods be so mixed with others that they can no longer be identified, the right of exemption is lost. The claimant must always be able to point out the identical property claimed.

Smith v. Turnley, 44 Ga. 245; *Roth v. Wells*, 29 N. Y. 471.

The right to exemption is a personal privilege and may be waived.

Hombs v. Corbin, 20 Mo. App. 497.

Huston, J., delivered the opinion of the court:

The plaintiff was a miner in the employ of the Comfort Consolidated Mining Company. A judgment had been recovered against him in justice's court. Execution was issued thereon, and levied upon a certain sum of money in the hands of one Trevitic. There is no question but that the money so levied upon was the wages of the plaintiff, earned within the thirty days next preceding the date of the levy. Trevitic had drawn the same from the

NOTE.—*Exemption of debtor's wages after payment by employer.*

Very little direct authority can be found as to the effect upon an exemption of wages of payment by the employer to the debtor or to some one for him.

In *Rutter v. Shumway*, 16 Colo. 95, which is cited and followed in the above case, the exemption was upheld as to wages which had been received by the debtor and deposited in a bank so long as they were capable of being identified.

So in *Cox v. Bearden*, 84 Ga. 804, 20 Am. St. Rep. 856, it was held that payment voluntarily made by an employer to the sheriff upon a judgment and *in fa.* in favor of an employé did not subject the money to garnishment in the hands of the sheriff, while on its way to the employé.

But on the other hand in *Cook v. Holbrook*, 6 Allen, 572, it was held that the exempt character of a claim for wages was lost when it had been put into judgment and collected by the employé's attorney, because the claim was merged in the judgment.

In harmony with the last case, it was held in *Ayer* 18 L. R. A.

v. Brown, 77 Me. 185, that the wages of a seaman are not exempt from attachment after they have been paid to his attorney, even if they would have been before payment, as to which authorities are in conflict.

The effect of payment to defeat a claim to exemption is also illustrated in *Kennedy v. Aldridge*, 5 B. Mon. 142, in which an exemption from attachment of the salary of an officer based on grounds of public policy is held not to exist after it has been paid to his agent.

This last case has little bearing on the question of exemption of wages in favor of the wage earner, as the only exemption there involved was one based on the public interests and therefore the ground of exemption was lost when payment had been made and the only rights affected were those of private individuals. The same is true of the preceding case as to seaman's wages in which it was objected that the seaman's attorney being a proctor in admiralty held the funds as an officer of the court, but the court decided that he held them not in that capacity but as the seaman's agent. I. T.

company at the request of plaintiff, and held it for him. Trevitic stated to the officer making the levy (J. N. Hall, the principal defendant) that plaintiff owed him nothing; that he simply drew the money for him as an accommodation, and held it subject to his call. On demand of the officer (Hall) holding the execution, Trevitic delivered the money so held by him to such officer. Plaintiff brings his action against the officer and his sureties for the recovery of the money, claiming the same as exempt from levy, under the provisions of subdivision 7 of section 4480 of the Revised Statutes of Idaho, which is as follows: "The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution, or levy of attachment, when it appears by the debtor's affidavit or otherwise that such earnings are necessary for the use of his family residing in this territory (state), supported wholly or in part by his labor." The necessary affidavits were duly served by plaintiff, establishing the facts required by the section of the statute referred to. Plaintiff recovered judgment in justice's court. Defendants appealed to district court, when the judgment of the justice's court was reversed, and judgment for costs was rendered for defendants, and from the judgment of the district court the plaintiff appeals to this court. There is nothing in the record showing the grounds upon which the district court based its decision and judgment. The case was heard by the district court upon a stipulation as to the evidence. It appears from the plaintiff's motion for a new trial that, while the district court held that the money levied upon by the officer by virtue of the execution was exempt as wages, under the provisions of the statute, the plaintiff had deprived himself of the benefit of the statute by "commingling, or causing to be commingled, said wages, so as to lose their identity as wages." This view seems to be acquiesced in by defendants. The only evidence of a "commingling" is the fact that Trevitic drew this money from the company, for the accommodation of the plaintiff, and held the same for the plaintiff; that plaintiff was not indebted to Trevitic, nor had Trevitic any claim or lien upon the money so drawn.

It is insisted by respondents (1) that the drawing of the money by Trevitic, upon the order or request of plaintiff, was a fraud upon the creditors of plaintiff; (2) that it was such a commingling of the money as deprived it of the exemption provided by the statute. The money being confessedly exempt as wages, its disposition by the plaintiff could not operate as a fraud upon defendants. *Freeman, Executions*, § 136; *Derby v. Weyrich*, 8 Neb. 174; *Union Pac. R. Co. v. Smerah*, 22 Neb. 751.

The drawing of the money by Trevitic, and his holding it for the accommodation of the plaintiff, if not appearing that there were any dealings between plaintiff and Trevitic, or that Trevitic had or claimed to have any interest in or lien upon the money, could hardly be called a "commingling." Trevitic did not hold any other money or property of the plaintiff. Suppose plaintiff had given his wife or one of his children an order to draw his wages; would that have been a commingling? The object

of the statute was to preserve, for the support of the debtor and his family, a portion of his earnings, and to the accomplishment of this end the statute should receive a liberal construction. The beneficent intention of the Legislature must not be defeated by a strained or technical construction. This rule of construction seems to have been quite generally recognized in this class of cases. *Freeman, Executions*, § 208; *Re McManus*, 87 Cal. 292, 10 L. R. A. 567; *Montague v. Richardson*, 24 Conn. 847, 68 Am. Dec. 173; *Kuntz v. Kinney*, 33 Wis. 514; *Kenyon v. Baker*, 16 Mich. 373, 97 Am. Dec. 158; *Bevan v. Hayden*, 13 Iowa, 122.

The case of *Wooster v. Page*, 54 N. H. 125, 20 Am. Rep. 128, is cited by respondents in support of their contention that the wages of the plaintiff lost the privilege of exemption by reason of the payment of the same to Trevitic, at the request of the plaintiff. The case of *Wooster v. Page* does not seem to go so far as claimed by the respondents, but would seem to favor that view. The court in that case rests its decision largely upon the decision of the same court in the case of *Morse v. Towns*, 45 N. H. 185. In the latter case (as cited by the court in *Wooster v. Page*) it seems that "Towns having enlisted, and received from the town of Pembroke a bounty of two hundred dollars, went away to the wars, leaving the money with his wife, for the support of herself and their two children. The wife used a part of it, and, of the rest, put into the hands of the trustee one hundred and fifty dollars, to be returned from time to time as needed for the support of the family; and for this sum the trustee gave his note, payable to her or her order. The trustee stated that he took the money expressly as the bounty money of the husband, and that the wife had no other means of support. The trustee was held chargeable, on the ground that the bounty, having being paid over to the volunteer, was no longer 'bounty,' and as such exempt, but was simply 'money,' not exempt." Does this construction of a statute, intended by the Legislature to encourage and uphold patriotism, to secure from the humiliation of poverty and want the wife and children of the soldier, who has voluntarily offered up his life for his country, carry out the intention of the lawmakers? We think not. In the case of *Rutter v. Shumway*, 16 Colo. 95, the Supreme Court of Colorado says: "It is claimed by counsel for plaintiff in error that the proper construction of the Act of 1885 is that the wages of the debtor are exempt from garnishment while they remain in the hands of the employer, before payment, but not afterwards." The Act declares: "There shall be exempt from levy under execution, attachment, or garnishment the wages and earnings of any debtor, to an amount not exceeding one hundred dollars, earned during the thirty days next preceding such levy," etc., (literally the same as the Idaho statute). The language is unconditional and absolute, that the wages "shall be exempt from levy under execution, attachment, or garnishment," and the courts cannot justly add words which would tend to defeat or restrict the manifest purpose of the statute. So long as the wages or earnings of the debtor are

capable of identification, he is entitled to have them exempt, according to the terms and provisions of the statute. We prefer the broad humanity of the "Cowboy Law" to the cold and technical construction which would make the intended beneficence of the law a mockery and delusion, and take the bread of the soldier and the wage earner from the mouths of his wife and children to glut the maw of an insatiate creditor.

The judgment of the District Court is reversed, and judgment ordered to be entered for plaintiff for the sum of \$66.25, and costs, which the clerk of the court below will enter in his judgment docket immediately on receipt of the remittitur from this court, and issue execution thereon.

Sullivan, Ch. J., and Morgan, J., concur.

WYOMING SUPREME COURT.

Anna Elizabeth NEER et al., Plffs. in Err.,
v.

Oscar F. COWHICK et al.

(.....Wyo.....)

The recognition of holographic wills by the Wyoming Act of 1891, providing that they may be proved in the same manner as other private writings are proved, does not dispense with the necessity of two witnesses in order to make them valid as in the case of other wills, under Wyo. Rev. Stat., § 2237.

(December 15, 1892.)

ERROR to the District Court of Laramie County to review a judgment refusing to admit to probate the alleged will of John Cowhick, deceased. *Affirmed.*

The facts are stated in the opinion.

Messrs. Potter & Burke, Davidson & Clark, and Charles N. Potter, Atty-Gen., for plaintiffs in error:

The object of the law governing the execution of wills is not to obstruct or make difficult the exercise of that right, but merely to protect the right, to make certain that what is claimed to be the will is the wish of the decedent, and to thus guard against fraud.

Protection under an holographic will as against such dangers is far greater than that under a will that is written entirely by others, and is merely subscribed and acknowledged by the testator in the presence of witnesses. The possibility of fraud through forgery is far less, for while it is possible to forge a signature and to procure two persons who will perjure themselves as witnesses, it is almost impossible to forge an entire instrument.

"The object of the law ceasing, the law itself ceases."

An enactment of the Legislature will be upheld unless it is totally repugnant to the organic law, is so entirely ambiguous as to be incapable of interpretation, or is repealed by subsequent legislation.

1 Bl. Com. p. 87.

There is nothing in chapter 2, § 13, that, is repugnant to any provision of our Constitution. If it is repugnant in any sense, or in any degree, to section 2237 of the Revised Statutes of Wyoming, then the latter section is repealed to the extent that any such repugnancy exists.

NOTE.—On the subject of holographic wills, see also *Warwick v. Warwick*, 6 L. R. A. 775, and *note*, 86 Va. 598.

18 L. R. A.

1 Bl. Com. p. 87, *note* 34; *Sutherland*, Stat. Constr. par. 288.

There can be no question that the intention of the Legislature was that holographic wills should be proved, and such proof to be made in a certain way. Nor is there any question as to what the words "holographic wills" refer; there is, and never was but one kind of an instrument so denominated.

Sutherland, Stat. Constr. par. 289.

It may be said that section 2237, by requiring all wills to be attested in a certain way, took away from our law the distinctive character of holographic wills.

This cannot be successfully maintained. An attesting witness does not change the character of the instrument.

Re Soher's Estate, 78 Cal. 477.

Suppose this instrument was, prior to January 10, 1891, invalid because of lack of compliance with the Statute of 1882. Yet if, after the writing of the will, and subsequent to the new legislation the testator die, and if, under the statute as it stood at the death of the author of the decedent, the instrument is provable, it shall be proved under the law existing at the time of the author's death, and the property passes under and by virtue of its provisions.

Re Elcock's Will, 4 McCord, L. 30; *Magruder v. Carroll*, 4 Md. 835; *Wynne v. Wynne*, 2 Swan, 405, 58 Am. Dec. 66; *Sutton v. Chennault*, 18 Ga. 1; *Re Lawrence v. Hebbard*, 1 Bradf. 252; *Hargroves v. Redd*, 43 Ga. 142; 1 Jarman, Wills, p. 537; 1 Redf. Wills, 4th ed. 408; *Herrick & Depee*, Probate Law & Practice, p. 29, and laws there cited; *Teris v. Pitcher*, 10 Cal. 466; *Downer v. Smith*, 24 Cal. 123; *Coppinger v. Rice*, 33 Cal. 423; *Ryder v. Cohn*, 37 Cal. 89; *Re Pfuhl's Estate*, 48 Cal. 644.

Messrs. A. C. Campbell, Lacey & Van Devanter, for defendants in error:

We have two classes of legislation relating generally to the subject of wills:

First. That legislation which provides the necessary elements without which an instrument shall not be held to be a will.

Second. The method by which a will shall be proved in the probate court.

Of the first class is § 2237 of the Revised Statutes. By this section the Legislature has seen fit to declare that a will to be valid must not only be in writing and signed by the testator but must likewise be witnessed by two competent witnesses.

Holographic wills, or those written out by the testator's own hand, stand on no privileged

footing, but require to be attested like any other testaments.

Schouler, Wills, § 255; 4 Kent, Com. *619.

Under our modern statutes, which require a will to be duly executed and attested by a certain number of subscribing witnesses in order to give its effect, there can be no judicial evasion in favor of informal writings.

Schouler, Wills, § 257.

Wyoming Laws 1890-91, p. 247, § 18, relates solely to the manner of proof of holographic wills, and does not, so far as its terms go, attempt to give the essentials of a valid holographic will.

When an affirmative statute contains no expression of a purpose to repeal a prior law it does not repeal it unless the two acts are in irreconcilable conflict, or unless the later statute covers the entire ground occupied by the earlier and is clearly intended as a substitute for it.

Red Rock v. Henry, 106 U. S. 596, 27 L. ed. 251; *Chew Heong v. United States*, 112 U. S. 586, 28 L. ed. 770.

If by any fair course of reasoning both can be reconciled, they must stand.

Cass v. Dillon, 2 Ohio St. 607; *Raudebaugh v. Shelley*, 6 Ohio St. 307.

Certainly a fair course of reasoning can find such construction of these two acts as will permit them both to stand.

Ludlow v. Johnston, 8 Ohio, 558, 17 Am. Dec. 609; *Dodge v. Gridley*, 10 Ohio, 178; *Ex parte Smith*, 40 Cal. 419; *People v. Gustin*, 57 Mich. 407; *McCool v. Smith*, 66 U. S. 1 Black, 459, 17 L. ed. 218; *Atty-Gen. v. Brown*, 1 Wis. 518.

The holographic, like any other, testament, is a solemn act, depending for its validity upon compliance with the forms prescribed by law; and, however clearly it appears that the decedent intended the instrument to be her will, if it is not clothed with the forms prescribed it cannot stand.

Re Arman's Will, 48 La. Ann. 810; *Re Rand's Estate*, 61 Cal. 468, 44 Am. Rep. 555.

Groesbeck, Ch. J., delivered the opinion of the court:

This case was submitted to the district court for Laramie county, in the exercise of its probate jurisdiction, on an agreed statement of facts. It appears that one John Young Cowhick, a resident of the city of Cheyenne, in this state, for more than ten years prior to his death, died on the 18th day of June, 1891, in said city, being the owner of and in possession of a large amount of real and personal property situate in the county of Laramie. On the day following his death, one George L. Beard, cashier of the Cheyenne National Bank, found a certain written instrument purporting to be the will of said John Y. Cowhick, in a safety vault box in said banking house, theretofore used by said deceased as a depository for his valuable and private papers, which he, the said Beard, filed on the day of its discovery in the office of the clerk of the district court for Laramie county. The said instrument is wholly in the handwriting of the deceased. It is signed by him, and bears the following indorsement, wholly in the handwriting of the deceased: "Will of John Young Cowhick, 18 L. R. A.

made September 13, 1889." It was enclosed in a sealed envelope, which was indorsed also in the handwriting of decedent as follows: "John W. Collins. To be opened after my death. Will." It was further admitted that the said Cowhick was of sound and disposing mind and memory at the time of signing this instrument, and from that time up to his death, and that he was then over fifty years of age. The said instrument was not witnessed by any person, and was not signed or attested by any witness or witnesses. The will is what is termed an "olographic," or, more properly speaking, a "holographic" will, and the sole question to be determined is whether or not the said instrument is a valid will without being signed or attested by witnesses. At the time of the execution of the instrument it was not a valid will, as it was not witnessed. Section 2287 of the Revised Statutes then provided that "all wills, to be valid, must be in writing, witnessed by two competent witnesses, and signed by the testator, or by some person in his presence, and by his express direction; and, if the witnesses are competent at the time of attesting the execution of the will, their subsequent incompetency, from whatever cause it may arise, shall not prevent the probate and allowance of the will," etc. The first state Legislature enacted a law entitled "An Act Providing for Probate Jurisdiction and Procedure, and Prescribing the Duties of the Courts and Officers in Connection therewith," approved January 10, 1891,—five months before the death of the said John Young Cowhick. Chapter 70, Sess. Laws 1890-91. It provides, among other things, for petitions for probate of wills and hearings thereon, whether contested or not, and the requisite proof to be adduced in support of the will, for administration of estates, and the like. If no person appears to contest a will, it may be admitted to probate on the testimony of one subscribing witness, if he testifies that the will was executed in all particulars as required by law, and that the testator was of sound mind at the time of its execution. Section 12, chap. 2, of the Act. And then follows section 13 of the same chapter: "An olographic will may be proved in the same manner as other private writings are proved." If the will be contested, all the subscribing witnesses who are present in the county, and who are of sound mind, must be produced and examined, and the death, absence, or insanity of any of them must be shown to the court. If none of the subscribing witnesses reside in the county, the court may admit the testimony of other witnesses to prove the sanity of the testator, and the execution of the will; and as evidence of the execution and attestation of the will it may admit proof of the handwriting of the witnesses, or any of them." Section 8, chap. 8, of the Act. Provision for the proof of lost and nuncupative wills is also made. This Act repeals in express terms many provisions of the former law, made obsolete under the constitutional provision conferring the powers and jurisdiction of probate courts under the territorial régime upon district courts. The former statute relating to the competency of testators, the devises of lands, the passing of after-acquired property by the will, and the

provisions relating to the execution and attestation of such instruments, were not repealed, although a number of sections relating to the proof of wills succeeding these sections of the Wills Act were repealed expressly. There is no general repeal of inconsistent laws, and the intent of the Legislature is plain to preserve unimpaired section 2287 of the Revised Statutes, requiring all wills to be in writing, signed by the testator, or by some person in his presence, by his express direction, and by two competent witnesses. Holographic wills were of no greater sanctity under the common law than other written wills. Such a will did not have any greater legal force than a will written by a third party, and signed by the testators. The Statute of 32 Hen. VIII. chap. 1, explained by 84 Hen. VIII. chap. 5, did not require witnesses to wills, and it was not until the enactment of the Statute of Frauds and Perjuries (29 Car. II. chap. 3) that witnesses were required to wills. Although, under the Scotch law, holographic writings were considered of higher value than other instruments, because of the difficulty of a successful forgery of them, this regard for such instruments does not seem to have been entertained by the English courts. Such wills grew in favor in this country during the colonial period, where they were generally held good as valid wills of personal property where recognized by statute, and they were favored in the Code Napoleon and in the civil law. The definition of a holographic will is exact; it is a testament written wholly by the testator. Our law of probate procedure is framed after the California Code, but the statute of that state defining such a will, and providing that it need not be witnessed, was not made a part of the Act, and cannot be found in our statutes. We have no provision of statute that dispenses with the necessity of witnesses to holographic wills. In all of the jurisdictions of the Union where such wills are recognized the laws expressly provide that such wills need not be witnessed. Our statute recognizes them, but merely declares that they may be proved in the same manner that other private writings are proved. The California Code of Evidence also provides that any writing may be proved (1) by any one who saw the writing executed, or (2) by evidence of the genuineness of the handwriting

of the maker, or (3) by a subscribing witness. We have no such statutory rule of evidence, and we must rely upon the ordinary rules of evidence independently of statute. A private writing may be proved by one subscribing witness. In case there is none, and where the law does not require any, proof may be received of the signature of the maker. But if the law requires subscribing witnesses to such private writings, they must be proved by subscribing witnesses, or, if dead, incompetent, insane, or beyond the jurisdiction, by proof of their signatures. The statute governing the execution of wills yet in force, and not expressly or impliedly repealed, requires all wills, including holographic wills, to be witnessed by two competent witnesses otherwise they cannot be valid. There are no witnesses to the will in the case at bar, and, the law not having excepted holographic wills from the provisions of the statute requiring such written wills, with all other written wills, to be witnessed, the instrument offered for probate is invalid. It was invalid under the law in force at the time of its execution, and, that law not having been repealed or modified, expressly or by implication, the will was invalid at the time of the testator's death. We cannot extend the terms of the statute providing that holographic wills may be proved in the same manner that other private writings are proved, and insert by construction a provision that they need not be witnessed, as that would be judicial legislation. We are forced to the position that the statute relating to proof of holographic wills does not dispense with the necessity of witnesses to them, and that as to such wills the former statute, providing that wills must be witnessed by two competent witnesses, is still in force. The Probate Procedure Act appears to recognize noncupative or oral wills, which is obnoxious to the wills statute, but we are not now considering the validity of such wills, nor passing upon the construction of that part of the Probate Procedure Act. We are unanimously of the opinion that holographic wills must be witnessed to be valid wills.

The judgment of the District Court rejecting the so-called will, and refusing to admit it to probate, is therefore affirmed.

Conaway and Merrell, JJ., concur.

MISSOURI SUPREME COURT, FIRST DIVISION.

Frank EICHENLAUB, *Appt.*,

v.

City of ST. JOSEPH *et al.*, *Respts.*

(.....Mo.....)

1. An ordinance prohibiting wooden buildings within fire limits, which is enacted under a charter which allows such regulations to be made only by ordinance, cannot be suspended by a simple resolution of

the city council which is not presented to the mayor and which does not constitute an ordinance, and a permit given in accordance with such resolution is void.

2. No judicial proceeding is necessary to give a city the right to tear down a wooden building erected in violation of an ordinance fixing fire limits.

3. The unlawful issuance of a permit by city officials authorizing the erection of a wooden building within the fire limits although

NOTE.—On the subject of the power of a municipality to prescribe fire limits and prohibit the erection of wooden buildings therein, see *Olympia v. Mann*, 12 L. R. A. 150, 1 Wash. 889. 18 L. R. A.

In respect to summary destruction of property constituting a nuisance, see *Lawton v. Steele*, 7 L. R. A. 124, 119 N. Y. 245.

acted on will not estop the city from enforcing its ordinance by tearing down the building.

4. **An ordinance having the seal of the city attached is properly admitted in evidence without further proof of its passage under Rev. Stat. 1879, § 4638.**

5. **An order or direction by the mayor to enforce an ordinance which need not be made by a written order is sufficiently made by a letter or order which is understood by both parties as a direction to enforce the ordinance although it is not in words or form an order or even a request.**

(January 23, 1893.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Buchanan County in favor of defendants in an action brought to recover damages for the alleged wrongful destruction of a partly erected frame building which was located within the fire limits of the defendant city. *Affirmed.*

The facts are stated in the opinion.

Messrs. C. A. Mosman and B. R. Vineyard for appellant.

Messrs. Huston & Parrish, J. W. Boyd, M. A. Reed and James Limbird for respondents.

Black, Ch. J., delivered the opinion of the court:

This is a suit to recover damages for tearing down a partly constructed frame house belonging to the plaintiff, which was situated within the fire limits of the defendant city, as those limits had been defined by ordinance before any part of the building had been constructed. The defendants other than the city are Hartwig, Westheimer, and McNutt, who were respectively the mayor, acting mayor, and chief of the fire department. The defendants justify under the charter and ordinances. The second section of the Act of February 8, 1865, amending the charter of the city of St. Joseph, (Acts 1865, p. 434,) provides: "The mayor and city council shall have power by ordinance to levy and collect the following taxes, viz.: First. To license, tax, and regulate" numerous occupations and objects, all of which are named. "Tenth.

To regulate, restrain, or prohibit the erection of wooden buildings within such limits as may be prescribed by ordinance, and to provide for the removal of the same at the expense of the owners thereof, when erected and suffered to remain contrary to the ordinances of the city." The defendants set up and put in evidence two ordinances defining the fire limits, and a third, which provides: "Sec. 2. No building shall be erected within the fire limits, . . . unless the same shall be constructed in conformity with the following provision: All outside and party walls shall be made of stone, brick, or other fireproof materials; said walls shall not be less than eight inches in thickness." "Sec. 6. Whenever any wooden building shall be erected, enlarged, or removed, or in process of erection, enlargement, or removal, contrary to the provisions of this chapter, upon information it shall be the duty of the mayor to issue an order to the owner, occupant, person in charge, or builder thereof to have such

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building taken down or removed to some place outside the fire limits forthwith; and, upon refusal or neglect of such person to comply with the requirements of such order within forty-eight hours after having received the same, the mayor shall cause said building to be removed, and the expense thereof may be recovered of the owner of such building by suit." The other evidence discloses the following facts: A sewer ran across the plaintiff's lot, upon which he first put up the walls of a brick house. These walls fell during a heavy rainfall, and at a meeting of the city council held on the 17th of September, 1884, the defendants Hartwig and Westheimer being present, he presented a petition asking permission to erect a frame building; and "on motion the petition was received and referred to the board of fire engineers and the two members of the council from the third ward, with power to give the permission asked for." This board or committee and the two aldermen signed and gave to the plaintiff written permission to build a frame house, the roof to be covered with tin, and the sides and ends with sheet iron. Defendant Westheimer was one of the persons who signed this permit. Armed with this permit the plaintiff made a contract for the construction of the house, and proceeded with the work. Mayor Hartwig signed and caused to be served on the plaintiff and his contractor a written notice, dated the 2d of October, 1884, stating that the building was within the fire limits, that it did not conform to the ordinance, and directing them to stop work on the building, and "to tear down all parts of said building already erected" within forty-eight hours. Plaintiff testified that the notice was served on him, that he could not give the date of the service, but he thought it was at least two days before the house was taken down. On the 21st of October, 1884, the defendant Westheimer, as acting mayor, signed and addressed to defendant McNutt, as chief of the fire department, this letter or order: "It is the wish of the mayor, his honor, H. R. W. Hartwig, that you notify Mr. Frank Eichenlaub to remove the wooden structure partly erected on lot 8, Logan's addition, within the time allowed by ordinance;" which being shown to the city counselor, he indorsed therein and signed the following instruction: "You must obey the mayor's instructions, and enforce the ordinance." McNutt testified that he employed carpenters, and tore the house down. He says, "I acted in accordance with the papers you have in your hand," (referring to the notice and order, as we understand.) There is evidence tending to show that the carpenters were careless, and destroyed much lumber in removing the building; and, on the other hand, there is evidence that the work was done with due care. At this time the studding was up for two stories, and the north side was boarded, and covered with sheet iron. The floors had not been laid, and the house was not yet under roof. The court directed a verdict for the defendants Hartwig and Westheimer, and as to the other defendants submitted to the jury the question whether McNutt used such care as to cause

no more injury to the materials than was necessary; and this issue the jury found for defendants.

1. The first contention on the part of the plaintiff is that the charter power to regulate, restrain, or prohibit the erection of wooden buildings carries with it the power to license the erection of such structures; that, the charter being silent as to the form of the license, the resolution of the council, and the permit issued pursuant thereto by the committee, amount to a license to construct the frame house. Where a charter commits the decision of a matter to the council, and is silent as to the mode of expressing the decision, it may be evidenced by resolution, and need not be in the form of an ordinance. This proposition is well settled by the authorities cited by the plaintiff; but it is just as well settled that, when the mayor is part of the lawmaking power, his concurrence in legislative action is essential to its validity. If the charter provides that the power given must be exercised by ordinance, and it requires the concurrence of the mayor to pass an ordinance, action by a simple resolution of the council is invalid. *Saxton v. Deich*, 50 Mo. 488; *Saxton v. St. Joseph*, 60 Mo. 153; *Thomson v. Boonville*, 61 Mo. 283; *Irvin v. Devore*, 65 Mo. 627; *Trenton v. Coyle*, 107 Mo. 194.

By the charter provision before quoted, the limit in which wooden buildings may be regulated, restrained, or prohibited must be defined by ordinance. As to this there can be no question. We think it equally clear that the restraint, regulation, or prohibition must also be by virtue of an ordinance. The words "by ordinance" in the first clause apply to and qualify the tenth clause, as well as the preceding nine clauses. Indeed, the tenth clause makes this clear, for it says the mayor and council shall have power to provide for the removal of wooden buildings when "erected and suffered to remain contrary to the ordinances of the city." The regulation, restraint, or prohibition, whatever it may be, must be evidenced by an ordinance, and a simple resolution of the council is not sufficient. The charter is clear to the effect that every ordinance, before it can become a law, must be presented to the mayor for his approval. This resolution was not presented to the mayor, and is not an ordinance. The mayor and council had in due form enacted the ordinance prohibiting the erection of wooden buildings within the defined district, and the council had no power to repeal, modify, or suspend its operation otherwise than by ordinance. The resolution and permit given thereunder did not have the effect to suspend the operation of the ordinance. That ordinance remained in full force, and the permit amounted to nothing. It could not and did not give the plaintiff any right to erect the frame house. It is doubtless true that under this charter the city of St. Joseph could regulate, instead of prohibiting, the erection of wooden buildings, even in the fire limits. It could fix and determine the regulations by general ordinance, and make it the duty of every person to obtain a permit or license before erecting a building.

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With such general ordinance prescribing the regulations a special ordinance in case of each permit would not be necessary. The power to examine the plans of a proposed structure, and to issue the permit, could be delegated to some officer, or the permit could be issued by resolution of the council. But all this does not aid the plaintiff in this case, for the mayor and council had enacted no such general ordinance. The ordinance, and the only ordinance, in force was the one which required all outside and party walls to be of stone, brick, or other fireproof materials. The resolution and permit issued by the committee, to which the plaintiff's petition was referred, undertake to suspend the operation of the ordinance in this particular case, and this the council could not do. It could only be done by the power that enacted the ordinance,—that is to say, by the concurrent act of the mayor and council by an ordinance. The court committed no error in excluding the petition which the plaintiff presented to the council, the resolution referring the same to the committee, and the so-called permit issued by that committee.

2. It is next insisted that the ordinance directing the removal of the building is void because it attempts to justify the destruction of private property without judicial inquiry, and therefore violates that provision of the Constitution which declares "that no person shall be deprived of life, liberty, or property without due process of law;" and in support of this we are cited to *Lourey v. Rainwater*, 70 Mo. 152, 85 Am. Rep. 420, and *River Rendering Co. v. Behr*, 77 Mo. 91. In the first of these cases the defendants, acting pursuant to statutory law, seized and publicly destroyed a table used as a gambling table, without judicial investigation or condemnation. The law was held unconstitutional. It was not the gambling table which constituted the offense, but it was the use to which it was put. Here it is the house itself which violates the law. In the other case a city ordinance was held unconstitutional, which undertook to confer upon one person the right to remove and convert to his own use the carcasses of dead animals not slain for food. It was held that the ordinance could not be upheld as a police regulation; and this, for the reason that it was not necessary to take the property from one and give it to another until the property was in such a condition that it, or the use of it, was likely to become a nuisance. Here the ordinance does not undertake to deprive the plaintiff of his property. The bare statement of these cases is enough to show that they are entirely unlike the one in hand. Many of the powers exercised by municipal corporations are police powers, delegated to the corporations for the public good; and it is well-settled law that every citizen holds his property subject to the exercise of such powers. Such laws and regulations may, and often do, disturb the enjoyment of the property of the citizen; but such laws having that effect do not amount to the taking of private property for public use. They simply regulate the use. 1 Dill. Mun. Corp. 8d ed. § 141. "All the property and vested

rights of individuals are subject to such regulations of police as the Legislature may establish with a view to protect the community and its several members against such use or employment thereof as would be injurious to society or unjust towards other individuals." 2 Story, Const. § 1954. See also *Bluedorn v. Missouri Pac. R. Co.* (Mo.) 18 S. W. Rep. 1108.

The power of a city to take all reasonable measures to prevent fires and their spread is of the greatest importance, for on its proper exercise depend the lives and property of the citizens; and it is accordingly held by a majority of the courts in this country that municipal corporations have the inherent power to prescribe fire limits, and to regulate or prevent the erection of wooden buildings within such limits, though in a few states it is held such power exists only where it is conferred by express grant. The cases on this subject are collected in 15 Am. & Eng. Encyclop. Law, 1170. It is unnecessary here to express any opinion on this question; for in this case the city has the express power to create such limits, and to regulate or prohibit the erection of wooden buildings therein, and to provide for the removal of such buildings when erected or allowed to remain contrary to ordinance.

The real question here is whether the city had the right to tear down the building without any judicial proceeding against the plaintiff, the owner thereof. We find no real conflict in the authorities upon this question; for it is held in many cases that where a municipal corporation has the power to prohibit the construction of wooden buildings in a district defined by ordinance, and has enacted an ordinance to that effect, it may remove any building erected in violation of the ordinance, and this, too, without any judicial proceeding whatever. *McKibbin v. Fort Smith*, 85 Ark. 852; *Klingler v. Bickel*, 117 Pa. 326; *King v. Davenport*, 98 Ill. 805; *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 880; *Hine v. New Haven*, 40 Conn. 478. As said in the case last cited: "Police powers of this character are of a high order, and, when a case arises, should be speedily exercised. Delays incident to the ordinary process of the law would seriously impair their efficiency, and could not be tolerated." The right to tear down or remove the prohibited building is analogous to the right which every individual has to abate a nuisance, the limits to which right of the individual we need not stop to consider. The cases cited also show that tearing down such prohibited buildings without judicial proceedings, erected in defiance of law, is not a forfeiture of private property; for as has been said, it is but the exercise of a police power, and not the declaration of a forfeiture. Persons, however, executing the provisions of such ordinances without judicial investigation must be prepared to establish these facts: (1) that the house was erected or permitted to remain in violation of law; and (2) that in tearing down the building reasonable care was taken to preserve the materials. We may add that such ordinance must be reasonable, but there is nothing in this case to show, or tending to show, that

this ordinance was or is unreasonable. There is no doubt but the plaintiff began the construction of this frame house, and expended some \$500, at least, relying upon the permit, and the case is a hard one; but it must be remembered this ordinance was enacted in the interest of the public good, and neither the council nor the committee had any right or power to license any one to violate the law. The fact that these officials did issue the permit in violation of the law did not estop the city or its officers from enforcing the ordinance. No case cited has any tendency to support the proposition that the officials were by the unauthorized act estopped from executing the ordinance prohibiting the erection of wooden buildings in this fire district.

8. To the ordinance fixing the fire limits, put in evidence by the defendants, the plaintiff objected on the ground that there was no evidence tending to show that it had been passed by the council, which objection was overruled. The records of the council were not offered in evidence, but the document professes on its face to be the original ordinance. It was approved by the mayor and attested by the register, and is under the seal of the city. Rev. Stat. 1879, § 4648, provides: "All ordinances of the city may be known by the seal of the corporation." We cite this section of the general law because we understand the city of St. Joseph had come under the general law before the date of the trial of this case in the circuit court. The ordinance having the seal of the city attached, was properly admitted in evidence. Further proof of its passage by the council was not necessary.

4. It is next insisted that the defendant McNutt stands before the court without a shadow of justification, because the letter or order addressed to him as chief of fire department, dated the 21st of October, 1884, and signed by acting Mayor Westheimer, did not command or even request him to tear down the house. The ordinance, it will be seen, makes it the duty of the mayor to issue an order to the owner of the building to have the same taken down, and upon the neglect of the owner to comply therewith within forty-eight hours after service of the same, it is duty of the mayor to cause the building to be removed. This order or notice was duly issued and served upon the plaintiff, and he neglected to remove the building within the specified time. The ordinance calls for no other or further written order from the mayor. His verbal direction to any one to tear down the house was all that was necessary. Though the letter or order from acting Mayor Westheimer to McNutt is not in words or form an order or even a request to tear down the house, still it is evident that it was understood by both parties as a direction to go on and enforce the ordinance. As a writ or written order was not necessary, the objection is not well taken.

5. The jury found that McNutt and the carpenters employed by him used due care in taking the house down, and no objections are made to the instructions relating to this branch of the case.

The judgment is therefore affirmed.

All concur.

FLORIDA SUPREME COURT.

ADVISORY OPINION to the Governor AS TO COMMISSIONING A duly Elected TAX COLLECTOR, Who during the immediately Preceding Term had been Suspended from Office for Neglect of Duty.

(.....Fla.....)

***1. A suspension from office and appointment to fill the office** under section 15 of article 4 of the Constitution, do not affect the suspended officer's right to qualify for or exercise the duties of a succeeding term of the same office; nor do they prevent a governor succeeding the one who made the suspension from commissioning the suspended officer for the new term.

2. An appointment to fill an office, the incumbent of which has been suspended under section 15 of article 4 of the Constitution, cannot be for a longer period than the remainder of the pending term of the suspended officer, and until the qualification of his successor.

(January 20, 1893.)

Hon. Henry L. Mitchell, Governor of the State of Florida.

Sir: We have the honor to acknowledge the receipt of your communication dated the 17th inst., in which you state that at the general election in 1890 James E. Johnson was elected tax collector for Duval county, and that he was re-elected to the office at the general election in 1892; that on the 29th day of October, 1892, he was suspended from office by your predecessor Gov. Fleming, for neglect of duty, and on the 26th of November, 1892, E. W. Gillen was commissioned as tax collector of Duval county to act until the adjournment of the next session of the Senate; and you ask an interpretation of the Constitution upon the question of your power and duties as to commissioning Johnson for the term to which he was elected in the year 1892.

The Constitution (sec. 13, art. 4) authorizes the governor to require our opinion "as to the interpretation of any portion of this Constitution upon any question affecting his executive powers and duties," and it makes it our duty to render an opinion in writing. The duty thus devolved upon us by the Organic Law goes no further than the interpretation of the Constitution upon some particular question affecting your executive power and duties.

Any question of executive duty involves necessarily that of executive power. The question of your power under the facts stated by you involves that of the effect of the suspension made by your predecessor. At the time of this suspension Johnson was holding the office of tax collector of Duval county

Headnotes by the Court.

for the term commencing on the first Tuesday after the first Monday in January, 1891, and to end on the corresponding Tuesday of January, 1893. From this term of office he was suspended on the 29th day of October, 1892, for neglect of duty in office, and the effect of the suspension was to arrest and take away from him the right and power to perform the duties of the office. This deprivation or arrest of the power and right to exercise the functions of the office until the Senate shall act, or fail to act, at its next ensuing session, is the effect which the Constitution has attached to the executive ascertainment of the official delinquency which the order of suspension affirms; and there is but one other limitation to this effect, and that is the power of the governor to reinstate at any time, at least until the Senate may meet, which power adheres to the executive office, to be exercised whenever the governor finds that the circumstances of any case justify it. If the Senate meets and refuses to concur with the governor in a removal of the officer for the cause stated in the order of suspension, or if it meets and adjourns without taking action upon the matter, the law restores the officer; while, if the Senate concurs in a removal of the officer, his right to the office is, in effect, adjudged to have been taken away and forfeited as from the date of the order of suspension, or at least the notice thereof, as the penal consequence of the delinquency stated in the order of suspension and recognized by the Constitution. Section 15, art. 4. When the Senate meets pending the term of the office from which the suspension has been made, and fails to act, or refuses to remove the restoration is to the exercise of the functions of the place for the balance of such pending term, and also to the salary or compensation for the time he was suspended; whereas, if it does not meet until after the term, then there can be no restoration, except to the right to the salary or other compensation for the time of suspension. Had the Senate met in special session between the day the order of suspension was made in this case and the first Tuesday after the first Monday of January of the present year, and adjourned without taking action on the question of Johnson's removal, or had it refused to remove him, the restoration would have been to the term from which he was suspended; or, meeting thus, had it removed him, the removal would have been from that term of office, and the combined executive and senatorial action would have had no effect upon his right to any future term. The delay of senatorial action, sometimes necessitated, in the absence of a special session, by the system of biennial sessions of the Legislature, to a period subsequent to the termination of the term from which there is

NOTE.—An unusual question is presented in the above case as to the effect of the suspension of an officer upon his right to hold the office during the term following.

On the subject of the right summarily to remove
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an officer, see note to Trainor v. Wayne County Auditors (Mich.) 15 L. R. A. 26, also the more recent cases of State v. Hewitt (S. Dak.) 16 L. R. A. 412; State v. Smith (Neb.) 16 L. R. A. 791.

suspension, cannot enlarge or change the effect of that action, or of the antecedent executive action. The final consummation intended by a suspension must, as shown in *State v. Johnson* (Fla.) 18 L. R. A. 410, (lately decided) always be a removal of the officer; and this removal is for the remainder of the term from which he is suspended, and nothing more. The remainder of the existing term is, including its incidents and rights, in our judgment, all the removal can act on or affect. There is certainly no express provision in the organic law that it shall affect any other term; nor is the officer in the exercise of other official functions than those covered by his title to the pending term.

Again, the Constitution has not given to the suspension or removal the effect of disqualifying the suspended or removed person from holding the same or any other office in the future; on the contrary, not only is there an utter absence of any such provision, but an intention that it shall not have this effect is also shown in a separate and distinct declaration of what the framers of the Constitution and the people intended should have that effect, which declaration is to be found in the fifth section of the sixth article. That section directs the Legislature to enact the necessary laws to exclude from every office of honor, power, trust, or profit, civil or military, within the state, all persons convicted of bribery, perjury, larceny, or of infamous crime, and for other causes therein stated, yet provides that this legal disability shall not accrue until after trial and conviction in due form of law. The legislation enforcing this section is to be found in the Revised Statutes, § 211; and the 214th section enacts that every office shall be deemed vacant upon the conviction of the incumbent of any felony or of an offense involving a violation of his official oath.

The limited effect which it was intended that the suspensions and removals under discussion should have is also shown by the provision of the section which authorizes them, (sec. 15, art. 4.) that "the suspension or removal herein authorized shall not relieve the officer from indictment for any misdemeanor in office."

A suspension or removal not having of itself the effect to taint the person or officer, either while suspended or after removal, with any disqualification to hold any office, we are unable to see how it can affect his right to exercise the functions of a future term of the same office. He is as qualified for or as eligible to election to a future term pending the suspension, or after the removal, as he was before the suspension. If the suspension under consideration had been made before the general election in October, it would not have impaired the right of the people to elect Johnson to the new term commencing on the first Tuesday after the first Monday in the present month; and a removal by the Senate subsequent to such election, and pending the old term, would not have rendered him ineligible to enter upon the office and perform its duties. Such removal, made at the time just indicated, would have taken from him 18 L. R. A.

forever the office and all its emoluments for the remainder of the term, or from the day of the suspension until the Tuesday last named; but it would have taken nothing more, nor had any other effect whatever upon his rights or capacities as to official station or his power to qualify under section 7 of article 8 of the Constitution, hereafter mentioned, for any such station to which he might have been elected.

How the mere suspension can in any way have a larger or more extended operation or disabling effect, or how it can derive additional potency from the mere postponement of the action of the body whose concurrence is essential to make the suspension a removal, we cannot see or find reason. Perhaps it may be said that it is contrary to good public policy that a person who has been suspended during one term of an office should be permitted to enter upon the duties of a subsequent term of the same office, pending such suspension. To this the answer is that a public policy which would impose upon the citizen disabilities as to official station must at least be consistent with the organic law which defines the requisites for such station, and not antagonistic thereto. If the Constitution attached to the removal, whenever it might be consummated by the concurrence of the Senate, a disability to hold the succeeding or future term or terms of the same office, it might naturally and logically follow that, pending the suspension, the functions of the succeeding term could not be performed, but where it fails entirely, as it does, to give even the removal, whenever consummated, any such effect, no room is left as a standing place for any such theory of public policy. We cannot extend by implication, or by inferences founded upon what might seem to be a wholesome public policy, the effect of a constitutional provision of a penal character, or give to the suspension or removal any result which is not clearly inferable from the terms of the Constitution, but must confine its consequence within the limits which are plainly ascribed to it by the organic law. It is penal in its nature, and is to be strictly construed as to its effect, yet it does not seem to us to be necessary to invoke this rule to reach the conclusion we have intimated.

Our opinion is that the suspension by your predecessor, Gov. Fleming, is confined in its legal effect, as it is in fact, to the term of office existing at the time the suspension was made, and had of itself no effect upon Johnson's title, capacity, or right to hold and exercise the office for the term which began on the first Tuesday after the first Monday in the present month, to which term, you say, he was chosen at the last general election.

As intimated above, the Constitution contemplates that county officers, including tax collectors, chosen at the general election of October last, should have entered upon the duties of their offices on the first Tuesday after the first Monday of the present month, (sec. 14, art. 18,) and it also requires that all county officers, except assistant assessors of taxes, shall, before entering upon their duties, be commissioned by the governor, but that no such commission shall issue to

any such officer until he shall have filed with the secretary of state a good and sufficient bond in such sum and on such conditions as the Legislature shall by law prescribe, approved by the county commissioners of the county in which the officer resides and by the comptroller, (sec. 7, art. 8.) The Legislature has prescribed the amount and condition of the bonds of tax collectors. Rev. Stat. §§ 616, 617. The section of the Constitution last cited also provides that, if any person elected or appointed to any county office shall fail to give bond and qualify within sixty days after his election, the office shall become vacant; and it and section 13, of article 16, and the Revised Statutes, §§ 616, 620, 621, make provision as to sureties.

The fact that the terms of Gillen's commission are that he shall hold office until the adjournment of the next session of the Senate, to which fact we have given the careful consideration due it, does not, as was decided in *State v. Johnson*, referred to above, confer upon Gillen any other or greater tenure of office than the Constitution gives him. In our judgment, the term of such an appointee can never be longer than the remainder of the

term of the officer suspended and until the qualification of his successor. The appointment is to fill "any office" the incumbent of which has been suspended. Section 21, art. 4. Had another person than Johnson been chosen in October last for the term commencing this month, certainly Gillen's tenure would have terminated with Johnson's, and could not have lasted longer than the qualification of the successor. Section 14, art. 16.

The result of these views is that the Constitution contemplates the commissioning of Johnson under his re-election, notwithstanding the mere fact of his suspension and the appointment of Gillen by your predecessor, if Johnson has not been delinquent in giving bond and qualifying.

This is the extent of your inquiry, as we understand it, and we consequently omit any discussion of the power of an executive under the Constitution to further suspend for an act committed prior to the term in which such order may be made. Very respectfully,

Geo. P. Raney, *Ch. J.*
R. F. Taylor, *J.*
M. H. Mabry, *J.*

LOUISIANA SUPREME COURT.

C. V. THIBAUT

v.

Joseph P. KEARNEY, *Appd.*

(.....La.....)

***A planter or farmer keeping a store on his plantation, and selling goods and liquors to his employes exclusively, falls under the terms of the law exacting a license from every one "doing a business of selling at retail."**

(*Fenner and Breaux, JJ., dissent.*)

(January 2, 1896.)

APPEAL by defendant from a judgment of the District Court for the Parish of Plaquemines in favor of plaintiff in an action to enforce payment of the license fee for carrying on business as a retail merchant and liquor dealer. *Affirmed.*

The facts are stated in the opinion.

Messrs. Gibson & Hall and R. L. Tullis for appellant.

Mr. Robert Hingle for appellee.

Nicholls, Ch. J., delivered the opinion of the court:

On a rule taken by plaintiff against the defendant, the latter was "condemned to pay one hundred and five dollars, with 5 per cent on said amount for lawyers' fees, and all costs," for a license for carrying on business as retail merchant and liquor dealer. The

*Headnote by *NICHOLLS, Ch. J.*

NOTE.—As to what constitutes "dealing" or "carrying on business" see note to *State v. Ray* (N. C.) 14 L. R. A. 529.
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defendant, in answer, pleaded the general issue, and denied specially that he was a retail merchant owing a license. He avers that he keeps a store on his plantation, in which are sold only such goods and merchandise as are needed on his plantation, and that he makes no sales to the general public, or to persons other than his laborers on the plantation; that defendant, being engaged in agriculture, is otherwise exempt from license taxation by the Constitution of this state and that of the United States. On trial of the case plaintiff testified that defendant is the owner of Belle Chasse plantation; that he knows that he carries on the business of retail merchant and liquor dealer; that he made demand on him for a license for carrying on the business of liquor dealer and retail merchant; and that he answered that he did not owe any license, because he sold only to hands employed by him on his plantation. This witness was not cross-examined. Defendant's manager testified that there was no store on the plantation wherein merchandise was sold to any persons other than the plantation laborers; that supplies are sold only to the hands employed thereon; that he himself, and not the defendant, attended to the store; that several applications by persons who did not reside on the plantation were made for the sale of supplies, and that he positively refused to sell to any one but those employed on the place; that the sales were restricted to the incidental supplies required by the laborers on the plantation; that no sales were made to any person working on the levees who were not connected with the plantation; that there were about fifty-eight men employed on the plantation, with the

exception of two other men, who are ditching on the place, who live at Little Rock; that all the rest reside on the plantation; that groceries in general were sold in the store, also liquors; that the profits are merely enough to pay the man for keeping the store, and the freight and general expenses of the store; that it was kept merely for the accommodation of the hands, and not with a view of making any profit; that the liquor was sold to no persons other than those employed on the plantation, that the ditchers when to work every morning, and remained until night; that the nearest public store to the plantation was two miles off. The defendant, on appeal, claims that, under these pleadings and evidence, the judgment of the district court should be reversed. He relies greatly on the case of *Luling v. Labranche*, 30 La. Ann. 973, and asserts that there is a difference between his position and that of Dymond, (the defendant in the case of *Thibaut v. Dymond*, 37 La. Ann. 902,) in this: that it was shown that in the Dymond store sales were made to outsiders, whereas the evidence in this case establishes the fact that he dealt exclusively with his employés. For the purposes of this case we will assume this last statement to be correct, and examine the defendant's right on that theory.

We have referred to Act No. 123 of 1866 (p. 236) and Act No. 89 of 1868 (p. 119,) alluded to in 30 La. Ann. 973, and find that the former Act was an Act entitled "An Act to Authorize Planters and Farmers to Furnish Their Freedmen and other Employés with Articles of Merchandise without Incurring the Penalties of Retail Merchants," and that it was evidently passed to "exempt planters and farmers" so dealing with their employés from the operation (under which they would otherwise fall) of the existing general law by which retail merchants were required to pay a license; and we also find that Act No. 89 of 1868 was entitled "An Act to Repeal an Act Entitled 'An Act to Authorize Planters to Furnish Their Freedmen and Other Employés with Articles of Merchandise without Incurring the Penalty of Retail Merchants,' approved March 21, 1866," and that it reads as follows: "Whereas the Act of the Legislature the title of which is set forth in the title of the present Act is against the interests of the laborer, and an Act of injustice to the paying storekeeper, be it enacted," etc., "that the same be repealed." It is conceded in the case of *Luling v. Labranche*, that the passage of Act No. 123 of 1866 is a clear legislative interpretation of the words "retail merchant" in the antecedent license law, and that, but for the Act of 1866, merchants and farmers furnishing their employés with supplies would fall under the terms of the Revenue Act, and that the second Act was intended to deprive the planters who thus sold of the benefit of the latter statute; but the court goes on to declare that the effect of this repeal is to leave "the question as a judicial one," since the "designation of a class would then appear in the Revenue Act, without any explanatory or qualifying interpretation elsewhere. We think the court was mistaken in saying that

the farmers and planters mentioned were exempted from license as retail merchants simply by a declaration in the Act of 1866 that they did not fall under the definition of the words "retail merchant." They were exempted by force of a direct affirmative exemption, one which the court rightly declared inconsistent with their being not held by a license before. We think the court was also mistaken in saying that, when the Exemption Law was repealed, it left the meaning of the words "retail merchants" a judicial question, without any explanatory or qualifying interpretation elsewhere. We do not see how the repealing of an "exemption" law, when the repealing statute assigns as a reason for the repeal that the further continuance of the exemption was against "the interests of laborers, and an injustice to tax-paying storekeepers," could be held to bring about the very reverse of what the Repealing Act declared to be its purpose. We do not think the matter was "set at large" by this repeal, but that the original legislative interpretation of the words gained, on the contrary, additional strength thereby. It was the exemption, and not the interpretation, which was repealed. We are of the opinion that the words of the present law that a license is exacted "for any business of selling at retail" reach the case of the defendant, both under legislative and judicial construction, and that he is liable, as claimed by the plaintiff. To construe the law otherwise would be to place it outside of the rule of equality and uniformity. Defendant's manager testifies that the store on defendant's plantation was not kept with a view of profit; that the profits are merely enough to pay the man for keeping the store, and the freight and general expenses of the store. The motive which the defendant might have in keeping the store on his place is not the controlling factor in the case. We think the preamble of the Repealing Act of 1868 is as applicable now as it was then, and that it would be "against the interests of the laborers, and an injustice to the tax-paying storekeepers" to sustain defendant's position, and we have no reason to believe that the Legislature has changed its view on that subject.

The conclusions we have reached do away with the necessity of an examination of the question raised in defendant's brief as to whether a liquor license was demandable of him unless and until it had been determined that he was a retail merchant; his claim being that he would be only liable as a liquor dealer when it should have been established that he sold liquors in connection with business as a retail merchant. We understand the defendant to contend in his brief that, granting his liability to pay a license, there is not sufficient evidence in the record to justify a payment of the amount which he has been condemned to pay. There are several reasons why we cannot accede to his views. It was defendant's duty, if liable, to have gone forward and demanded a license at the beginning of the year, presenting an exact statement of his situation. Not only did he fail to do this, but, when applied to for payment, he, without contesting the amount

claimed, denied, as he still denies, all liability. Not only has he not pleaded that he was "overcharged," but when plaintiff, in connection with the demand set up by him, testified that he knew defendant to be a retail merchant and liquor dealer, defendant failed to take the stand as a witness. If he was overcharged, he was better informed and better able to show that fact than any one else, and he should have done so after his default.

For the reasons herein assigned, it is ordered, adjudged, and decreed that the judgment of the District Court be, and the same is hereby affirmed.

Fenner, J., dissenting:

The claim is for a license under the License Act of 1890, and under that clause of the Act which levies a license on the "business of selling at retail," or, as elsewhere designated in the Act, the business of "retail merchant." Under a like statute, imposing a license on "retail merchants," or, as otherwise described, "for keeping a retail store," this court held: "*A person whose business or avocation is that of planter or manufacturer, and who keeps in store only such goods and wares as his employes require, and who sells to them alone, and not to the general public, and who sells not as a retail dealer does, exclusively for the profit, but only as an advance to his laborers and an incident to his main business, and to promote its better administration, is not a 'retail dealer,' within the meaning of the Revenue Act; and the tax or license imposed upon that class of persons by that Act is not legally demandable from him.*" (Italics ours.) *Luling v. Labranche*, 80 La. Ann. 972. This case was substantially affirmed in a later decision, where the court referred to it, and said: "Granting that the law, as it now stands, would not justify the exaction of a license where sales from a plantation store were confined strictly to the laborers on the place, still, where this restriction is not observed," etc. *Thibaut v. Dymond*, 37 La. Ann. 902. The first decision was rendered in 1878,—fourteen years ago. The Legislature has passed numerous license laws since that date in any of which it was perfectly competent to subject to license plantation stores selling exclusively to their own laborers, by express description; but, instead of doing so, it continued to employ the same general words, which had been held by this court not to include such stores.

It is conceded that defendant in this case keeps a plantation store, and sells exclusively to his laborers and employes. He, and the thousands of planters in like case, had the right to suppose that they could conduct such business without subjecting themselves to license, under the interpretation placed on the statutes by this court, which he was authorized and bound to accept. If we now reverse the decisions, all planters who have conducted such business will find themselves liable for licenses for all years within the prescriptive term. If there was error in those decisions, it has been condoned by subsequent legislative acquiescence; and, independently of this, it furnishes the strongest

possible case for application of the rule of *stare decisis*. As said by Mr. Sutherland, in his very recent work on the subject: "A judicial construction of a statute becomes a part of it, and, as to rights which accrue afterwards, it should be adhered to for the protection of those rights. To divest them by a change of the construction is to legislate retroactively." *Suth. Stat. Const. par. 319*. So far as contract rights acquired on the faith of such adjudications are concerned, the Supreme Court of the United States has held: "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights under it are concerned, as much a part of the statute as the text itself; and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by legislative enactment." *Douglas v. Pike County*, 101 U. S. 677, 25 L. ed. 968. No reason can be given for a distinction between contract and other rights acquired, in good faith, by action on the faith of such construction. If instead of a license, it was a criminal penalty resulting to defendant from our change of decision, he would undoubtedly be protected by the constitutional inhibition against *ex post facto* laws. "Whatever might be our impressions were the matter *res integra*, we deem it important, in the construction of statutes, to adhere to what has already been adjudged. The judicial interpretation becomes, as it were, a part of the statute, and should not be changed but for most cogent reasons." *State v. Thompson*, 10 La. Ann. 122. "A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time, and another at some subsequent time." *Cooley, Const. Lim. p. 67*. "As a general rule and particularly in regard to the construction of statutes, courts adhere strictly to the decisions of their predecessors. 'Thirty-four years have nearly passed,' said Lord Kenyon construing a special statute for the observance of the Lord's day 'since the decision in *Rez v. Cox*, 2 Burr. 787, which informed the public that all bakers have a right to do what is imputed to this defendant as an offense. This circumstance alone should have weight in the determination of this case;' and, the words being doubtful, the original decision was adhered to." *Sedgw. Stat. & Const. Law, p. 215*. "There are many questions upon which there is no objection to a change of decision other than grows out of those general considerations which favor certainty and stability of the law. There are questions where the decisions did not constitute a business rule, and where a change would invalidate no business transactions conducted upon the faith of the first adjudication; . . . but where a decision relates to certain modes of doing business, which business enters largely into the transactions of the people of a state, and a change of decision must invalidate everything done in the mode prescribed by the first, when a

decision has once been made and acted on for any considerable length of time, the maxim becomes imperative, and no court is at liberty to change." *Suth. Stat. Const. par. 317.* The fact that this is a different statute from the first construed does not affect the case. It is a statute on the same subject-matter, using the same language to express the same meaning; and every one had the right to suppose it continued to have the same meaning and effect which the first decision determined it had. The fact that the Legislature did not change the language signified its acquiescence in the construction given, and thus powerfully reinforces the reasons for applying the maxim. I find nothing in the change of constitutions of the state having any bearing on the case. I am therefore compelled to dissent.

Breaux, J., dissenting:

I have no dissent to express from the interpretation of the statute in said case as stated by the majority of the court. The decisions of this court heretofore unreversed formed the law, and entered into the body of precedents. The ruling in making the change might, for the purpose of settling all questions, embrace the possible issue as to whether any demand can be made for previous years for amount and penalty. The implied guaranty of the state not to disturb past final settlements, under existing precedents, are questions which may now be decided, and thereby add to the certainty and security of judicial interpretation.

Petition for rehearing denied January 30, 1898.

MISSOURI SUPREME COURT, SECOND DIVISION.

Sarah H. YARNELL, *Resp't.*,

v.

KANSAS CITY, FT. SCOTT & MEMPHIS R. CO., *App't.*

(.....Mo.....)

1. A railroad train may be started without waiting for a passenger to reach a seat after he has entered the vehicle unless there is some special reason to the contrary, as in the case of a weak or lame person.
2. Alighting from the train and assisting passengers to enter it is no part of the duty of the employés on a passenger train where access to the cars is easy, a neglect of which resulting in injury can be the basis of an action.
3. Time need not be given for a person who has entered a railroad train merely to assist passengers in getting on to leave the train where no notice is given of his intent to get off.
4. The presumption of negligence on the part of a railroad company cannot be based on the presumption that a person who was killed by the train as it started was in the exercise of due care where it does not appear whether he was killed while getting off the train or while standing too near it.

(January 31, 1893.)

APPEAL by defendant from a judgment of the Circuit Court for Howell County in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Reversed.*

Statement by **Sherwood, J.:**

Action for damages for the death of plaintiff's husband, the petition claiming that such death was caused by the negligence of the defendant, in the manner following, to

wit: That plaintiff's husband, at 8 o'clock A. M. on July 7, 1890, took his two daughters to Bransville, a station on defendant's road, to put them on a passenger train due about that hour; that, when arrived, no employé of defendant appeared to assist his daughters upon the train, and that he helped them upon it; "that before he could get them safely on said train the servants and employes of defendant carelessly and negligently started said train in motion, and that the said Yarnell, alighting therefrom, fell, and was run over and killed by defendant's said train of cars; that said train barely stopped at said depot and station, and wholly failed to give said parties time to get aboard thereof; that in consequence of the negligent failure of defendant's servants and employes to alight from said train, and assist passengers thereon, and the negligent failure of defendant's servants and employes to have lights on said platform and at said station, as aforesaid, and in consequence of the negligent starting of said train before passengers had time to get aboard thereof, the said Robert M. Yarnell was run over and killed by defendant's train of cars, as aforesaid." A second count in the petition contained substantially the same averments as the first, with the following in addition: "That the platform at said station was out of repair, and unsafe for use by the public; that it was rotten and broken in many places, and that, in attempting to alight from said moving train, deceased stepped on a decayed plank in the platform, which broke, and caused him to fall back under the train, by which he was killed, and that the negligence of defendant in having an unsafe platform caused his death." The answer contained a general denial, and a plea of contributory negligence, and plaintiff replied. Having introduced her testimony, the plaintiff rested, after having dismissed as to her second

NOTE.—For duty of railway conductors in stopping and starting trains, see *Highland Ave. & B. R. Co. v. Burt*, 13 L. R. A. 95, and note, 92 Ala. 291. As to feeble passenger, see the case following.

18 L. R. A.

For duty of carrier to person entering vehicle to assist passenger, see *Little Rock & Ft. S. R. Co. v. Lawton*, 15 L. R. A. 434, and note, 55 Ark. 423.

See also 18 L. R. A. 602; 26 L. R. A. 406.

count, and the court instructed the jury to disregard any testimony on that count. Defendant declined to offer any testimony, but demurred to that offered by plaintiff, which demurrer was overruled. Under the instructions given the jury returned a verdict for plaintiff in the sum of \$5,000, and judgment went accordingly, from which defendant appeals. The record has been printed in full and has been carefully read. The testimony, in substance, shows this state of facts: Robert M. Yarnell, the husband of plaintiff, was a strong, active man, nearly forty-four years old, at the time of the accident which is the basis of this action. He lived, with his family, some seven miles from the station of Brandville. About 2 o'clock on the morning of the 7th day of July, 1890, he went with his two daughters,—one married, and the other single,—to Brandville, to put them aboard the cars of the defendant company. George Wall, a cousin of the young ladies, accompanied the party. The daughters were going to the home of one of them, Mrs. Curry, who lived near McDonald. Arriving at Brandville at about 8:15 A. M., the party proceeded to the depot, where the father bought tickets for his daughters, only, as neither he nor Wall intended to become a passenger. There were no lights on the platform of the station; but the moon was shining, and, when the expected train arrived, it stopped, and the agent brought out a light, and the party proceeded to get on the train. The father and George Wall assisted the young ladies to get on the train, and George Wall, taking the two valises from the hands of the father, left him either standing on the bottom step of the car, or else on its platform, or else on the depot platform, and went with the ladies through the car which they first entered, and to the second or third seat of the next or chair car, where the ladies obtained seats. About that time the train started. Leaving the ladies and the valises, Wall went to the platform of the car, where he saw a negro, whom he took for the porter, standing on the steps, looking backward. This, if the porter, was the only employé, aside from the agent of the defendant company, that Wall saw, up to that time. Nor had any persons been seen by Wall and his party getting off or on the train. He then jumped off the train, and estimated that the point where he got off was 25 or 30 feet above the end of the depot platform. When he reached the end of the depot platform, he found Yarnell there, dead; having been decapitated, it would seem, by the cars. The body lay on its side, at the upper end of the platform, between the platform and the rail. The right foot was fastened under the platform, and the head of the deceased "was just apast the end" of the platform. There was blood on the rail where the corpse lay, but there were no indications that the body had been dragged. How far the "switch" is from the depot, does not appear, nor how long the depot platform is; but when the switch was reached the conductor came from the back of the car on which the ladies were, stopped the train, and said to the ladies, "The old gentleman has been hurt," helped them to

alight, and they went back to the scene of the accident. How long the car stopped at the time the daughters of plaintiff took passage cannot be told. Wall, testifying on this point, said "about a minute;" Mary Yarnell, that the train started "just about the time we got seated." In response to the question whether the train stopped, Mrs. Curry said, "Yes, sir, it did;" but, being pressed by counsel to say "about how long," replied: "Hardly a stop. It was almost moving all the time." All the testimony respecting the condition of the depot platform having been properly excluded by the court from the consideration of the jury, when the plaintiff dismissed as to the second count in her petition, such testimony forms no part of this record, and will not be further noticed.

Messrs. Wallace Pratt, L. P. Dana and Olden & Orr, for appellant

The demurrer to the evidence should have been sustained, because:

1. There was no evidence of any negligence towards any one on the part of defendant or its employes, as alleged in the petition or in any respect.

Raben v. Central Iowa R. Co. 74 Iowa, 783; *Straus v. Kansas City, St. J. & C. B. R. Co.* 75 Mo. 185; *Hurt v. St. Louis, I. M. & S. R. Co.* 94 Mo. 255; *Gurley v. Missouri Pac. R. Co.* 104 Mo. 228; *Roddy v. Missouri Pac. R. Co.* 12 L. R. A. 746, 104 Mo. 244; *Patterson, Railway Accident Law*, §§ 7, 258; *Williams v. Kansas City, S. & M. R. Co.* 96 Mo. 284; *Shaw v. Missouri Pac. R. Co.* 104 Mo. 654; *Clotworthy v. Hannibal & St. J. R. Co.* 80 Mo. 220; *Little Rock & Ft. S. R. Co. v. Lawton*, 15 L. R. A. 494, 55 Ark. 428.

2. There was no evidence of any failure on the part of defendant in any duty it owed deceased, nor did the petition aver any such failure.

Coleman v. Georgia R. & Bkg. Co. 84 Ga. 1, 40 Am. & Eng. R. R. Cas. 690; *Griswold v. Chicago & N. W. R. Co.* 64 Wis. 652, 23 Am. & Eng. R. R. Cas. 468; *Louisville & N. R. Co. v. Crunk*, 119 Ind. 542, 41 Am. & Eng. R. R. Cas. 158; *Imhoff v. Chicago & M. R. Co.* 20 Wis. 344; *Lucas v. New Bedford & T. R. Co.* 6 Gray, 64, 66 Am. Dec. 406.

3. There was no evidence of what caused the death of plaintiff's husband, or of how it happened.

Schlereth v. Missouri Pac. R. Co. 96 Mo. 509; *Boren v. Chicago, B. & K. O. R. Co.* 95 Mo. 268; *Murray v. Missouri Pac. R. Co.* 101 Mo. 236; *Stepp v. Chicago, R. I. & P. R. Co.* 85 Mo. 229.

It would be no proof of negligence on the part of defendant even as to the passengers—the two women—if the trainmen had not alighted and offered to assist them upon the train, even if afforded an opportunity to do so, for defendant did not owe them that duty.

Raben v. Central Iowa R. Co., *Straus v. Kansas City, St. J. & C. B. R. Co.*, *Hurt v. St. Louis, I. M. & S. R. Co.*, *Gurley v. Missouri Pac. R. Co.* and *Roddy v. Missouri Pac. R. Co.* *supra*; *Patterson, Railway Accident Law*, p. 7.

The duty of defendant to its passengers was to stop its train at this way station for a rea-

sonable time, in order that passengers might get off or on the cars with safety.

Patterson, *Railway Accident Law*, p. 258; *Straus v. Kansas City, St. J. & O. B. R. Co.*, *Clotworthy v. Hannibal & St. J. R. Co.*, *Hurt v. St. Louis, I. M. & S. R. Co.* and *Lawton v. Little Rock & Ft. S. R. Co. supra*.

The instruction given at plaintiff's request was erroneous and improper:

1. Because it failed to submit to the jury the question of whether or not it was necessary for Mr. Yarnell to go upon the train, but virtually told them that if defendant's servants failed to assist his daughters it was necessary for him to go.

To assume in an instruction a material fact in issue is error.

Stoher v. St. Louis, I. M. & S. R. Co. 91 Mo. 509; *Peck v. Ritchey*, 66 Mo. 114.

2. Because it singles out and calls attention to an isolated fact, namely, the failure of defendant's servants to appear and assist Mr. Yarnell's daughters upon the train.

This was a comment on the testimony which was improper.

Barr v. Kansas City, 105 Mo. 558; *Jones v. Jones*, 57 Mo. 138; *Forrester v. Moore*, 77 Mo. 660; *Kendig v. Chicago, R. I. & P. R. Co.* 79 Mo. 207; *Chouteau v. Jupiter Iron Works*, 83 Mo. 83.

The theory of the petition was evidently quite different from that on which the instruction was framed.

Ely v. St. Louis, K. O. & N. R. Co. 77 Mo. 84; *Price v. St. Louis, K. O. & N. R. Co.* 72 Mo. 414; *Bohn v. Chicago, R. I. & P. R. Co.* 106 Mo. 429; *Harty v. St. Louis, I. M. & S. R. Co.* 95 Mo. 368.

The instruction did not confine the jury to the negligence alleged in the petition.

Dahlstrom v. St. Louis, I. M. & S. R. Co. 96 Mo. 99; *Melvin v. St. Louis & S. F. R. Co.* 89 Mo. 106.

Sherwood, J., delivered the opinion of the court:

The controlling question in this case, as already seen, is whether the testimony adduced to support the first count in the petition is sufficient to sustain the verdict. It will have been observed that the gravamen of the petition is contained in its concluding words: "That said train barely stopped at said depot and station, and wholly failed to give said parties time to get aboard thereof; that in consequence of the negligent failure of defendant's servants and employes to alight from said train, and assist passengers thereon, and the negligent failure of defendant's servants and employes to have lights on said platform and at said station, as aforesaid, and in consequence of the negligent starting of said train before the passengers had time to get aboard thereof, the said Robert M. Yarnell was run over and killed by defendant's train of cars, as aforesaid."

1. It is quite clear from the testimony that the daughters of the plaintiff "did have time to get aboard," and even to be seated, before the train started. But, under the authorities, the defendant company did not need to wait till the passengers were seated before the cars started. "As soon as the passenger has fairly

entered the vehicle, the carrier may start, without waiting for him to reach a seat, unless there is some special reason for doing so, as in the case of weak or lame person, or of a passenger on the outside of a coach, and the ground of the exception must be brought to the carrier's notice, or he will be justified in starting in the usual manner." 2 Shearm. & Redf. Neg. 4th ed. § 508. So that neither upon the facts nor the law is the plaintiff entitled to recover on this charge in the petition.

In the circumstances heretofore related, it was no part of the duty of the defendant's employes to "alight from said train, and assist the passengers thereon," and negligence cannot, therefore, be based on such alleged failure. When access to the cars of a railway company is easy, as in the case at bar, such assistance cannot be claimed as a matter of right. 2 Shearm. & Redf. Neg. § 510. It has been ruled that it is not the duty of the employes of a railway company to assist a passenger in alighting from a train. *Raben v. Central Iowa R. Co.* 74 Iowa, 732. This was substantially the view taken by this court in *Hurt v. St. Louis, I. M. & S. R. Co.* 94 Mo. 255. See also *Sevier v. Vicksburg & M. R. Co.* 61 Miss. 8, 48 Am. Rep. 74. And obviously the reasoning which denies the right of assistance to a passenger from a train would also deny it in getting on a train. The two cases cannot be distinguished in principle.

As before stated, the testimony shows that on the night of the accident the moon was shining; and there is no testimony indicating, in the slightest degree, that the absence of stationary lights from the platform had any connection with the injury, nor does it appear that the defendant company's employes were aware of Yarnell's being on the train in any other capacity than that of a passenger, if, indeed, they were aware that he was on the train at all; and there is no testimony on either of these points. There is not a particle of testimony that Yarnell entered the cars in attendance on his daughters, so that the doctrine of the right to "welcome a coming or speed a departing guest" has no application here; and it is to be noted that the petition does not count upon the failure of duty on the part of the defendant's employes towards him. The charge of failure of duty on the part of the defendant company consisted in "the negligent starting of said train before the passengers had time to get aboard thereof;" and it is not charged that sufficient time was not given Yarnell to get off the train, or that the company had any notice of his desire in that particular, nor, if there had been such a charge, would there have been any evidence to support it. Even if Yarnell had actually been upon the train in attendance upon his daughters, and had intended to leave the train after seeing them to their seats, there is no testimony, as before stated, that the company's servants had any knowledge of this fact. The authorities are virtually unanimous in holding that, unless knowledge of such a purpose is communicated to the company's servants, no

duty arises to hold the train for a reasonable time in order that such purpose may be accomplished. *Griswold v. Chicago & N. W. R. Co.* 64 Wis. 652; *Coleman v. Georgia R. & Bkg. Co.* 84 Ga. 1; *Little Rock & Ft. S. R. Co. v. Lawton*, 55 Ark. 428, 15 L. R. A. 484, and cases cited; *Lucas v. New Bedford & S. R. Co.* 6 Gray, 64, 66 Am. Dec. 642; *Imhoff v. Chicago & M. R. Co.* 20 Wis. 344. In such cases the duty is dependent upon the knowledge of the carrier, and the negligence upon the nonperformance of the ascertained duty. Without the presence of these constituent elements, liability, which is but the legitimate result of a known and nonperformed legal duty, cannot exist.

The foregoing remarks, and the authorities which abundantly support them, show that the court below erred in giving, at plaintiff's instance, the following instruction: "The court instructs the jury that if you believe and find, from all the facts and circumstances in evidence, that the husband of plaintiff, Robert M. Yarnell, took his two daughters to defendant's train, and that when defendant's train arrived at Brandsville station the defendant's servants failed to appear, and assist said Yarnell's daughters on said train, then said Yarnell had the right to assist his daughters on such train; and if the jury further believe that the said Yarnell did go upon the platform of defendant's train to assist his daughters on the train, in the absence of defendant's servants, then the said Yarnell had a right so to do; and that if defendant's servants started said train before said Yarnell had time to alight from said train, and in alighting from such train he did so as speedily and carefully as possible, and was killed in so doing, without negligence and carelessness on his part, then they will find the issues for the plaintiff, and assess her damages in the sum of five thousand dollars." And it may be further observed of this instruction that it is a departure from the cause of action, as set forth in the petition, in that it introduces a new element of liability,—one unknown to the petition,—to wit, that "the defendant's servants started said train before said Yarnell had time to alight from said train."

2. This record is utterly barren of any testimony showing, or tending to show, how or in what way Yarnell came to his unfortunate death. His locality at the time his

daughters and Wall left him on entering the cars—whether he was on the bottom step of the car, on the car platform, or on the depot platform—is entirely unknown; and it is equally unascertained and unascertainable, whether his death resulted from an attempt to alight from the cars while in motion, and he was thus thrown beneath them and killed, or whether, having alighted, he ventured too close to the cars, and was struck by them as they started, and hurled to his death. It has been suggested that it will be presumed that Yarnell was in the exercise of "due care." This may be granted; but, while indulging this presumption, it must not be forgotten that every one is presumed to properly acquit himself of his engagements and his duty, (*Lenox v. Harrison*, 88 Mo. 491, and cases cited,) and that carriers of passengers are by no means outside of the pale of this favorable presumption. So that the result is that one presumption rebuts and neutralizes the other, like the conjunction of an acid and an alkali. Again, we are asked to presume that the deceased was in the exercise of due care. This presumption is evidently invoked in order that, if "due care" be presumed on the part of the deceased, it may then be presumed that the defendant was guilty of negligence, or else the accident would not have happened. But it is not allowable to build one presumption on another, and thus make a cause of action. Negligence cannot be assumed from the mere fact of an accident and an injury. 1 Shearm. & Redf. Neg. 4th ed. § 59. It is quite legitimate, when facts are admitted or proven, to draw from them such reasonable inferences as will be sufficient to sustain a verdict; but without this basis of fact a presumption has no office to perform. *Philadelphia City Pass. R. Co. v. Henrice*, 92 Pa. 431, 37 Am. Rep. 699; *Northern Cent. R. Co. v. State*, 54 Md. 118; *Sorenson v. Menasha Paper Co.* 56 Wis. 338. See also *Wintuska v. Louisville & N. R. Co.* (Ky.) 20 S. W. Rep. 819. For the foregoing reasons the judgment will be reversed, and, as there is no evidence on which to base a recovery, we will not demand the cause.

All concur.

Petitions for rehearing and to transfer the court *in banc* overruled.

MINNESOTA SUPREME COURT.

Robert CROOM, *Recept.*,
v.

CHICAGO, MILWAUKEE & ST. PAUL
R. CO., *Appt.*

(.....Minn.....)

*1. A railway company is not bound to

* Headnotes by MITCHELL, J.

NOTE.—As to the duty of a carrier to assist in landing a passenger safely, see *Foss v. Boston & M. R. Co.* (N. H.) 11 L. R. A. 367, and *note*.

As to duty to stop trains, see preceding case.

18 L. R. A.

See also 19 L. R. A. 671.

accept as a passenger on its cars, without an attendant, one who, because of physical or mental disability, is unable to take care of himself; but if it voluntarily accepts such a person as a passenger without an attendant, his inability to care for himself, rendering special care and assistance necessary, being apparent, or made known at the time to its servants, the company is negligent if such care and assistance is not afforded. The degree of care to be exercised in such a case is that which is reasonably necessary for the safety of the passenger, in view of his mental and physical condition.

2. Whether the defendant exercised such a degree of care in this case was, under the evidence, a question for the jury.

3. A pleading construed.

(January 20, 1893.)

APPEAL by defendant from a judgment of the District Court for Freeborn County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

the facts are stated in the opinion.

Messrs. H. H. Field and W. E. Tidd for appellant.

Messrs. Lovely & Morgan for respondent.

Mitchell, J., delivered the opinion of the court:

The defendant accepted the plaintiff as a passenger on its train for transportation from Savannah, Ill., by way of Austin, Minn., to Wells, in this state. He was aged eighty years, feeble, and infirm in mind and body, and hence required special care and assistance during his journey, of which fact the defendant was informed when it accepted him as a passenger by a letter from its station agent at Savannah, which accompanied his ticket, and was exhibited to each successive conductor on the train. The train reached Austin before daylight, about four o'clock in the morning. At that point it was necessary for plaintiff to change cars, and take a train going west to Wells. The two trains, on arrival at Austin, stood head to head on the same track alongside of the depot platform. When plaintiff's train arrived, an employé of defendant called to passengers going west to change cars, but no one assisted plaintiff to get off the train, or to find his way to the other. Owing to his age and to his being incumbered with some luggage, the old man was the last person to get off the train, and by the time he did so all the other passengers had gotten out of sight. Although the depot platform was lighted by some oil lamps, yet it was somewhat dark, and the plaintiff, being in a strange place, under such circumstances was evidently dazed, and unable to decide where to go or what to do. He says he kept "hunting round" without success to find his train and the other passengers, until finally he saw a man with a lantern, and asked him where he should go, and that the man told him "to go up the steps," referring or directing him to what proved to be the steps up onto the platform of a coach on the west-bound train, and that the man hurried off, without giving him any assistance; that he, (plaintiff,) unaided, succeeded in getting up on the platform on the coach. On the other hand, one of defendant's employés testified that he saw the plaintiff on the station platform, tottering along as if he needed assistance, and that, after ascertaining his destination, helped him up onto the platform of the coach, and then left, supposing he would go into the car. The jury were at liberty to accept as true whichever statement they thought most credible. The plaintiff, how-

ever, in his dazed condition, apparently mistook the platform of the car for something else, and instead of entering the car walked off in the dark, and fell to the ground on the opposite side of the train, and near to another track, which was from four to six feet distant from the one on which the train stood, and sustained severe injuries. Defendant's yard foreman, who was superintending the switching of a car onto that track, stood within about eight feet, and saw plaintiff fall, but, assuming apparently that he was not seriously hurt, and not in a place of danger, the foreman, without rendering any assistance, started off a distance of some fifty feet, to open a switch to let the car and switch engine in onto that track. A switchman, who was riding on the foot board of the engine, as it approached, seeing plaintiff lying there in a place of danger, jumped off, and picked him up. He testified that he did not know whether the engine "rubbed against" plaintiff or not, but the jury would have been justified in finding from the testimony of plaintiff himself that the engine came in contact with him as he was lying there along the track, and inflicted on him injuries in addition to those received by the fall.

Defendant's assignments of error are all directed to two points: *First*, that there was no evidence to justify a verdict that defendant was guilty of any negligence; *second*, that the court erred in giving plaintiff's ninth request, which was to the effect that, if defendant's yard foreman saw plaintiff in a place of peril, and was in a position to protect him from injury, and failed to do so, and thereby the plaintiff received additional injuries, then, for all such injuries resulting from the foreman's failure to perform his duty, the defendant would be liable.

1. Taking up these points in the order named, we are of opinion that, under all the circumstances disclosed by the evidence, it was a question for the jury whether defendant's servants exercised proper care in directing and assisting the plaintiff from the incoming to the outgoing west-bound train. Of course, a railroad company is not bound to turn its cars into nurseries or hospitals, or its employés into nurses. If a passenger, because of extreme youth or old age, or any mental or physical infirmities, is unable to take care of himself, he ought to be provided with an attendant to take care of him. But if the company voluntarily accepts a person as a passenger, without an attendant, whose inability to care for himself is apparent or made known to its servants, and renders special care and assistance necessary, the company is negligent if such assistance is not afforded. In such case it must exercise the degree of care commensurate with the responsibility which it has thus voluntarily assumed, and that care must be such as is reasonably necessary to insure the safety of the passenger, in view of his mental and physical condition. This is a duty required by law as well as the dictates of humanity. *Indianapolis, P. & O. R. Co. v. Pitzer*, 109 Ind. 179, and *Sheridan v. Brooklyn City & N. R. Co.*, 86 N. Y. 39, 93 Am. Dec. 490.

Whether the defendant fully performed this duty was a question for the jury.

II. There was evidence making the instruction complained of applicable to the case, and it was properly given if the matter referred to was within the allegations of the complaint. The 8d, 4th, and 5th paragraphs of the complaint, respectively, charge three distinct and separate acts of negligence: *First*, omission to properly light the station platform; *second*, failure to render plaintiff proper directions and assistance in going to and boarding his train; and, *third*, (as alleged in the fifth paragraph,) "that said plaintiff was then and there, [while lying

on the ground after he fell,] by and through the negligence of said defendant, run upon and against by one of its locomotive engines," whereby he sustained injuries. We are of opinion that the negligence here alleged must be construed as a separate charge, additional to those which preceded, and does not, as defendant claims, merely refer to allegations of negligence contained in preceding paragraphs. We may add that it would seem that the parties, in the introduction of evidence on the trial, construed it that way.

Order affirmed.

Collins, J., absent, took no part.

WASHINGTON SUPREME COURT.

S. EPHRAIM, *Appt.*,

v.

W. T. KELLEHER *et al.*, *Respts.*

(.....Wash.....)

1. An indemnity chattel mortgage upon a stock of goods is not void as matter of law in favor of creditors of the mort-

gagor because of an extraneous agreement that he may continue to sell the goods in the usual course of trade and use the proceeds to replenish the stock and defray the expenses of the business applying the balance in discharge of the mortgage indebtedness, under a statute giving him the right to possession until foreclosure and sale; its invalidity depends upon the finding of fraud as a matter of fact.

2. Creditors whose attachments have

NOTE.—Effect upon the validity of a mortgage of merchandise of a provision or agreement giving the mortgagor the possession with power of sale.

1. The general rules.
2. Mortgage showing possession with power of sale.
3. Effect of extraneous agreement.
4. Sales by mortgagor as agent for mortgagees.
5. How far the instrument is void in toto.
6. Effect of Recording Acts.
7. Effect of statutes making fraud a question for the jury.
8. Effect of mortgagee's taking possession.
9. Analysis of the law in different jurisdictions.

1. The general rules.

In England the doctrine of *Twynes' Case*, 3 Coke, 80, became the settled law in cases where the mortgagor of chattels was left in possession with power to sell them for his own benefit, and under the authority of that case such transactions were pronounced void. There was subsequently to the decision of that case much discussion of the question whether or not merely leaving the mortgagor in possession would avoid the mortgage, which question is foreign to the subject of this note. Subsequent legislation in that country has materially weakened the force of the early precedents and since such legislation is so foreign to anything found in this country that the interpretation given it by the courts would be of little aid in determining the law applicable here no attempt has been made to set out the English cases.

In this country a mortgage made simply to shield the mortgagor's property from creditors while he remained in possession with power to sell for his own benefit and apply the proceeds to such uses as he might choose would be void, and if all those facts fully appeared on the face of the mortgage few if any courts would hesitate to pronounce it so as matter of law. The chief difference of opinion is with regard to how many of those facts must appear on the face of the instrument to make it void in law.

Quotation from the opinions of judges who were dealing with the question, including those who have decided that the particular cases under con-

sideration must be submitted to the jury, will show that a change of facts would quite probably result in the application of a different rule.

Court to construe the instrument.

Thus the construction of written instruments is for the court and it must tell the jury the effect of the language used in the instrument where there is no dispute as to what provisions it contains. *Louthain v. Miller*, 85 Ind. 168.

The court must adjudge the existence of legal fraud whenever it appears upon the face of the instrument itself. *Hirshkind v. Israel*, 18 S. C. 168.

Where the instrument contains illegal provisions not reconcilable on any possible hypothesis with an honest and legal intent the law declares it void on its face, because no evidence could change its character. *Oliver v. Eaton*, 7 Mich. 118.

Hypothetical cases of invalidity.

If the mortgage deed expressed that there were other outstanding unsecured debts, and that the mortgaged property was all the mortgagor possessed, a reservation of possession with power to sell without accounting for the proceeds would render it void as matter of law. *Cheatham v. Hawkins*, 76 N. C. 325.

A mortgage providing for sales which would exhaust the stock without any provision for application of the proceeds on the mortgage debt might well be declared fraudulent. *Jaffray v. Greenbaum*, 64 Iowa, 492.

If it is proved that the object in making and taking the mortgage is to hold the instrument as a shield for the protection of the debtor against other creditors or wrongfully hindering and delaying them for the benefit of the debtor then fraud is an inference of law and the jury is, under the direction of the court, bound to find it. *Hughes v. Cory*, 20 Iowa, 399.

If an understanding appears either on the face of the mortgage or in a contemporaneous agreement that the mortgagor was not to account for the proceeds but might deal with the property to all intents and purposes as if it was his own, an inference of fraud arises which renders the mortgage void. *New v. Sailors*, 114 Ind. 408.

Giving the mortgagor possession with power to

been dissolved by an assignment for benefit of creditors may intervene under § 1907, Code of 1881, in proceedings for the foreclosure of a mortgage on the debtor's property to contest the right to foreclose such mortgage as against their rights.

(May 6, 1892.)

APPEAL by plaintiff from a judgment of the Superior Court for King County denying the prayer of his petition as against attaching creditors and others in a suit brought to foreclose a mortgage upon a stock of goods. *Reversed.*

The facts are stated in the opinion.

Messrs. Thompson, Edsen & Humphries, for appellant:

In the case at bar the court finds as a fact that the money was to be applied to the extinction of the mortgage debt, which fact makes the mortgage valid.

Wineburgh v. Schaer, 2 Wash. Terr. 326; *Etheridge v. Sperry*, 139 U. S. 266, 85 L. ed. 171; *Howard v. Rohlfing*, 86 Kan. 357; *Morris v. Stern*, 80 Ind. 227; *McFadden v. Fritz*, 90 Ind. 590; *New v. Sailors*, 114 Ind. 407; *Langet v. Brown*, 8 Wash. Terr. 102; *Maiah v. Bird*, 22 Fed. Rep. 576; *Morse v. Riblet*, 22

Fed. Rep. 501; *Whitson v. Griffiths*, 89 Kan. 311.

After the filing of the assignment, the attachments were dissolved and the creditors had no right to intervene.

A simple contract creditor cannot intervene.

Horn v. Volcano Water Co. 18 Cal. 62, 73 Am. Dec. 569; *Gasquet v. Johnson*, 1 La. 431; *Omaha & St. L. R. Co. v. O'Neill*, 81 Iowa, 468.

The court erred in refusing to strike out the pleas of intervention of all the creditors.

Welborn v. Eskey, 25 Neb. 198; *Horn v. Volcano Water Co. and Omaha & St. L. R. Co. v. O'Neill*, *supra*.

By virtue of the assignment the liens by which the intervenors claim the right to intervene were lost and destroyed.

Ward v. Proctor, 7 Met. 818, 39 Am. Dec. 782; *Baum v. Raphael*, 57 Cal. 361; *Frelinghuysen v. Nugent*, 86 Fed. Rep. 229.

The creditors of an insolvent debtor cannot contest the deed of assignment. As soon as the deed is executed the property passes into the custody of the law, and neither the debtor nor his creditors can contest the matter.

First Nat. Bank of Brattleboro v. Estate of Waite, 57 Vt. 608; *Berkeley D. School v. Jarvis*, 32 Conn. 412; *Freeland v. Mechanics Bank*, 16 Gray, 137.

sell does not render the mortgage fraudulent *per se*, if such possession is not inconsistent with the security of the mortgage, and there is not mingled in the contract any intention to delay or defraud other creditors or unreasonably withhold the property from their reach. *Brinley v. Spring*, 7 Me. 241. See also the argument of the court in *Peabody v. Landon*, 61 Vt. 313.

Fraud must be apparent.

The court cannot presume fraud unless the terms of the instrument preclude all other inferences. *Williams v. Lord*, 75 Va. 380.

It is only where the fact or intention which avoids the deeds is apparent on its face or a necessary deduction therefrom that the court can pronounce it void. *Scott v. Alford*, 58 Tex. 92.

It is only where the conveyance so unmistakably reserves the right to the mortgagor to deal with the property as his own that all evidence to the contrary should be excluded as contradicting the writing that the court can declare the deed fraudulent in law. *Britton v. Criswell*, 68 Miss. 395.

To find fraud as matter of law it must so expressly and plainly appear in the deed itself as to be incapable of explanation by evidence *dehors*. *Cheatham v. Hawkins*, 76 N. C. 335.

The mortgage must on its face plainly or by necessary implication express the right of the grantor to remain in possession and dispose of the property. *Voorhis v. Langsdorf*, 81 Mo. 451.

The court cannot declare the mortgage void unless an agreement has been made either in the mortgage or between the parties to it, the necessary construction of which permits the mortgagor to make sales for his own benefit. *Chatham Nat. Bank v. O'Brien*, 6 Hun, 231.

Effect of absence of fraudulent intent.

The fraudulent element cannot be purged by a disavowal of fraudulent intent as present in the mind and inducing the act. *Phifer v. Erwin*, 100 N. C. 59.

Nor by proof of want of fraudulent intent. *Cheatham v. Hawkins*, 80 N. C. 164.

2. Mortgage showing possession with power of sale.

The cases are relatively few in which the question at issue has been simply the effect of the presence in the mortgage of a provision giving the 18 L. R. A.

mortgagor possession with power of sale, unattended with other provisions or extraneous circumstances which might have had more or less effect in influencing the decision.

Good as between the parties.

Such a mortgage may be enforced as between the parties to it. *Wiley v. Knight*, 27 Ala. 336.

And against a volunteer. *Gregory v. Whedon*, 8 Neb. 377.

And against third persons whose claims are not based on a valuable consideration. *McCoy v. Boley*, 21 Fla. 304.

It is good between the parties although it contains a stipulation giving the mortgagor power to sell and purchase new goods, "and so on forever," all of which should be subject to the lien. *Allen v. Goodnow*, 71 Me. 421.

Stipulation that mortgagor may dispose of proceeds.

Where the agreement is that the mortgagor shall make sales for his own benefit, it shows conclusively that it was given for some purpose other than that of securing a debt to the mortgagee, and that its only operation must be to prejudice others, and therefore it cannot be shown that the mortgage was not made in bad faith and without design to hinder or defraud creditors since such can be its only effect. It is so plainly fraudulent that the court should so pronounce it, and it is immaterial whether the agreement appears on the face of the instrument or not. *Russell v. Winne*, 4 Abb. Pr. N. S. 388, 87 N. Y. 595, 97 Am. Dec. 755; *Southard v. Pinckney*, 5 Abb. N. C. 195; *S. C. sub nom. Southard v. Benner*, 72 N. Y. 425.

A mortgage of chattels containing an agreement that the mortgagor may retain possession and sell and dispose of the mortgaged property as his own without satisfaction of the mortgage debt is of no effect as a security and can only operate to hinder, delay, and defraud creditors. *Horton v. Williams*, 21 Minn. 191.

A stipulation that the mortgagor should dispose of the goods in the ordinary course of business as his own avoids the mortgage. *Stein v. Munch*, 24 Minn. 391.

Or without accounting for the proceeds. *Rocheleau v. Boyle*, 11 Mont. 451.

Retention of possession with power to sell with-

The creditors' right to intervene passed out, and the law fixed the person who could contest the fraudulent conveyances.

Bennett v. Whitcomb, 25 Minn. 148; *Root v. Potter*, 59 Mich. 504.

Messrs. Allen & Powell, Preston, Carr & Preston, and Pennfather & Williamson, for respondents:

This case is controlled by *Robinson v. Elliott*, 89 U. S. 22 Wall. 518, 22 L. ed. 758, and *Wineburgh v. Schaer*, 2 Wash. Terr. 328, because none of the proceeds of the sales was applied on the mortgage debt, but on other debts and for other purposes.

Part of the proceeds was accepted by appellant himself as payment on a debt not secured by the mortgage, bringing the case within the

rule laid down in *Byrd v. Forbes*, 8 Wash. Terr. 318.

See *Frankhouser v. Ellett*, 22 Kan. 127, 31 Am. Rep. 178, note; *Leser v. Glaser*, 32 Kan. 546; *Standard Imp. Co. v. Schultz*, 45 Kan. 52.

The mortgage is fraudulent.

Freeman v. Rawson, 5 Ohio St. 1; *Harman v. Abbey*, 7 Ohio St. 218; *Robinson v. Elliott*, *supra*; *Wilson v. Voight*, 9 Colo. 614; *Blakeslee v. Rosman*, 48 Wis. 116; *Collins v. Myers*, 16 Ohio, 547; *Harman v. Hoskins*, 56 Miss. 149; *Huschle v. Morris*, 181 Ill. 587; *Britton v. Criswell*, 68 Miss. 394; *Wood v. Hall*, 23 Mo. App. 110; *Hangen v. Hachemeister*, 114 N. Y. 566; *Means v. Dowd*, 128 U. S. 273, 32 L. ed. 429; *Second Nat. Bank of Leavenworth v. Hunt*, 78 U. S. 11 Wall. 391, 20 L. ed. 190; *Orton v.*

out accounting for the proceeds raises a presumption of fraud which, if not rebutted, becomes conclusive, and there is nothing then for the jury to pass on, but the law pronounces the mortgage fraudulent. *Cheatham v. Hawkins*, 76 N. C. 336.

Where it appears either by the face of the mortgage or by parol evidence that the mortgagee has given to the mortgagor an unlimited power to dispose of the mortgaged property for the use of the mortgagor the mortgage is void as to purchasers and attaching creditors. *Orton v. Orton*, 7 Or. 478, 33 Am. Rep. 717; *Aiken v. Pascall*, 19 Or. 493.

Reservation of power to sell the goods and apply the proceeds as the mortgagor should see fit, renders the mortgage void. *Saunders v. Waggoner*, 82 Va. 382.

Possession with power of sale simply.

The courts take different views of the effect of a stipulation vesting the possession in the mortgagor with power of sale. On the one side, it is said that if the mortgagor may sell without any accountability for the proceeds the provision is as vicious as though he was expressly given power to sell for his own benefit and that therefore the mortgage is void as matter of law. See *McDermott v. Eborn*, 90 Ala. 258, in connection with *Benedict v. Renfro*, 75 Ala. 121, 51 Am. Rep. 429; *Martin v. Ogden*, 41 Ark. 136; *City Nat. Bank v. Goodrich*, 3 Colo. 140; *Logan v. Logan*, 22 Fla. 532; *Lewiston Nat. Bank v. Martin* (Idaho) March 5, 1890; *The Federal Decisions in Iowa*, Crooks v. Stuart, 2 McCrary, 17, 7 Fed. Rep. 800; *Argall v. Seymour*, 4 McCrary, 55; *Wells v. Langbein*, 20 Fed. Rep. 183; *Lyon v. Council Bluffs Sav. Bank*, 29 Fed. Rep. 531; *Leser v. Glaser*, 32 Kan. 546; *Price v. Pitzer*, 44 Md. 527; *Lodge v. Samuels*, 50 Mo. 204; *Leopold v. Silverman*, 7 Mont. 266; *Hedman v. Anderson*, 6 Neb. 399; *Re Bloom*, 17 Nat. Bankr. Reg. 426; *Wagner v. Jones*, 9 Daly, 375; *Collins v. Myers*, 16 Ohio, 547; *Catin v. Currier*, 1 Sawy. 7; *Tennessee Nat. Bank v. Ebbert*, 9 Eelak, 153; *Wilber v. Kray*, 73 Tex. 534; *Addington v. Etheridge*, 12 Gratt. 426; *Kuhn v. Mack*, 4 W. Va. 194.

On the other side, it is argued that the mere fact that the mortgagor is given a power of sale does not conclusively show fraud. It may be capable of explanation and perfectly consistent with an honest purpose and that therefore an opportunity to explain should be given and the question passed on as one of fact by the jury. *Lister v. Simpson*, 38 N. J. Eq. 428; *Fletcher v. Powers*, 131 Mass. 333; *Blanchard v. Cooke*, 144 Mass. 226; *Muncie Nat. Bank v. Brown*, 112 Ind. 481; *Googins v. Gilmore*, 47 Md. 15; *Cheatham v. Hawkins*, 76 N. C. 336.

A mortgage which leaves the mortgagor in possession and by inference permits him to sell in the usual course of business is not fraudulent *per se*. *Gay v. Bidwell*, 7 Mich. 521.

The court cannot instruct the jury that the fact that the mortgagor is given power to sell in the usual course of trade will alone warrant them in

finding fraud. *Sleeper v. Chapman*, 121 Mass. 404.

Where a mortgage of liquors and other property provided that the mortgagor should keep possession until the note became due the claim was made that the mortgage was void on its face for not requiring the mortgagor to account to the mortgagee for the proceeds of sales made by him, relying on *Mobley v. Letts*, 61 Ind. 11; but the court said that under the statute the mortgage could not be declared void on its face, that fraud in such cases was a question of fact. *McFadden v. Fritz*, 96 Ind. 592.

So in Iowa it has been held that the absence of a provision as to application of the proceeds does not render the mortgage void. *Clark v. Hyman*, 55 Iowa, 20, 39 Am. Rep. 160; *Meyer v. Evans*, 66 Iowa, 185.

In *New v. Sailors*, 114 Ind. 408, the court said where no agreement as to the disposition of the proceeds appears the court cannot infer an intention that the mortgagor is to use them for his own benefit. It will be presumed that he was to account as agent to the mortgagee.

One of the most vigorous protests against holding the mortgage void in law is found in *Brett v. Carter*, 2 Low. Dec. 458, where *Judge Lowell* says it is very strange that since the passage of the Registration Acts and statutes providing that fraud shall be a question of fact for the jury the courts should have gone back to the harsh doctrine of holding the mortgage void as matter of law.

In *Mitchell v. Winslow*, 2 Story, C. C. 647, in speaking of a mortgage which left the mortgagor in possession with power to deal with the mortgaged goods, the court said: "I am not aware of any policy of the law, or of any principle of law, which makes any conveyance of this sort invalid as to creditors, if they have full notice, or may have full notice of it by the exercise of reasonable diligence." And it held the statutory recording of the mortgage was notice which made a mortgage valid.

Attempting to cover future-acquired property.

The mere existence of a provision that the mortgage shall cover after-acquired property does not as a rule render the mortgage void. See note to *Deeley v. Dwight*, *ante*, 298.

A clause conveying "all the goods that may be hereafter purchased to be sold in the store" is not such an express provision for the continuance of the business as to render the mortgage void on its face. *Baldwin v. Little*, 64 Miss. 126.

Attempting to cover the goods "which may be added from time to time to said stock" is not sufficient to render the mortgage void upon its face. *Voorhis v. Langsdorf*, 31 Mo. 451.

Describing the goods as those "now kept and offered for sale at the store-room at" etc., and extending it to cover and include any goods which

Orton, 7 Or. 478; *Southard v. Benner*, 73 N. Y. 432.

The mortgage is fraudulent in fact. Fraud will be presumed in courts of equity from the circumstances of the case.

Ward v. Lamberth, 31 Ga. 150; *Kendall v. Hughes*, 7 B. Mon. 868; *Burch v. Smith*, 15 Tex. 219, 65 Am. Dec. 154; *King v. Moon*, 42 Mo. 551.

The court did not err in holding the mortgage void as to the fixtures.

If the mortgage is void in part it is void *in toto*.

Wilson v. Voight, 9 Colo. 614; *Horton v. Williams*, 21 Minn. 187; *Russell v. Winnie*, 37 N. Y. 591, 97 Am. Dec. 755; *Hyslop v. Clarke*, 14 Johns. 464; *Burke v. Murphy*, 27 Miss. 167; *Clafin v. Fuley*, 22 W. Va. 484.

the mortgagor might thereafter add to the stock, does not render it void on its face. *Hewson v. Tootle*, 72 Mo. 632.

But the Tennessee chancellor has vigorously expressed his disapproval of such mortgages, saying that "the mortgage of future additions of stock is void upon the ground that such a transaction irrespective of fraud is against public policy throwing open wide a door for possible fraud, and the contract does not fall within that class of which a court of equity will decree specific performance." *Phelps v. Murray*, 2 Tenn. Ch. 746.

An attempt to cover future additions to stock is, however, usually held void when combined with a provision giving the mortgagor possession with power of sale.

Thus where by the terms of the mortgage and the schedule attached the mortgagor was to retain possession and sell in the usual course of trade and the mortgage lien was to attach to any purchases as they were from time to time made, the instrument was held to be void as to creditors as matter of law. *Edgell v. Hart*, 9 N. Y. 216, 59 Am. Dec. 532, affirming 13 Barb. 380.

A provision that the mortgagor may carry on the business and that the mortgage shall attach to all goods and credits that may come into possession of the mortgagor renders the mortgage void. *Harmann v. Hoskins*, 56 Miss. 143.

A mortgage providing that the mortgagor shall keep possession of the goods, sell them in the usual course of trade, and out of the proceeds pay certain creditors named, the mortgage to become void when this was done, which shall be within fifteen months, all after-acquired property to be subject to its provisions, is void. *Davis v. Ransom*, 18 Ill. 386.

Provisions as to keeping up stock.

There is a sharp conflict as to the effect of a provision requiring the replenishing of stock. If the mortgagor is in possession as agent for the mortgagee and the replenishing of stock is necessary to realize the money invested in it a provision permitting such replenishing is usually upheld. See *infra*, 4. But when nothing appears except that the stock is to be kept up, one class of cases hold that the mortgage is not rendered void on its face. *McKay v. Shotwell*, 6 Dak. 124; *Roundy v. Converse*, 71 Wis. 524; *Hirshkind v. Israel*, 18 S. C. 168; *Stedman v. Batchelor*, 28 N. Y. S. R. 438; *Williams v. Winsor*, 13 E. I. 12; *Peabody v. Landou*, 61 Vt. 318; *Barnard v. Baton*, 2 Cush. 294.

Where a mortgage provides that the security shall be kept good a court cannot declare as a matter of law that it appears upon the face of the mortgage that it was not given as security and that it is therefore void. *Jaffray v. Greenbaum*, 64 Iowa, 462.

Permission to the mortgagor to remain in possession of the goods upon his promising to keep the stock in as good condition as it then was will not be construed as authorizing sales to be made so as to avoid the mortgage. *Kalk v. Fielding*, 50 Wis. 339.

The assignment did not affect the status of the intervenors because:

(a) The property was in the hands of the court pending the determination of the rights of the parties already in court, among whom were the intervenors, whose liens were on the property, and the defendant could not by his act change the legal status of the property; he could neither pass possession nor right of possession of the attached property.

High, Receivers, §§ 51 *et seq.*, 188, 141, 153-160; *Bostwick v. Menck*, 40 N. Y. 383.

The title was in the receiver.

High, Receivers, § 448.

Not even a purchaser for value could take title.

Weed v. Smull, 3 Sandf. Ch. 273, 7 L. ed. 850.

sion of the goods upon his promising to keep the stock in as good condition as it then was will not be construed as authorizing sales to be made so as to avoid the mortgage. *Kalk v. Fielding*, 50 Wis. 339.

On the other side such a provision is held to give the mortgagor power to sell and apply the proceeds to his own use if he keeps the security good, and to therefore render the mortgage void. *Fox v. Davidson*, 1 Mackey, 102; *Garden v. Bodwing*, 9 W. Va. 121; *Goddard v. Jones*, 78 Mo. 513; *Carpenter v. Simons*, 1 Robt. 380; *Spies v. Boyd*, 1 E. D. Smith, 445.

Such a provision has sometimes been held void when considered in connection with the conduct of the parties. Thus in *Robinson v. Elliott*, 89 U. S. 22 Wall. 512, 23 L. ed. 758, where it appeared that the mortgagor remained in possession for more than two years during which time less than \$100 was paid on the indebtedness, the mortgage was held void. And in *Wray v. Davenport*, 79 Va. 20, where the mortgagor carried on a brisk trade for more than a year without molestation, the mortgage was declared void.

If the mortgage is void because of other provisions, a provision requiring the mortgagor to replenish and keep up the stock will not render the instrument valid. *Gallagher v. Rosenfield*, 47 Minn. 510.

Provisions for paying business and living expenses. On the one side, it is held that the mortgage is not void as a matter of law because it provides for an extension of time of the indebtedness, and that the mortgagor shall have the right to retain possession and carry on the business in the usual retail way for one year paying the cost and expenses of running the business and keeping up the stock to what it was when the mortgage was given. *Jaffray v. Greenbaum*, 64 Iowa, 462.

A mortgage containing reservations to the mortgagor, first, to sell before default in the usual course of retail trade, keeping the property up to its then value, second, to retain in his hands the avails of the sales, 33 per cent of which shall be applied on the notes secured by the mortgage, is not fraudulent on its face. *Hughes v. Cory*, 20 Iowa, 309.

A stipulation that the mortgagor may pay store and living expenses out of the proceeds does not avoid the mortgage. *Whitson v. Griffin*, 39 Kan. 211.

On the other, it is held that authorizing the mortgagor to retain possession and dispose of the goods in the regular course of business paying out of the proceeds all necessary expenses of the business and of the support of the mortgagor and his family as long as he should deposit the excess to the credit of the mortgagee is void. *Place v. Langworthy*, 13 Wis. 629, 80 Am. Dec. 758.

Permission to sell and receive the proceeds and

b) Intervenor was parties to the suit before assignment was made. Their rights were as comprehensive as the other parties to the suit, and could not be nullified by any act of defendant.

Field v. Gantier, 8 Tex. 74; *Poehmann v. Kennedy*, 48 Cal. 201; *Elliott v. Ivers*, 6 Nev. 287; *Joliet Iron & S. Co. v. Chicago, O. & W. R. Co.* 51 Iowa, 300.

After the assignment, intervenors' interest was sufficient to support an intervention.

Lambert v. Slade, 4 Cal. 337; *Dawson v. Sims*, 14 Or. 561; *Hahn v. Salmon*, 20 Fed. Rep. 801; *Coburn v. Smart*, 58 Cal. 743; *Grossini v. Perazzo*, 66 Cal. 545; Wash. Code, §§ 23, 1997; *Heyneman v. Dannenberg*, 6 Cal. 376, 65 Am. Dec. 519; *Meacham Arms Co. v. Swarts*, 2 Wash. Terr. 412; *Brown v. Bryan*, 81 Iowa, 556.

Assignee's right to intervene does not preclude creditors from intervening also.

Rumsey v. Town, 20 Fed. Rep. 558; *Pom. Remedies*, § 188; *Hallowell v. Bayliss*, 10 Ohio St. 537.

On petition for rehearing.

The mortgage ought not to hold these goods. The record shows that the lien of creditors attached before the mortgagee took possession.

People v. Bristol, 35 Mich. 28; *Jones, Chat. Mortg.* §§ 482, 483; *Gay v. Bidwell*, 7 Mich. 521; *Thompson v. Van Vechten*, 27 N. Y. 568; *Stewart v. Beale*, 7 Hun, 405; *Buttton v. Rathbone*, 48 Hun, 147; *Hilliard v. Cagle*, 46 Miss. 309; *Gill v. Griffith*, 2 Md. Ch. 270; *Beamer v. Freeman*, 84 Cal. 554.

retain a certain sum therefrom each month to enable the mortgagor to run the business, pay hands, and support his family, renders the mortgage void. *Greenbaum v. Wheeler*, 90 Ill. 296.

Implied provisions in the mortgage that the mortgagor may sell on credit, taking good business paper which the mortgagee will accept and apply on the debt, and that part of the avails of sales may be used to replenish stock, which shall be substituted in the mortgage in place of the goods sold, by monthly renewals, do not make the mortgage void on its face, but the further agreement to permit the mortgagor to use part of the avails for personal expenses will do so. *Brackett v. Harvey*, 21 N. Y. 220, reversing 25 Hun, 602.

Construction of particular mortgages.

The right to sell the property must be expressed to render the mortgage void as matter of law. *Hitchler v. Citizens Bank*, 63 Miss. 408.

The power to continue the business will render the mortgage void where it arises by clear and irresistible implication. *Perry v. Shenandoah Nat. Bank*, 27 Gratt. 758.

A mortgage to secure the purchase price of a stock of goods which contemplates that the mortgagor shall carry on the business, make sales, and from the profits pay for the stock, is valid. *Kreth v. Rogers*, 101 N. C. 263.

A clause that the mortgagor "shall be allowed to continue the sale of goods from the store as though this instrument had not been made," simply authorizes sales in the usual course of business and does not render the mortgage void. *Wingler v. Sibley*, 35 Mich. 231.

The mere insertion of a provision that the mortgage shall be a continuing lien upon "the stock or goods thereafter brought into the store," is not of itself sufficient to show permission to the mortgagor to deal with the goods which will render the mortgage void *per se*. *Yates v. Olmsted*, 56 N. Y. 632, reversing 65 Barb. 63.

Where the mortgagor by an agreement, express or implied, is permitted to continue in possession of and sell the stock of goods, shifting in their nature, at retail, for his own benefit, the mortgage is void. *First Nat. Bank of Pierre v. Comfort (Dak.)*, Feb. Term, 1896.

A mortgage of a stock in trade and the "increase and decrease" thereof, with a provision that the mortgagor shall remain in possession, is void as matter of law. *Mittnacht v. Kelly*, 8 Keyes, 407, 3 Abb. App. Dec. 301.

A stipulation that the mortgagee may take possession on default is an implied reservation to the mortgagor of possession until that time with power of sale and renders the mortgage void. *Owens v. Hobbie*, 82 Ala. 463.

Permitting the mortgagor to retain and use the goods consisting of liquors does not necessarily 18 L. R. A.

imply the power to sell them so as to render the mortgage void. *Cleaves v. Herbert*, 61 Ill. 126.

A mortgage of fixtures and "wines, liquors, and cigars," with the provision that the mortgagor may remain in possession and carefully use the mortgaged property, but which expressly forbids him to make away with, sell, or in any manner dispose of the same, is not void on its face. *Schwab v. Owens*, 10 Mont. 381.

The mere fact that the mortgaged property is a stock of drugs is not sufficient to show an implied reservation of a power of sale. *Weber v. Armstrong*, 70 Mo. 217.

Where the mortgage is on a stock of goods the only use that can be made of which is to sell them in the usual course of trade, and contains a provision that the mortgagor shall retain possession "with the privilege of using the same," it is void. *Mobley v. Letts*, 61 Ind. 11.

A stipulation that the mortgagor shall apply one half of the proceeds upon the mortgage gives him by implication the absolute disposition of the other one half and renders the mortgage void. *Blakeslee v. Rossman*, 43 Wis. 116.

Inserting in the mortgage a clause excepting "such goods as are sold in the usual course of retail trade" is an implied permission to the mortgagor to make such sales, and if there is no agreement that the proceeds are to be turned over to the mortgagee the mortgage is presumptively fraudulent. *Greeley v. Winsor (S. Dak.)*, May 12, 1890.

3. Effect of extraneous agreement.

If the power of sale does not appear on the face of the mortgage the court cannot declare it void. *Summers v. Roos*, 42 Miss. 749, 2 Am. Rep. 653; *Hilliard v. Cagle*, 46 Miss. 341.

The court will not hear extrinsic evidence to enable it to pronounce the mortgage void as matter of law. *Weber v. Armstrong*, 70 Mo. 217.

Under those circumstances the case must of course be presented to the jury and the question then arises, What course shall be taken when the evidence develops the existence of the iniquitous agreement? Shall the court instruct that if the jury find such an agreement to exist they must find the mortgage void because the law declares it fraudulent? Or must the court leave it to the jury to say whether or not there is fraud? Much the same conflict exists concerning this question which is shown above where the agreement appears on the face of the mortgage.

On the one side, it is held that so soon as an agreement is shown which will leave the mortgagor in possession with power to sell and apply the proceeds to his own use the obvious tendency of which is to secure the mortgagor in the enjoyment of his property beyond the reach of creditors, the mortgage becomes fraudulent in law and is void. *Gaus*

Where, as in this case, the mortgagor is allowed to use the proceeds in payment of unsecured debts, the mortgage is clearly not being used for security only.

Cook v. Bennett, 38 N. Y. S. R. 632; *Place v. Langworthy*, 13 Wis. 630.

The permission to dispose of the proceeds as the mortgagor pleased vitiated the mortgage.

Southard v. Benner, 73 N. Y. 432; *Potts v. Hart*, 99 N. Y. 173; *Hangen v. Hachemeister*, 114 N. Y. 566.

Nor does there seem to be any distinction between cases where there is an express agreement and where the mortgagor is permitted to dispose of the proceeds with the knowledge and consent of the mortgagee.

Standard Imp. Co. v. Schultz, 45 Kan. 52.

v. Doyle, 46 Ark. 122; *Barnet v. Fergus*, 51 Ill. 852; *Huschle v. Morris*, 131 Ill. 590; *Johnston v. Tuttle*, 45 Miss. 494; *State v. D'Oench*, 31 Mo. 438; *Rocheleau v. Boyle*, 11 Mont. 451; *Raulett v. Blodgett*, 17 N. H. 268; *Putnam v. Osgood*, 52 N. H. 148; *Speigelberg v. Hersch*, 3 N. M. 186; *Potts v. Hart*, 99 N. Y. 168; *Freeman v. Rawson*, 5 Ohio St. 12; *Jacobs v. Ervin*, 9 Or. 60; *Bank of Rome v. Haselton*, 15 Lea, 216.

Under such circumstances the court should instruct that if the jury find that the mortgagor was to be left in possession with power to sell they should find the conveyance void as to creditors.

Bullene v. Barrett, 37 Mo. 186.

If the evidence shows the mortgage to be void the court should so instruct. *McCarthy v. Miller*, 41 Mo. App. 200; *Re Kahley*, 2 Biss. 383.

In *Cook v. Halsell*, 65 Tex. 6, a charge was approved that told the jury that if they found that the mortgagee intended to permit the mortgagor to continue in possession of the goods and sell the same in the ordinary course of trade the mortgage would be void.

On the other side it is held that if matters outside of the mortgage are relied on the question of fraud is for the jury. *Williams v. Evans*, 6 Neb. 219; *Frankhouser v. Ellett*, 23 Kan. 127; *Lauthain v. Miller*, 85 Ind. 163.

In *Etheridge v. Sperry*, 139 U. S. 206, 35 L. ed. 171, a case coming from Iowa in which the mortgage had no imperfections on its face but there was a parol agreement that the mortgagor might use the proceeds of his daily sales to support himself and keep up his stock applying only the surplus but all of that to the payment of the mortgage debt, the court stated that if not bound by Iowa decisions it was inclined to the opinion that the question of the validity of the mortgage was not one of law so much as of fact and good faith.

Of course courts holding that the mortgage is not avoided by the appearance of such provision on its face will not instruct the jury that evidence showing such an agreement will render it void.

Kind of agreement necessary.

A tacit understanding is sufficient to avoid the mortgage. *Hangen v. Hachemeister*, 5 L. R. A. 187, 114 N. Y. 566.

The agreement can be inferred from circumstances. *Simmons v. Jenkins*, 76 Ill. 479.

If a power of sale is implied from circumstances it is as much a part of the contract as if expressed. *Benedict v. Renfro*, 75 Ala. 128, 51 Am. Rep. 429.

The agreement will avoid the mortgage although it is oral. *Steinart v. Deuster*, 25 Wis. 136.

Effect of evidence of good faith.

Where the mortgage is lawful upon its face and there is evidence that the transaction was fair and honest, but the circumstances tend to show an agreement that the mortgagor should continue making sales as usual, the question of fraud is for the jury. *Gardner v. McEwen*, 19 N. Y. 124.

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Anders, Ch. J., delivered the opinion of the court:

From August, 1889, until March 13, 1890, appellant and W. T. Kelleher were partners doing business as retail dry goods merchants in the city of Seattle, in this state, under the firm name and style of W. T. Kelleher & Co. On February 28, 1890, the firm, being indebted, settled with their creditors by paying half of their indebtedness in cash, and giving their firm notes for the balance to Schweitzer & Co., of San Francisco, who represented all of their creditors. There were four of these notes, each for the sum of \$3,133.80, and amounting in the aggregate to \$12,534.20. On March 13, 1890, the firm of Kelleher & Co. was dissolved by mutual

4. Sales by mortgagor as agent for mortgagee.

The courts are almost unanimous in holding that the mortgagee may lawfully be made the agent of the mortgagee to dispose of the mortgaged goods. *Felner v. Wilson*, 55 Ark. 77; *Wilcox v. Jackson*, 7 Colo. 524; *Read v. Wilson*, 22 Ill. 380, 74 Am. Dec. 159; *Wilson v. Sullivan*, 58 N. H. 200; *Kleine v. Katzenberger*, 20 Ohio St. 110; *Lane v. Starr* (S. Dak.) May 1, 1890; *Crow v. Red River County Bank*, 52 Tex. 362; *Bettes v. Weir Plow Co.* (Tex.) May 6, 1892; *Cotton v. Marsh*, 3 Wis. 221.

Although it is held in Illinois that if the mortgagor is left in full possession simply calling him agent will be of no avail. *Dunning v. Mead*, 90 Ill. 878.

The mortgagor may receive compensation for his services. *Gleason v. Wilson* (Kan.) April 9, 1892; *Wilcox v. Landberg*, 30 Minn. 98; *Frank v. Robinson*, 96 N. C. 80.

Requirement to account for proceeds.

It is generally held that a provision that the proceeds of sales shall be applied in satisfaction of the mortgage debt will prevent the mortgagee from being declared void as matter of law. *Murray v. McNealy*, 66 Ala. 234; *Miller v. Lookwood*, 32 N. Y. 300; *Fletcher v. Martin*, 123 Ind. 56; *Abbott v. Goodwin*, 20 Mo. 408; *Bannon v. Bowler*, 34 Minn. 416; *Metzner v. Graham*, 57 Mo. 404; *Davis v. Scott*, 22 Neb. 154; *Langer v. Brown*, 3 Wash. Terr. 103; *Saunders v. Turbeville*, 3 Humph. 272.

The mere fact of leaving the goods in the mortgagor's possession with instructions to sell and make remittances to the mortgagee does not amount to fraud as matter of law. *Fisk v. Harshaw*, 45 Wis. 666.

The fact that the provision as to accounting for proceeds refers to the "net proceeds" does not avoid the mortgage. *Manhattan Brass Co. v. Webster Glass & Q. Co.* 37 Mo. App. 145.

A provision that the mortgagor may sell the mortgaged property turning over the proceeds to the banker of the mortgagee after deducting the expenses of sale including his own salary does not render the mortgage void. *Adler v. Claflin*, 17 Iowa, 91.

There is, however, some dissent from the broad rule as above stated.

Thus power to sell renders the instrument void although there is a requirement to account to the mortgagee for the proceeds. The court says there is a material distinction between a provision simply to account and one which would require an application of the proceeds in satisfaction of the debt. *Chopard v. Bayard*, 4 Minn. 533.

If the power to sell is given to the mortgagor it is immaterial what provision is made as to the disposition of the proceeds. The mortgage will be void in any event. *William Deering & Co. v. Washburn* (Ill.) Jan. 18, 1892, affirming 39 Ill. App. 434.

No lien is valid which allows the debtor to carry

consent. By the terms of the agreement of dissolution, Ephraim retired from the firm, and Kelleher was to retain all the stock of goods then on hand, and all other firm assets, and promised and agreed to pay all of the copartnership notes and debts, and to save Ephraim harmless from all liability on account thereof. It was also agreed between them that Ephraim should retain the same control of the business that he had before the dissolution until the notes and debts of the firm for which he was liable should be paid; but it appears from the evidence that that part of the agreement was disregarded, and that, in fact, the business was thereafter conducted exclusively by Kelleher. Notice of the dissolution was given by publication

in the newspapers and personally to those with whom the firm had formerly dealt, but the firm name of Kelleher & Co. was retained by Kelleher after the dissolution. Ephraim remained in Seattle after the dissolution a greater part of the time, until about July 20 or 25, 1890, at which time he concluded to go to his home in California to remain. Before leaving, however, he entered into an agreement with Kelleher whereby the latter was to give him a chattel mortgage upon the entire stock of goods then in his store in Seattle, and upon the fixtures, and all his book accounts and notes, to indemnify him against his liabilities upon the notes to Schweitzer & Co., then amounting to \$9,401.40, (one of the notes having been

on his business and account for the profits only to the person holding the lien. *Duncan v. Taylor*, 63 Tex. 648.

A provision that the goods shall be disposed of for the sole benefit of the mortgagee either by applying the money on the mortgage or in keeping up the security by adding to the stock renders the mortgage void if it provides for an indefinite continuing lien. *Byrd v. Forbes*, 3 Wash. Terr. 312.

Construction of particular mortgages.

Permission to sell on credit and turn the proceeds over to the mortgagee when the accounts are collected will render the mortgage void. *City Bank of Rochester v. Westbury*, 16 Hun. 458.

But if the accounts are to be assigned when made and credited immediately on the indebtedness the mortgage is not fraudulent *per se*. *Caring v. Richmond*, 22 Hun. 371.

Permitting the mortgagor to make public sale of the goods, the mortgagee taking the notes given to himself and also taking all cash paid, will not render the mortgage void. *Goodheart v. Johnson*, 68 Ill. 58.

Permitting the continuance of the business and replenishing of the stock by a mortgagor under control of the mortgagee with a view to realizing the fund and winding up the business is not fraudulent *per se*. *Marks v. Hill*, 15 Gratt. 400.

The understanding that the proceeds are to be applied upon the mortgage debt need not be incorporated into the written permission to sell. *Wilson v. Sullivan*, 58 N. H. 200.

Where it was proved that the goods were to remain in the mortgagor's possession and he was empowered to make sales of them but to account to the mortgagee, if called on, the mortgage was held void because the possession and power of sale were incompatible with the avowed purpose of the deed. *Lang v. Lee*, 3 Rand. (Va.) 424.

A stipulation that the mortgagee should at all times hold absolute and exclusive possession against all persons but the mortgagor and release all claims to the mortgaged property as soon as the debt should be fully paid will not render the mortgage valid. *Harman v. Abbey*, 7 Ohio St. 218.

A parol agreement that the proceeds of the sale shall be turned over to the mortgagee will not validate the mortgage. *Owens v. Hobbie*, 82 Ala. 438.

A stipulation for monthly accounts to the mortgagee of the business and for payment to him of the money received to be applied under his direction to the maintenance of the business by payment of the current expenses and making purchases to replenish stock will not save the mortgage from being declared void. *Joseph v. Levi*, 58 Miss. 844.

Application of proceeds.

All money or credits taken by the mortgagor when acting as the mortgagee's agent will be applied to the mortgage debt. *18 L. R. A.*

filled in reduction of the mortgage whether they have been collected and paid over or not. *Conkling v. Shelley*, 28 N. Y. 380, 84 Am. Dec. 848; *Brackett v. Harvey*, 91 N. Y. 220; *Elsworth v. Phelps*, 30 Hun. 646; *Sperry v. Baldwin*, 46 Hun. 125; *Hawkins v. Hastings Bank*, 1 Dill. 432; *Wilson v. Sullivan*, 58 N. H. 200; *Weill v. First Nat. Bank*, 108 N. C. 1; *Lane v. Starr* (S. Dak.) May 1, 1890; *Warren v. His Creditors*, 3 Wash. 43; *New v. Sailors*, 114 Ind. 403.

But in Michigan mortgaged chattels do not cease to belong to the mortgagor until steps are taken to end his rights. The mortgage is a mere security to the mortgagee and not a transfer of title. The mortgagor while remaining in possession is not the agent of the mortgagee but owner of incumbered property. Permission to sell at retail is permission to pass title free from incumbrance but cannot be regarded as in any sense a payment of the mortgage. *People v. Bristol*, 35 Mich. 33.

5. How far the instrument is void in toto.

There is much conflict in regard to the effect of the invalid provision upon the remainder of the instrument.

On the one side it is held that if the mortgage is void in law because containing a power of sale it is void not only as to the property to which the power of sale relates but as to all other property which it purports to cover. *Russell v. Winne*, 37 N. Y. 595, 97 Am. Dec. 755; *Re Burrows*, 7 Biss. 523; *Harman v. Hoskins*, 56 Miss. 148; *Bank of Rome v. Haselton*, 15 Lea, 216; *Claflin v. Foley*, 22 W. Va. 434; *Dodds v. Johnson*, 3 Thomp. & C. 215; *Smith v. Kenney*, 1 Mackey, 12; *Grooley v. Winsor* (S. Dak.) March 4, 1891; *Harblson v. Tufts*, 1 Colo. App. 140; *Gallagher v. Rosenfield*, 47 Minn. 507.

On the other side are authorities holding that even though the mortgage is held to be void as to the property to which the power of sale relates it will be valid as to other property of which no sale is contemplated. *Hayes v. Westcott*, 11 L. R. A. 483, 91 Ala. 143; *Garrettson v. Pegg*, 64 Ill. 111; *Davenport v. Foulke*, 68 Ind. 332; *Bullene v. Barrett*, 87 Mo. 136; *Rocheleau v. Boyle*, 11 Mont. 451; *Re Kahley*, 2 Biss. 333.

6. Effect of Recording Act.

The Recording Act does not repeal the statute concerning fraudulent conveyances. *Wood v. Lowry*, 17 Wend. 492.

The Recording Act does not make the filing of the mortgage legally equivalent to actual delivery and continued possession. *Horton v. Williams*, 21 Minn. 191.

If the mortgage contains provisions which on legal principles vitiate the whole instrument, recording it cannot make it even *prima facie* valid. *Robinson v. Elliott*, 39 U. S. 22 Wall. 513, 23 L. ed. 753.

paid,) and upon an indebtedness of Kelleher of \$465 to Newhall Sons & Co., and of \$300 to the Merced Woolen Mill Company, for which he had agreed to be responsible. The mortgage was executed according to this agreement by Kelleher and wife, on July 28, 1890, and delivered to Ephraim's agent, who caused it to be recorded on August 11, 1890. A day or two subsequent to the recording of the mortgage the respondents Fleischener, Mayer & Co. and Newstadter Bros., respectively, commenced actions against Kelleher in the superior court of King county, in which action writs of attachment were issued and placed in the hands of respondent McGraw, who was sheriff of King county, by virtue of which he levied upon and took possession

of the property and goods belonging to said Kelleher, and covered by the said mortgage. Appellant, Ephraim, thereupon commenced an action to foreclose his chattel mortgage, and asked to have the same declared to be a lien prior to the attachment liens of the defendants, and prayed for the appointment of a receiver to take charge of and sell the property under the direction of the court. A receiver was accordingly appointed, who sold the property, and now holds the proceeds subject to the order of the court. As a defense to the action, the attaching defendants alleged in their answer that the mortgage was given without consideration, and was executed and delivered by Kelleher for the purpose of hindering, de-

The Recording Act has no effect to validate a mortgage in which the power of disposition is retained. *Freeman v. Rawson*, 5 Ohio St. 12.

The effect of the Recording Act is not to make a recorded mortgage prima facie valid which prior thereto would have been fraudulent in law. *Peiser v. Peticolas*, 50 Tex. 646.

The Recording Acts do not change the rules of the common law as to the validity of such mortgages. *Wineburgh v. Schaer*, 2 Wash. Terr. 323.

The Chattel Mortgage Act does not make valid that which the law pronounces void. *Duncan v. Taylor*, 63 Tex. 646.

The Recording Act does not validate the mortgage. *Lewiston Nat. Bank v. Martin* (Idaho) March 5, 1890.

The invalidity of the deed is not affected by the fact of its being recorded. *McCormick v. Atkinson*, 78 Va. 10.

But in Iowa it was held that, under the statute making the recording of the mortgage equivalent to actual delivery to the mortgagee, giving the mortgagor power to dispose of the mortgaged property in due course of trade is not fraudulent *per se*. *Torbert v. Hayden*, 11 Iowa, 435.

And *Justice* Story held that the statutory recording of the mortgage was notice of the power of the mortgagor to deal with the property which removed the otherwise objectionable features and rendered the mortgage valid. *Mitchell v. Winslow*, 2 Story, C. C. 647.

7. Effect of statutes making fraud a question for the jury.

The clause of the statute making fraudulent intent a question of fact is not applicable to written instruments which the law adjudges to be fraudulent on their face and consequently void. *Robinson v. Elliott*, 89 U. S. 23 Wall. 513, 23 L. ed. 758.

When it appears by the terms of the instrument that a trust has been created for the use and benefit of the mortgagee the instrument is made void by statute and there is no question for the jury. This provision is distinct from that rendering void conveyances made with intent to defraud creditors and making the question of intent one for the jury. *Spies v. Boyd*, 1 E. D. Smith, 445.

But where the statute provides that the question of fraudulent intent shall be deemed a question of fact, the cases will be rare in which it can be correctly stated that the mortgage is void on its face. *Lockwood v. Harding*, 79 Ind. 133.

8. Effect of mortgagee's taking possession.

The great majority of cases hold that if the mortgage is so fraudulent in law as to be void the mortgagee can acquire no rights which will entitle him to protection by taking possession under the mortgage. *Wilson v. Voight*, 9 Colo. 614; *Re* 18 L. R. A.

Forbes, 5 Blas. 510; *Wells v. Longbein*, 2 Fed. Rep. 183; *Stein v. Munich*, 24 Minn. 391; *Janvrin v. Fogg*, 49 N. H. 351; *Quinn & N. B. Brew. Co. v. Hart*, 43 Hun, 393; *Blakeslee v. Roseman*, 43 Wis. 116.

Even if possession is taken, the goods sold, and the proceeds applied upon the mortgage debt, they are not beyond the reach of creditors. *Mandeville v. Avery*, 124 N. Y. 387.

The mortgagee may still be made to account for the proceeds. *Gallagher v. Rosenfield*, 47 Minn. 510.

So foreclosure and sale under the mortgage will not alter the relations of the parties. *Bremer v. Fleckenstein*, 9 Or. 270.

But the mortgagor may make a valid pledge to the mortgagee of the mortgaged goods which will be effective to perfect the mortgagee's title notwithstanding the fact that the mortgage was fraudulent. *Pettee v. Dustin*, 58 N. H. 309.

A valid delivery of the goods to the mortgagee may be made notwithstanding the fact that the mortgage was void. *Baldwin v. Flash*, 58 Miss. 563.

If the goods are delivered into the possession of the mortgagee with authority to sell immediately and appropriate the proceeds to the payment of the claim before the rights of other creditors attached, the mortgagee's rights will be protected. *Brown v. Platt*, 8 Bosw. 331.

If before any proceedings are taken hostile to the mortgage the mortgage property is delivered to the mortgagee in good faith in satisfaction of the mortgage debt the title of the mortgagee will prevail against that of creditors subsequently proceeding against the mortgagor. *First Nat. Bank of Fergus Falls v. Anderson*, 24 Minn. 436.

And some courts have held that possession could be acquired under the mortgage which would entitle the mortgagee to protection. *Brown v. Webb*, 20 Ohio, 389; *Read v. Wilson*, 22 Ill. 380, 47 Am. Dec. 159; *Dobyns v. Meyer*, 95 Mo. 132.

Acquiring possession by replevin is sufficient. *Wood v. Hall*, 23 Mo. App. 113.

9. Analysis of the law in different jurisdictions.

United States Supreme Court.

Decisions of the Supreme Court of the United States are of course not of controlling weight upon this question since that court will follow the decisions of the state from which a case comes before it, in disposing of the question as to whether or not the mortgage is void upon its face. *People's Sav. Bank v. Bates*, 120 U. S. 558, 30 L. ed. 754.

Yet because of the eminent ability of that court and the careful consideration which it gives to all questions discussed by it, its utterances upon this subject will well repay an examination by any one interested in the question. In an early case where the question was not directly before it, it stated that power to appropriate the proceeds of sale to the sole benefit of the mortgagor renders the

laying, and defrauding his creditors, and the said defendants, and that the same was fraudulent and void as to the defendants and the creditors of Kelleher. After the institution of the foreclosure proceedings a number of other creditors of Kelleher commenced actions against him, in which writs of attachments were issued and levied on the same goods, for the recovery of their respective claims and demands, several of whom, by leave of the court, intervened in the foreclosure suit, and likewise contested the validity of the mortgage. On September 28, 1890, and before judgment was rendered against him in any of these actions, Kelleher made a general assignment of all his property for the benefit of his creditors under the

Act of March 6, 1890. An assignee was appointed, who duly qualified, and thereafter intervened in the foreclosure suit, and asked to have the mortgage declared fraudulent and void as to the creditors of Kelleher. After the making of the assignment a motion was filed by plaintiff to dissolve the attachments, which motion was overruled, and the court proceeded to try the case upon the issues thus raised. Subsequent to the commencement of his action to foreclose the mortgage, the plaintiff, Ephraim, paid or secured the payment of the Schweitzer & Co. notes described in the mortgage. Upon the trial the court gave judgment in favor of Ephraim, and against Kelleher, for the sum of \$10,916 and costs, and in favor of the assignee and

mortgage void. *Second Nat. Bank of Leavenworth v. Hunt*, 78 U. S. 11 Wall. 301, 20 L. ed. 190.

In a later case, where the question was to be decided as it says on general principles, it held void a mortgage containing an express agreement that until default the mortgagors might remain in possession of the goods and sell them as theretofore and supply their places with other goods, and the goods substituted for those sold should, upon being put into the store, be subject to the lien of the mortgage, and it appeared that the mortgagors were permitted to remain in possession for more than two years, during which time less than \$100 was paid in satisfaction of the debt. The court said that the creditor must take care in making his contract that it does not contain provisions of no advantage to him but which benefit the debtor and were designed to do so, and are injurious to other creditors. Retention of possession with power to dispose of the goods for the benefit of the mortgagor alone is inconsistent with the nature and character of a mortgage, is no protection to the mortgagee, and of itself furnishes a pretty effectual shield to a dishonest debtor. Whatever may have been the motive which actuated the parties to the instrument it is manifest that the necessary result of what they did was to allow the mortgagors under cover of the mortgage to sell the goods as their own and appropriate the proceeds to their purposes, and this, too, for an indefinite time, a mortgage which in its very terms contemplates such results beside being no security to the mortgagee operates in the most effectual manner to ward off other creditors; and where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose. *Robinson v. Elliott*, 80 U. S. 23 Wall. 513, 23 L. ed. 758.

Where, in a case coming from Iowa, the mortgage had on its face no imperfections, the court held that it was not invalidated by the fact of a parol understanding at the time of its execution that the mortgagor might use the proceeds of his daily sales to support himself and to keep up the stock by purchases applying only the surplus, but all of that, to the payment of the mortgage debt. The court says that if the question were open and not affected by any settled law of the state of Iowa it inclines to the opinion that the question is not one of law so much as it is one of fact and good faith, and that the decisions of the Supreme Court of Iowa rests on sound principles although the doctrine of *Robinson v. Elliott*, *supra*, appears to be regarded as sound so far as it holds that such an instrument should not be used to enable the mortgagor to continue in the business as theretofore with full control of the property and business and appropriating to himself the benefits thereof and all the while holding the instrument as a shield 18 L. R. A.

against the attacks of unsecured creditors. *Ethridge v. Sperry*, 139 U. S. 204, 35 L. ed. 171.

Alabama.

In this state although the general rule was recognized that if the deed showed on its face that the intention was to hinder and defraud creditors it was void in law (*Johnson v. Thweatt*, 18 Ala. 744), yet for a number of years no general rule was established upon the question, but each case was disposed of on its facts, and the question of the solvency or insolvency of the mortgagor was given much prominence. Thus it was decided that where an insolvent debtor mortgages his stock by an instrument providing that he shall retain possession and make sales in the usual course of business and pay the indebtedness from the net proceeds, if the mortgagee has knowledge of the insolvency he must rebut the presumption of fraud, and if he fails to do so the mortgage will be void as matter of law. *Tickner v. Wiswall*, 9 Ala. 310.

A mortgage of a stock of goods authorizing the mortgagor to remain in possession and sell to responsible men in the usual way, the mortgagee to have control of the proceeds for the purpose of paying the debt and providing that all goods subsequently purchased should be subject to the mortgage is not void on its face but becomes so upon proof that the mortgagor was insolvent to the knowledge of the mortgagee and soon after the mortgage was executed an attempt was made to remove the goods out of the state. *Constantine v. Twelve*, 29 Ala. 607.

A mortgage by an insolvent to one knowing his condition whose debt is not due or bearing interest, conveying the entire stock but fixing no law day and reserving power to the mortgagor to sell in the usual course of trade covering goods brought into the store to keep up stock is void. *Price v. Mazange*, 31 Ala. 701.

The mortgage is void if it ties up more than enough to satisfy the debt for an unreasonable time, and the mortgagor is insolvent. *Reynolds v. Welch*, 47 Ala. 200.

A deed is fraudulent on its face if made by an insolvent debtor to secure debts past due, which covers future acquisitions to stock and gives the mortgagor possession with power of sale for several months and it appears that there were other existing creditors at the time it was executed. *Commercial Bank of Selma v. Brewer*, 71 Ala. 374.

Where the mortgage covers practically all the property of the insolvent, which is worth twice the amount of the debt, and the mortgagor is impliedly given power to sell in the usual course of business, the mortgage is void. *Benedict v. Renfro*, 75 Ala. 128, 51 Am. Rep. 429; *Renfro v. Goetter*, 78 Ala. 311.

A statute was subsequently passed making void instruments reserving a trust for the maker since

the intervenors, and against the plaintiff for their costs. As a conclusion of law from the facts found, the court stated that, as to the assignee and creditors of Kelleher, the mortgage sued on was fraudulent and void, and that the proceeds of the property in the hands of the receiver should be delivered to the assignee as assets under the assignment. The plaintiff excepted to all the conclusions of law stated by the court, except that which stated that the plaintiff was entitled to judgment against the defendants, and moved the court to so change the conclusions of law as to state that the mortgage should be foreclosed as against all of the defendants. The court denied the motion, and the plaintiff duly excepted. Judgment was thereupon

entered in accordance with the conclusions of law stated by the court, and the plaintiff appealed to this court.

Following the description of the property, the mortgage recites, in substance, that it is given to secure, indemnify, and hold harmless the mortgagee from all liability, loss, or damage accruing, directly or indirectly, by reason of the failure or refusal of the said W. T. Kelleher to pay off and satisfy the whole or any part of the amount due or to become due upon all or any of the aforesaid promissory notes, or upon all or any of the aforesaid accounts, or upon all or any of the claims of the creditors of the original firm of Kelleher & Co. for whose benefit the aforesaid promissory notes were executed.

which the mortgages have been declared void as matter of law upon reservation of power to sell and dispose of the proceeds alone. See *McDermott v. Eborn*, 90 Ala. 258.

If a power of sale is implied from circumstances it is as much a part of the contract as if expressed. *Benedict v. Benfro*, *supra*.

A stipulation that the mortgagee may take possession on default is an implied reservation to the mortgagor of possession until that time with power of sale and renders the mortgage void. *Owens v. Hobbie*, 88 Ala. 468.

A provision that the mortgagor shall retain possession and sell for and on account of the mortgagee, paying over the proceeds of sale at the end of each week, or oftener if required, is not fraudulent on its face. *Murray v. McNealy*, 86 Ala. 234.

But a parol agreement that the proceeds of the sale shall be turned over to the mortgagee will not validate the mortgage. *Owens v. Hobbie*, *supra*.

The mortgage may be valid between the parties. *Wiley v. Knight*, 27 Ala. 326.

And is not void as to the portion of property not within the power of sale. *Hayes v. Westcott*, 11 L. R. A. 486, 19 Ala. 142.

Arkansas.

Power to sell as the demand of trade in the usual way shall require "to the same extent as though this instrument had not been made" and no requirement that the proceeds are to be applied upon the mortgage, or so invested as to fix a continuing trust on them for the purposes of the mortgage, renders the mortgage void as against creditors. *Martin v. Ogden*, 41 Ark. 186.

Although the mortgage may be valid between the parties, and as to property not within the power of sale. *Lund v. Fletcher*, 30 Ark. 825.

That the agreement does not appear upon the face of the instrument is immaterial. It is sufficient to avoid the transaction if it is shown by extrinsic evidence. *Gauss v. Doyle*, 46 Ark. 122.

Making the mortgagor the agent to sell the goods does not render the mortgage void. *Fink v. Ehrman*, 44 Ark. 310; *Felner v. Wilson*, 55 Ark. 77.

California.

The question is not an open one in California since a statute provides that "no mortgage of personal property shall be valid against any other than the parties to it unless possession of the mortgaged property is delivered to and retained by the mortgagee." See *Meyer v. Gorham*, 5 Cal. 322.

Colorado.

Permission to the mortgagor to continue selling in regular course of business renders the mortgage void. *City Nat. Bank v. Goodrich*, 3 Colo. 140.

The mortgage is void *in toto*. *Wilson v. Voight*, 9 Colo. 614; *Hartblison v. Tufts*, 1 Colo. App. 140.

Taking possession will not perfect the mortgage. 18 L. R. A.

gee's title as against creditors. *Wilson v. Voight*, *supra*.

But the mortgagor may be made the agent to sell the property for the mortgagee. *Wilcox v. Jackson*, 7 Colo. 524.

Connecticut.

Permitting the mortgagor to remain in possession of the property renders the mortgage ineffectual against creditors. *Gaylor v. Harding*, 37 Conn. 516.

But see the reasoning of a case upholding a conditional sale where the property was delivered to the vendee with a provision that the title should remain in the vendor. *Lewis v. McCabe*, 49 Conn. 141, 44 Am. Rep. 217.

Dakota.

Where the mortgagor by an agreement, express or implied, is permitted to continue in possession of and sell the stock of goods, shifting in their nature, at retail, for his own benefit, the mortgage is void. *First Nat. Bank of Pierre v. Comfort* (Dak.) Feb. Term, 1893.

Permitting sales for the purpose of replenishing stock does not avoid the mortgage. *McKay v. Shotwell*, 6 Dak. 124.

District of Columbia.

A mortgage permitting the mortgagor to retain possession and use the property, and purporting to cover "every article that may be purchased by way of replenishing the stock," is void. *Fox v. Davidson*, 1 Mackey, 102.

It is void *in toto*. *Smith v. Kenney*, 1 Mackey, 12.

Florida.

If the mortgagor has power to sell the goods at his discretion or in the usual course of business the mortgage is void. *Logan v. Logan*, 22 Fla. 562.

The mortgage is not void as between the parties to it nor as against a third person whose claim is not based on a valuable consideration. *McCoy v. Boley*, 21 Fla. 804.

Georgia.

The Georgia Code, § 1954, permits mortgages upon stocks of goods which shall cover the stock as it changes from time to time. See *Johnson v. Patterson*, 2 Woods, C. C. 443.

Under that statute the mortgage cannot by purchase or addition of new goods be made to cover an amount greater in value than the stock originally mortgaged. *Chiselm v. Chittenden*, 45 Ga. 213.

Where the goods mortgaged are put into a partnership concern against an equal amount of goods furnished by the other partner the mortgage does not cover the goods bought to replenish sales from the partnership stock. *Anderson v. Howard*, 49 Ga. 813.

The mortgage will cover goods bought on credit to replenish stock sold which come into the store free from liens. *Goodrich v. Williams*, 50 Ga. 423.

It also sets forth the fact that the parties thereto had been partners; that the firm was dissolved by Kelleher purchasing the interest of Ephraim, the giving of the notes to Schweitzer & Co. for the benefit of their creditors, and the agreement of Kelleher to pay the firm liabilities. The mortgage also contains the following provisions: "And it is agreed, if the mortgagors shall fail to cause said promissory notes, and each of them, to be duly paid off, satisfied, and canceled, or shall fail or refuse to cause the aforesaid account of Schweitzer & Co. to be paid off and satisfied, or shall fail or refuse to cause the aforesaid account in favor of the Merced Wool Mill Company to be paid off and satisfied, or if the aforesaid stock, goods,

wares, merchandise, and fixtures, or any part thereof, shall be levied upon by any writ of attachment, execution, or other proceedings, or shall come into the hands of any sheriff, assignee, receiver, administrator, executor, or other officer, or if all or any one of the aforesaid promissory notes shall fall due and remain unpaid, then, and in that event, the mortgagee may immediately take possession of said property, goods, wares, merchandise, fixtures, book accounts, and promissory notes, using all force necessary so to do, and may immediately proceed to sell the same, in the manner provided by law, and from the proceeds may pay the whole amount due, or thereafter to become due, upon each and all of the aforesaid promissory notes,

Idaho.

A mortgage permitting the mortgagor to remain in possession with power of sale is void. *Lewiston Nat. Bank v. Martin* (Idaho) March 5, 1900.

And the Recording Act does not validate it. *Ibid.*

Illinois.

A mortgage providing that the mortgagor shall keep possession of the goods, sell them in the usual course of trade and out of the proceeds pay certain creditors named, the mortgage to become void when this is done, which shall be within fifteen months, all after-acquired property to be subject to its provisions, is void. *Davis v. Ransom*, 18 Ill. 303.

Permission to sell and receive the proceeds and retain a certain sum therefrom each month to enable the mortgagor to run the business, pay hands, and support his family, renders the mortgage void. *Greenbaum v. Wheeler*, 90 Ill. 236.

That the agreement was not inserted in the mortgage is not important. *Huschle v. Morris*, 181 Ill. 580, affirming 29 Ill. App. 484.

An agreement extraneous to the mortgage will avoid it. *Barnett v. Fergus*, 51 Ill. 552, 99 Am. Dec. 547.

And can be inferred from circumstances. *Simmons v. Jenkins*, 76 Ill. 479.

But in this state the mortgage is not void *in toto*. *Barnett v. Fergus*, *supra*; *Garretson v. Pegg*, 64 Ill. 111; *Sohermerhorn v. Mitchell*, 15 Ill. App. 418.

And the right of the mortgagee may be perfected by taking possession under the mortgage before the rights of creditors attach. *Read v. Wilson*, 22 Ill. 390, 74 Am. Dec. 159.

Although the United States court for this district has held to the contrary. *Re Forbes*, 5 Biss. 510.

Permitting the mortgagor to retain and use the stock consisting of liquors does not necessarily imply the power to sell them so as to render the mortgage void. *Cleaves v. Herbert*, 61 Ill. 126.

Permitting the mortgagor to make public sale of the goods, the mortgagee taking the notes given to himself and also taking all cash paid, will not render the mortgage void. *Goodheart v. Johnson*, 88 Ill. 58.

Continuing the mortgagor in the store to assist in the sale of the goods under the supervision of the mortgagee will not avoid the mortgage. *Read v. Wilson*, *supra*.

But leaving the mortgagor in exclusive possession with permission to sell although as agent of the mortgagee renders the mortgage void as against bona fide creditors and purchasers. *Dunning v. Mead*, 90 Ill. 373.

If the power to sell is given to the mortgagor it is immaterial what provision is made as to the disposition of the proceeds. The mortgage will be void in any event. *William Deering & Co. v. Washburn* (Ill.) Jan. 18, 1892, affirming 39 Ill. App. 424.

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Indiana.

The course of decision in this state has occasioned some difficulty to persons attempting to state the Indiana law. But a comparison of the various decisions of the court seems to show little if any conflict and a fair degree of adherence to one general rule. An early decision held that if a mortgage is executed merely as a cloak to protect property in the hands of a mortgagor from his creditors, the mortgagor still retaining possession and the right of disposition, and these facts appear on the face of the mortgage, the court should declare it void. *New Albany Ins. Co. v. Wilcoxson*, 21 Ind. 358.

So where the mortgage is on a stock of goods the only use that can be made of which is to sell them in the usual course of trade, and contains a provision that the mortgagor shall retain possession "with the privilege of using the same," it is void. *Mobley v. Letts*, 61 Ind. 11.

A statute was passed which made the question of fraudulent intent one of fact, under which the court said the cases will be rare in which it can be correctly stated that the mortgage is void on its face. *Lookwood v. Harding*, 79 Ind. 183.

In accordance with that doctrine, it was held that the mere fact that the mortgagor is authorized to sell the goods at retail will not render the mortgage fraudulent if there was nothing to show that he was to apply the proceeds to his own use. *Morris v. Stern*, 80 Ind. 281.

That where the authority to sell the mortgaged goods is by a writing executed contemporaneously with the mortgage the question of fraud is for the jury. *Louthain v. Miller*, 85 Ind. 163.

That a fraudulent intent cannot be judicially inferred from the fact that the mortgagor by the terms of the mortgage may remain in possession with leave to sell the property even though he be not by stipulation in the mortgage required to account for the proceeds of sale. *Fisher v. Syfers*, 109 Ind. 518.

That a court cannot declare that a provision vesting the right of disposition in the mortgagor vitiates the mortgage. *Muncie Nat. Bank v. Brown*, 112 Ind. 481.

And in a case in which it did not appear whether the authority of the mortgagor to sell the goods appeared on the face of the mortgage or not the court said that under the statute a mortgage cannot be declared void on its face. *McFadden v. Hopkins*, 61 Ind. 482.

So where a mortgage of liquors and other property provided that the mortgagor should keep possession until the note became due the claim was made that the mortgage was void on its face for not requiring the mortgagor to account to the mortgagee for the proceeds of sales made by him, relying on *Mobley v. Letts*, 61 Ind. 11; but the court

and upon the account of the aforesaid Newhall Sons & Company, and upon account of the said Merced Woolen Mill Company; and also from the proceeds aforesaid, pay and satisfy the reasonable costs and expenses of selling said stock, appropriating the proceeds thereof to the purposes aforesaid, and for the payment of reasonable and proper attorney's fees, in the sum of ten per cent of the amount of said stock so taken and sold; and, further, that in the event that the mortgagee shall at any time deem himself to be insecure by reason of the failure of said W. T. Kelleher to pay and satisfy the aforesaid notes and accounts, or from any other cause, then the said Ephraim shall have the right to take possession of said property, and

sell the same, in the same manner, for the same purposes, and with the same power, as hereinbefore granted." No provision is made in the instrument for selling the mortgaged goods by the mortgagor, but the proof shows that at the time the mortgage was given it was understood and agreed between the parties that Kelleher should have the right to sell the goods in the usual course of trade, and use part of the proceeds to pay for such new goods as might be required to keep up the stock, and to defray the expenses of conducting the business, and apply the balance in discharge of the obligation set forth in the mortgage.

The controlling question in this case is whether the court below erred in adjudging

said that under the statute the mortgage could not be declared void on its face, that fraud in such cases was a question of fact. *McFadden v. Fritz*, 90 Ind. 592.

But the court still held that the construction of written instruments is for the court, and it may tell the jury the effect of the language used in the instrument where there is no dispute as to what provisions it contains. *Louthain v. Miller*, 85 Ind. 163.

And finally the court said, where no agreement as to the disposition of the proceeds appears the court cannot infer an intention that the mortgagor may use them for his own benefit or that the mortgage was made with fraudulent intent and in the absence of any showing as to what application was made of the proceeds it will be presumed that the mortgagor remained in possession under an agreement to account as agent of the mortgagee and the proceeds of sales will be regarded as applied to the liquidation of the mortgage debt. But if an understanding appears, either on the face of the mortgage or in a contemporaneous agreement, that the mortgagor was not to account for the proceeds but might deal with the property to all intents and purposes as if it was his own, an inference of fraud arises which renders the mortgage void. *New v. Sailors*, 114 Ind. 408.

This last decision, it will be seen, varies but little from the doctrine originally announced in *New Albany Ins. Co. v. Wilcoxson*, 21 Ind. 358.

The state court took the position that the mortgage is void only as to the property permitted to be sold. *Davenport v. Foulke*, 68 Ind. 382.

While the Federal court for that district regarded the entire mortgage as void. *Re Burrows*, 7 Biss. 523.

Authority to the mortgagor to sell and apply the proceeds to the payment of the mortgage debt does not vitiate the mortgage. *Fletcher v. Martin*, 128 Ind. 66; *Mayer v. Feig*, 114 Ind. 577.

The mortgagor may be permitted to retail and apply the proceeds in satisfaction of the mortgage debt. *Overman v. Quick*, 8 Biss. 184.

The mortgage is not invalid if the proceeds of sales are to be applied in payment of the debt secured. *Rindakopf v. Vaughan*, 40 Fed. Rep. 304. Iowa.

Under the statute making the recording of the mortgage equivalent to actual delivery to the mortgagee giving the mortgagor power to dispose of the mortgaged property in due course of trade is not fraudulent *per se*. *Torbert v. Hayden*, 11 Iowa, 435.

The mortgagor may retain possession and dispose of the mortgaged property by sale, if done in good faith. *Fromme v. Jones*, 13 Iowa, 481.

A mortgage merely giving the mortgagor the power of sale will not be declared void on its face. *Meyer v. Gage*, 65 Iowa, 610.

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And is not rendered so by the fact that no provision is made as to the application of the proceeds of sales. *Clark v. Hyman*, 55 Iowa, 20, 39 Am. Rep. 160; *Meyer v. Evans*, 66 Iowa, 185.

A provision that the mortgagor may sell the mortgaged property turning over the proceeds to the banker of the mortgagee after deducting the expenses of sale including his own salary does not render the mortgage void. *Adler v. Clafin*, 17 Iowa, 91.

A mortgage containing reservations to the mortgagor, first, to sell before default in the usual course of retail trade, keeping the property up to its then value, second, to retain in his hands the avails of the sales, 33 per cent of which shall be applied on the notes secured by the mortgage, is not fraudulent on its face. *Hughes v. Cory*, 20 Iowa, 399.

The mortgage is not rendered fraudulent in law by the fact that the mortgagor is insolvent and that he is permitted to retain possession and dispose of the goods in the usual course of trade and appropriate a part of the proceeds to the support of himself and family. *Sperry v. Etheridge*, 63 Iowa, 544.

The mortgage is not void as matter of law because it provides for an extension of time of the indebtedness and that the mortgagor shall have the right to retain possession and carry on the business in the usual retail way for one year paying the cost and expenses of running the business and keeping up the stock to what it was when the mortgage was given. *Jaffray v. Greenbaum*, 64 Iowa, 492.

The Federal courts in Iowa have to some extent refused to follow the state courts and have held the mortgages void as matter of law. *Crooks v. Stuart*, 2 McCrary, 17, 7 Fed. Rep. 800; *Argall v. Seymour*, 4 McCrary, 55; *Wells v. Langbein*, 20 Fed. Rep. 183.

This course, so far as there is real conflict, would seem to be plainly erroneous in view of the opinion of the Supreme Court of the United States in *Etheridge v. Sperry*, 139 U. S. 236, 35 L. ed. 171; although *Judge Shiras* attempts to explain the apparent conflict between the state and Federal decisions in the case of *Lyon v. Council Bluffs Sav. Bank*, 29 Fed. Rep. 581, which opinion as much as any shows the real point of variance between the two lines of decision obtained throughout the country.

If the mortgage does not show that the sales are to be for the mortgagor's benefit the burden is on the party asserting the invalidity of the mortgage to show that such was the intention in order to have the mortgage set aside. *Maish v. Bird*, 23 Fed. Rep. 578.

Taking possession will not render the mortgagee's title good. *Wells v. Langbein*, 20 Fed. Rep. 183.

the mortgage in question fraudulent and void as to the assignee and the creditors of the mortgagor. The instrument is in the usual form of indemnity mortgages. It shows no infirmities upon its face, and was executed in accordance with the provisions of the statute, and apparently for a legitimate purpose; and, if it is to be declared invalid, it must be either by reason of the parol agreement between the parties at the time of its execution, whereby the mortgagor was permitted to appropriate part of the proceeds of the property for the purposes of replenishing the stock and paying the expenses of carrying on the business, or because the mortgage was given and received for the purpose of enabling the mortgagor to de-

fraud his other creditors. The doctrine that fraud may be deduced, as a legal conclusion, from the mere retention by the mortgagor of the property mortgaged, can have no application under our law of chattel mortgages, for the reason that by our statute the mortgagor is the owner of the property, and, unless he stipulates to the contrary, is entitled to the possession, even after default. The mortgage is a mere lien, by virtue of which no title passes or can pass to the mortgagee, except by foreclosure and sale, in the manner provided by law. This is the plain import of the provisions of chapter 141, and §§ 618, 619, Code 1881, (1 Hill's Code, chaps. 1-8, title 19,) relating to mortgages on personal property; and, the mortgagor in this case

Kansas.

An agreement outside of the mortgage that the mortgagor may continue disposing of the goods in the usual course of business and use a portion of the proceeds thereof in the support of his family, paying the remainder over in discharge of the debt, does not avoid the mortgage. *Frankhouser v. Ellett*, 22 Kan. 127.

Where the mortgagor is permitted to have the entire possession of the property with power to sell the same and dispose of the proceeds thereof, as he may choose, the mortgage should generally be held void as against the mortgagor's creditors. *Leiser v. Glaser*, 22 Kan. 552.

Where the mortgage did not contain any provision as to proceeds and the mortgagor was a near relative of the mortgagee, and the mortgaged property was worth much more than the mortgage debt, and there were other circumstances tending to show that the mortgage was executed for the purpose of hindering, delaying, and defrauding the creditors of the mortgagor, it was held void. *Ibid.*

A stipulation that the mortgagor may pay store and living expenses out of the proceeds does not avoid the mortgage. *Whitson v. Griffin*, 30 Kan. 211.

The mortgagee may place the mortgagor in possession as his agent to sell the property and such agent may receive compensation for his services. *Gleason v. Wilson*, 48 Kan. 500.

The fact that the mortgagor neglects to account for the proceeds of sale according to agreement will not render the mortgage void. *Howard v. Rohlfing*, 36 Kan. 357.

Kentucky.

No decision from this state has been found which deals with the question under consideration.

In *Ross v. Wilson*, 7 Bush, 33, there is nothing to show any agreement between the parties as to sales, but it does appear that the mortgagee acquiesced in sales by the mortgagor of the mortgaged property and the misappropriation by him of the proceeds. The question raised by such state of facts is not within the scope of this note and the court expressly distinguished *Edgell v. Hart*, 9 N. Y. 216, 59 Am. Dec. 532, from the one before it on the ground that the contract in the New York case permitted the mortgagor to buy and sell goods under cover of the mortgage.

Louisiana.

A chattel mortgage is unknown to the law of Louisiana. *Delop v. Windsor*, 26 La. Ann. 185.

Maine.

A stipulation that the mortgagor should retain possession of the property changing it by manufacturing and selling, and that such possession should continue beyond the day when the debt becomes due, does not render the mortgage fraudulent. 18 L. R. A.

lent *per se* if such possession is not inconsistent with the security of the mortgage and there is not mingled in the contract any intention to delay or defraud other creditors or withhold the property from them beyond what may have been necessary for the mortgagee's protection. *Brinley v. Spring*, 7 Me. 241.

A clause allowing the mortgagor to remain in possession for a year with an understanding that the business should go on as before under the control of the mortgagor will not avoid the mortgage as matter of law. *Googins v. Gilmore*, 47 Me. 15, 74 Am. Dec. 472.

As between the parties a mortgage is good with a stipulation giving the mortgagor the power of selling and with the proceeds to purchase other goods, and so on forever, all of which should be subject to the lien. *Allen v. Goodnow*, 71 Me. 421.

And the title when acquired will vest in the mortgagee. *Deering v. Cobb*, 74 Me. 332, 43 Am. Rep. 506; *Williamson v. Nealey*, 81 Me. 447.

A stipulation that the mortgagor may retain possession and sell for the purpose of paying the debt will not avoid it. *Melody v. Chandler*, 12 Me. 232; *Cutter v. Copeland*, 18 Me. 127; *Abbott v. Goodwin*, 20 Me. 403.

Maryland.

A deed of trust for creditors reserving the right of possession with power to continue business in the usual manner was held void in *Price v. Pitzer*, 44 Md. 537.

Massachusetts.

An agreement that the mortgagor may continue in possession of the mortgaged goods and sell them in the usual course of trade and apply the proceeds to his own use is merely evidence of fraud subject to explanation, and evidence for that purpose is therefore admissible. *Briggs v. Parkman*, 3 Met. 264, 37 Am. Dec. 89.

A mortgage of a stock of goods is not fraudulent *per se* because of a provision therein that the mortgagor may sell and dispose of some of the goods provided he forthwith purchase and place in the store other like goods of like value and apply the sales thereof to the payment of the mortgage debt. *Jones v. Huggesford*, 3 Met. 515.

The mortgage is not rendered void by a provision that the proceeds realized from any sale shall be applied to the purchase of other articles of the same kind to be held subject to the mortgage. *Cobb v. Farr*, 16 Gray, 597.

Power to sell the mortgaged property and purchase more in its place does not necessarily render the mortgage void. *Codman v. Freeman*, 3 Cush. 309.

The court will not set aside as fraudulent a mortgage because of a provision that until default the mortgagor may retain possession and make sales substituting other goods of equal value for those sold. *Barnard v. Eaton*, 2 Cush. 394.

having a right to the possession of the mortgaged goods, no presumption of fraud can arise from the fact that he remained in possession until the levy of the writs of attachment. This proposition does not seem to be disputed by the respondents. Nor is it claimed that the mortgage in controversy would have been rendered invalid by an agreement or provision for the sale of the goods by the mortgagor in the ordinary course of trade, provided the proceeds were to be applied exclusively to the payment of the mortgage debt. Such a mortgage was held valid in the case of *Langert v. Brown*, 8 Wash. Terr. 102, and we feel confident that no court in such a case would now hold the contrary doctrine, unless controlled by statute or bound by prior decisions.

But the respondents contend that the fact that the mortgagee agreed to allow the mortgagor to use part of the proceeds of the sales to purchase additions to the stock, and to pay the running expenses of the business, invalidated the mortgage as to the creditors of Kelleher; and in support of their contention they cite, among others, the case of *Wineburgh v. Schaer*, 2 Wash. Terr. 823, and that of *Byrd v. Forbes*, 8 Wash. Terr. 318. In the former case the question of the validity of a chattel mortgage was raised upon a demurrer to the answer which alleged that the mortgagor retained possession of the goods, and sold and disposed of the same in the usual course of business, and applied the proceeds to his own use and benefit, with the knowledge and consent of the mortgagee;

Power to sell the goods does not of itself avoid the mortgage. *Fletcher v. Powers*, 181 Mass. 832; *Blanchard v. Cooke*, 144 Mass. 226.

The court cannot instruct the jury that the fact that the mortgagor is given power to sell in the usual course of trade will alone warrant them in finding fraud. *Sleeper v. Chapman*, 121 Mass. 404. **Michigan.**

Where the instrument contains illegal provisions and such as are not reconcilable on any possible hypothesis with an honest and legal intent, the law declares it void upon its face because no evidence could change its character. *Oliver v. Eaton*, 7 Mich. 112.

A mortgage which leaves the mortgagor in possession and by inference permits him to sell in the usual course of business is not fraudulent *per se*. *Gay v. Bidwell*, 7 Mich. 521.

A clause that the mortgagor "shall be allowed to continue the sale of goods from the store as though this instrument had not been made," simply authorizes sales in the usual course of business and does not render the mortgage void. *Wingler v. Sibley*, 35 Mich. 231.

The mortgage is not void in law. *Hills v. Stockwell & D. Furniture Co.* 23 Fed. Rep. 432.

The question of fraud is one for the jury. *Morse v. Riblet*, 23 Fed. Rep. 501.

A mortgage cannot properly be given under an agreement by which it is to fall due at once and be foreclosed and the property placed in the hands of a receiver who shall manage it to the exclusion of other creditors. *Merchants & Mfrs. Nat. Bank v. Kent*, 43 Mich. 202.

Mortgaged chattels do not cease to belong to the mortgagor until steps are taken to end his rights. The mortgage is a mere security to the mortgagee and not a transfer of title. The mortgagor while remaining in possession is not the agent of the mortgagee but owner of incumbered property. Permission to sell at retail is permission to pass title free from incumbrance but cannot be regarded as in any sense a payment of the mortgage. *People v. Bristol*, 35 Mich. 33.

Minnesota.

A mortgage of chattels containing an agreement that the mortgagor may retain possession and sell and dispose of the mortgaged property as his own without satisfaction of the mortgage debt is of no effect as a security and can only operate to hinder, delay, and defraud creditors. *Horton v. Williams*, 21 Minn. 191.

A stipulation that the mortgagor should dispose of the goods in the ordinary course of business as his own avoids the mortgage. *Stein v. Munch*, 24 Minn. 351.

Power to sell renders the instrument void although there is a requirement to account to the 18 L. R. A.

mortgagee for the proceeds. *Chopard v. Bayard*, 4 Minn. 533.

In that case the court says there is a material distinction between an agreement simply to account for the proceeds under which they might be applied to any object, even the support of the mortgagor, and one which would require their application upon the mortgage debt. It subsequently held that a provision that the proceeds of sale should be applied in satisfaction of the mortgage will prevent the mortgage being declared void as matter of law. *Bannon v. Bowler*, 34 Minn. 416.

Permitting the mortgagor to dispose of the goods as agent for the mortgagee and account for the proceeds does not render the mortgage void. *Hawkins v. Hastings Bank*, 1 Dill. 462.

But the proceeds of all sales must be credited on the mortgage whether turned over to the mortgagee or not. *Ibid.*

In a case of a sale of a stock of merchandise a stipulation that the vendor might act as agent for the vendee for a stipulated compensation was held not to avoid the transaction. *Wilcox v. Landberg*, 30 Minn. 93.

A provision requiring the mortgagor to replenish and keep up the stock will not render the instrument valid. *Gallagher v. Rosenfield*, 47 Minn. 510.

The Recording Act does not make the filing of the mortgage legally equivalent to actual delivery and continued possession. *Horton v. Williams*, 21 Minn. 191.

Possession acquired under the mortgage will not perfect the title of the mortgagee. *Stein v. Munch*, 24 Minn. 351.

So taking possession by the mortgagee for the purpose of foreclosure will not impair the rights of creditors to reach the property or compel the mortgagee to account for the proceeds. *Gallagher v. Rosenfield*, *supra*.

But if before any proceedings are taken hostile to the mortgage the mortgage property is delivered to the mortgagee in good faith in satisfaction of the mortgage debt the title of the mortgagee will prevail against that of creditors subsequently proceeding against the mortgagor. *First Nat. Bank of Fergus Falls v. Anderson*, 24 Minn. 426.

The mortgage if void at all is void *in toto*. *Gallagher v. Rosenfield*, *supra*.

The right to impeach the mortgage does not pass to an assignee for benefit of creditors. *Flower v. Cornish*, 25 Minn. 473; *Mann v. Flower*, 25 Minn. 500.

Mississippi.

A provision that the mortgagor may carry on the business and that the mortgage shall attach to all goods and credits that may come into possession of the mortgagor renders the mortgage void. *Harman v. Hoskins*, 56 Miss. 142.

A stipulation for monthly accounts to the mort-

and the court held, upon the facts as admitted by the demurrer, that the mortgage was void as to the creditors of the mortgagor. But in so holding the court did not attempt to express its own view as to the rule that should govern in determining the validity of such instruments, but followed the binding decision of the Supreme Court of the United States in the case of *Robinson v. Elliott*, 89 U. S. 22 Wall. 518, 22 L. ed. 758. In delivering the opinion of the court, Turner, J., said: "If we were at liberty to do so, it would be profitable to take up these cases, [referred to by counsel,] and attempt to extract from them the rule upon the subject that seems to be most consonant with sound reason. We are stopped on the threshold of

the investigation, however, by an authority of such weight that it would have great force with the court of any state where the question was still an open one; and that, as to this court, is binding and authoritative. We refer to the decision of the Supreme Court of the United States in the case of *Robinson v. Elliott*, reported in 89 U. S. 22 Wall. 518, 22 L. ed. 758. It was decided in that case, by the unanimous voice of the full bench, that a chattel mortgage upon a stock of goods in trade, which permits the mortgagor to remain in possession of the property, and in its disposition by sale in due course of trade, at his discretion, until the maturity of the debt purporting to be secured by it, is fraudulent and void as to other

gages of the business and for payment to him of the money received to be applied under his direction to the maintenance of the business by payment of the current expenses and making purchases to replenish stock will not save the mortgage from being declared void. *Joseph v. Levi*, 58 Miss. 844.

The right to sell the property must be expressed to render the mortgage void as matter of law. *Hitchler v. Citizens Bank*, 63 Miss. 408.

If the power of sale does not appear on the face of the mortgage the court cannot declare it void. *Summers v. Boos*, 43 Miss. 749, 2 Am. Rep. 658; *Hilliard v. Cagle*, 46 Miss. 841.

It is only where the conveyance so unmistakably reserves the right to the mortgagor to deal with the property as his own that all evidence to the contrary should be excluded as contradicting the writing that the court can declare the deed fraudulent in law. *Britton v. Criswell*, 68 Miss. 306.

A clause conveying "all the goods that may be hereafter purchased to be sold in the store" is not such an express provision for the continuance of the business as to render the mortgage void on its face. *Baldwin v. Little*, 64 Miss. 128.

When the agreement is shown by the evidence the deed becomes void. *Johnston v. Tuttle*, 65 Miss. 494.

The mortgage is void *in toto*. *Harman v. Hoskins*, 56 Miss. 148.

A valid delivery of the goods to the mortgagee may be made notwithstanding the fact that the mortgage was void. *Baldwin v. Flash*, 58 Miss. 593.

Missouri.

General rules.

To render a mortgage fraudulent on its face it must plainly or by necessary implication express the right of the grantor to remain in possession and dispose of the property. *Voorhis v. Langsdorf*, 31 Mo. 451.

If the goods are to remain in the possession of the mortgagor to be disposed of in the ordinary course of business the mortgage is void. *White v. Graves*, 68 Mo. 223.

Permission to remain in possession for the purpose of carrying on the business as before will render the mortgage void. *Lodge v. Samuels*, 50 Mo. 204; *Moser v. Claes*, 23 Mo. App. 420.

But the mere fact that the mortgagor is to remain in possession will not render the mortgage void. *Hisey v. Goodwin*, 30 Mo. 866.

Authorizing the mortgagor to retain possession and dispose of the goods in the regular course of business paying out of the proceeds all necessary expenses of the business and of the support of the mortgagor and his family as long as he should deposit the excess to the credit of the mortgagee is void. *Place v. Langworthy*, 13 Mo. 629, 30 Am. Dec. 758.

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The constructive fraud which exists where there is an agreement that the grantor in a deed of trust shall remain in possession and continue to sell in the ordinary course of business is sufficient to support an attachment. *Reed v. Pelletier*, 23 Mo. 173. The court will not hear extrinsic evidence to enable it to pronounce the mortgage void as matter of law. *Weber v. Armstrong*, 70 Mo. 217.

A contemporaneous agreement is sufficient to avoid the mortgage. *State v. D'Oench*, 31 Mo. 453; *State v. Jacob*, 2 Mo. App. 138.

Construction of particular mortgages.

A mortgage by a mechanic covering all tools, machinery, materials, stock, etc., that may now or hereafter belong to the mortgagor in the course of his trade or business is not void on its face. *State v. Tasker*, 31 Mo. 445.

The mere fact that the mortgaged property is a stock of drugs is not sufficient to show an implied reservation of a power of sale. *Weber v. Armstrong*, 70 Mo. 217.

Attempting to cover the goods "which may be added from time to time to said stock" is not sufficient to render the mortgage void upon its face. *Voorhis v. Langsdorf*, 31 Mo. 451.

Describing the goods as those "now kept and offered for sale at the storeroom at," etc., and extending it to cover and include any goods which the mortgagor might thereafter add to the stock, does not render it void on its face. *Hewson v. Tuttle*, 72 Mo. 623.

A mortgage is not void if it expressly prohibits the mortgagor from making sales without the express consent of the mortgagee. *Thompson v. Foerstel*, 10 Mo. App. 290.

It is void if it confers on the mortgagor power to substitute other property in place of that covered by the mortgage. *State v. Busch*, 38 Mo. App. 440.

And if it attempts to cover "substitutes." *Godard v. Jones*, 78 Mo. 518.

Instructions.

If the evidence shows the mortgage to be void the court should so instruct. *McCarthy v. Miller*, 41 Mo. App. 200.

The court should instruct that if the jury find that the mortgagor was to be left in possession with power to sell they should find the conveyance void as to creditors. *Bullene v. Barrett*, 87 Mo. 186.

Taking possession.

There seems to have been a change of opinion in this state as to the effect of taking possession. It was held at one time that taking possession of the goods will not perfect the title of the mortgagee. *Armstrong v. Tuttle*, 34 Mo. 432.

But subsequent cases have decided that if the mortgagee takes possession in good faith to secure his claim before the rights of other creditors attach, he may hold the property against their claims. *Greeley v. Reading*, 74 Mo. 909.

creditors, without reference to the bona fides of the parties. We gather from the opinion, however, that the court strongly doubted if the mortgage would be invalid in case the money derived from the sale of the mortgaged property was applied, and was understood to be applied, to the extinction, in whole or in part, of the mortgage debt. This authority must govern us in the decision of this case." But that case can hardly be regarded as an authority in support of the contention of respondents, for the reason that in the case at bar it does not appear that the mortgagor was authorized by the mortgagee to apply the proceeds of the property sold to his own use and benefit. But the case of *Byrd v. Forbes*, to some extent at least,

would seem to support the claim of the respondents, and was probably relied on as authority for the conclusion reached by the learned judge of the superior court in this case. In that case it was stipulated, among other things, in the mortgage, that "until default be made in the payment of any of the said promissory notes, and so long as the mortgagor shall keep up his stock of goods so as to be good and ample security for the payment of the principal and interest of the said promissory notes, that the said mortgagor may and shall have the right to retain possession of the mortgaged property, and sell and dispose of the same in the usual course of his retail business and trade or in job lots for the sole use and benefit of mort-

Where the mortgagee in good faith takes actual possession of the goods prior to the levy of attachment for the purpose of securing the payment of the debt and continues to hold the actual possession up to the time of the attachment he will be protected. *Petring v. Christer*, 90 Mo. 684; *Dobyns v. Meyer*, 95 Mo. 132, affirming 20 Mo. App. 66.

Acquiring possession by means of an action of replevin is sufficient. *Wood v. Hall*, 33 Mo. App. 118.

May be valid in part.

The mortgage is void only as to the goods to which the power of sale relates. *Re Kirkbride*, 5 Dill. 116.

It is valid as to property not within the power of sale. *Donnell v. Byern*, 69 Mo. 468.

A mortgage on a stock of goods and fixtures giving power to sell the goods in the usual course of business is not invalid as to the fixtures. *Bullene v. Barrett*, 87 Mo. 138; *Kennedy v. Dodson*, 44 Mo. App. 554.

Proceeds to be applied on mortgage.

The mortgage is not void if the mortgagor is required to apply the proceeds of sales in discharge of the mortgage debt. *Metzner v. Graham*, 57 Mo. 404; *Hubbell v. Allen*, 90 Mo. 574.

The fact that the provision as to accounting for proceeds refers to the "net proceeds" does not avoid the mortgage. *Manhattan Brass Co. v. Webster Glass & Q. Co.* 37 Mo. App. 145.

Montana.

A provision that the mortgagor may sell in the usual course of trade renders the mortgage void. *Leopold v. Silverman*, 7 Mont. 268.

A mortgage of a stock of goods which leaves possession with the mortgagor with power to sell in the usual course of trade without accounting for the proceeds is void. *Rochelleau v. Boyle*, 11 Mont. 451, criticising on the facts, *Leopold v. Silverman*, 7 Mont. 268.

It is immaterial whether such agreement appears on the face of the mortgage or by intrinsic evidence. *Ibid.*

It is not void in toto. Ibid.

A mortgage of fixtures and "wines, liquors, and cigars," with the provision that the mortgagor may remain in possession and carefully use the mortgaged property, but which expressly forbids him to make away with, sell, or in any manner dispose of the same, is not void on its face. *Schwab v. Owens*, 10 Mont. 381.

Nebraska.

Possession with power of sale avoids the mortgage. *Tallon v. Ellison*, 3 Neb. 75; *Hedman v. Anderson*, 6 Neb. 399.

If matters outside the mortgage are relied on the question is for the jury. *Williams v. Adams*, 6 Neb. 219.

The mortgage is valid between the parties and
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against a volunteer. *Gregory v. Whedon*, 8 Neb. 377.

If the proceeds are to be applied upon the mortgage debt the mortgage is not void as matter of law. *Turner v. Killian*, 12 Neb. 580; *Davis v. Scott*, 22 Neb. 154.

Nevada.

By the Nevada statute failure of the mortgagee to take and retain possession is conclusive evidence of fraud. *Wilson v. Hill*, 17 Nev. 401.

New Hampshire.

Where a contemporaneous agreement permits the mortgagor to make sales in the usual course of the business without accounting for the proceeds except that he was to keep a supply equal in value to the property mortgaged always on hand, the mortgage is void. *Banlett v. Blodgett*, 17 N. H. 298, 43 Am. Dec. 603.

An agreement outside of the mortgage will render it void. *Putnam v. Osgood*, 52 N. H. 148.

An understanding that the proceeds are to be applied upon the mortgage debt will prevent the mortgage from being declared void, and such understanding need not be incorporated into the written permission to sell. *Wilson v. Sullivan*, 58 N. H. 230.

The proceeds will be regarded as applied upon the debt whether they have been received by the mortgagee or not. *Ibid.*

The proceeds being regarded as having been applied on the mortgage the fact that they are misappropriated by the mortgagor will not invalidate the mortgage. *Gibbs v. Parsons*, 64 N. H. 64.

A statute permitting creditors to attach the interest of the mortgagor does not change the law in respect to fraudulent conveyances. *Putnam v. Osgood*, 51 N. H. 201.

The mortgagor may sell as agent for the mortgagee. *Wilson v. Sullivan*, *supra*.

Taking possession under a void mortgage will not perfect the title of the mortgagee. *Janvryn v. Fogg*, 49 N. H. 351.

But the mortgagor may make a valid pledge to the mortgagee of the mortgaged goods which will be effective to perfect the mortgagee's title notwithstanding the fact that the mortgage was fraudulent. *Pettee v. Dustin*, 53 N. H. 309.

New Jersey.

The fact that the mortgagor is authorized to sell in the usual course of business does not render the mortgage void *per se*, but the question of fraud is one of fact to be determined in the same manner as other questions of fact are determined. *Lister v. Simpson*, 38 N. J. Eq. 438.

The Federal court of this district has taken a different view of this matter and held the mortgage void. *Re Bloom*, 17 Nat. Bankr. Reg. 423.

gage, until the said promissory notes are fully paid, and said mortgage debt is fully paid and satisfied." And the court held that the mortgage was void for indefiniteness, and as being fraud on creditors of the mortgagor. It was observed by *Chief Justice* Greene, who delivered the opinion of the court, that the mortgage fell fairly within the principle underlying the case of *Robinson v. Elliott*, 89 U. S. 22 Wall. 518, 22 L. ed. 758. But it would seem that the decision of the court, in its application of the doctrine of constructive fraud, really went beyond the underlying principle in the case of *Robinson v. Elliott*; for in the latter case of *Mr. Justice* Davis, speaking for the court, used this language: "But there are features ingrafted

on this mortgage which are not only to the prejudice of creditors, but which show that other consideration than the security of the mortgagees, or their accommodation even, entered into the contract. Both the possession and right of disposition remain with the mortgagors. They are to deal with the property as their own, sell it at retail, and use the money thus obtained to replenish their stock. There is no covenant to account with the mortgagees, nor any recognition that the property is sold for their benefit." It may be reasonably inferred, from the language above quoted, that the court would have sustained the mortgage then before it had the features spoken of not been ingrafted on it; and we do not feel certain that the

New Mexico.

An agreement outside of the mortgage that the mortgagor may transact business as before while the mortgage is to remain a continuing lien on all goods brought into the stock for an indefinite time renders the mortgage void. *Speigelberg v. Hersch*, 8 N. M. 188.

New York.

Early decisions.

In this state the broad proposition that a stipulation in the mortgage giving the mortgagor possession with power of sale rendered the mortgage void was not at once established. The courts seemed to approach it gradually. The earliest cases seem to have been decided after a consideration of all the facts bearing on the question of fraud.

Thus it was held that—

Permitting the mortgagor to remain in possession and sell in the usual course of trade after the mortgage has become forfeited without any accounting between the parties, or any knowledge of the amount due, the amount of the mortgage being originally much greater than the debt, is fraudulent as matter of law. *Divver v. McLaughlin*, 2 Wend. 586.

That where the mortgage is kept secret and the mortgagor remains in possession using and disposing of the property as absolute owner, a verdict against the validity of the mortgage will be sustained although the jury was wrongly instructed. *McLachlan v. Wright*, 3 Wend. 384.

That a stipulation in the mortgage that the mortgagor shall remain in possession of the goods until default accompanied by the authority of the mortgagee that he may deal with them in all respects as other merchants do with their merchandise renders the mortgage void in law notwithstanding it is filed under the provisions of the Recording Act. That Act does not repeal the statute concerning fraudulent conveyances. *Wood v. Lowry*, 17 Wend. 492.

But a mortgage leaving the mortgagor in possession was upheld in *Lery v. Welsh*, 2 Edw. Ch. 443, 6 L. ed. 460, although he continued to make sales in the usual course of trade on the ground that such possession was not inconsistent with the object and intention of the parties and there had been no forfeiture of the mortgage although it does not appear by what authority he continued making sales.

The rule established.

The question came before the new court of appeals soon after its organization.

The mortgage provided that the mortgagor was to remain and continue in quiet possession and full enjoyment of the property and the circumstances of the parties and other provisions in the mortgage tended to show an intention that the mortgagor should go on selling the goods as a merchant as though he was the absolute owner. The court was 18 L. R. A.

equally divided in opinion, four of the judges holding that the mortgage was void upon its face; while the other four, although admitting that if the mortgage contained a provision allowing the mortgagor to go on selling and disposing of the goods at his pleasure it would not be a mortgage or create any lien, yet were of the opinion that, since no such provision appeared on the face of the mortgage and a resort to other evidence was required to prove it, the case ought to be submitted to the jury, stating that since the statute made retaining of possession presumptive evidence of fraud if there was no evidence of good faith the court should declare the fraud as matter of law; but if there was evidence of good faith the question became one of fact and should be submitted to the jury. *Gräwold v. Sheldon*, 4 N. Y. 582.

When the question again came before the court it appeared that by the terms of the mortgage and the schedule attached the mortgagor was to retain possession and sell in the usual course of trade and the mortgage lien was to attach to any purchases as they were from time to time made. The instrument was held to be void as to creditors as matter of law. *Edgell v. Hart*, 9 N. Y. 218, 59 Am. Dec. 522, affirming 13 Barb. 380.

The court subsequently in discussing the question said that where the agreement is that the mortgagor shall make sales for his own benefit, it shows conclusively that it was given for some purpose other than that of securing a debt to the mortgagee, and that its only operation must be to prejudice others, and therefore it cannot be shown that the mortgage was not made in bad faith and without design to hinder or defraud creditors since such can be its only effect. It is so plainly fraudulent that the court should so pronounce it, and it is immaterial whether the agreement appears on the face of the instrument or not. *Russell v. Winne*, 4 Abb. Pr. N. S. 388, 37 N. Y. 595, 97 Am. Dec. 755.

An agreement that the mortgagor may deal with the goods for his own benefit destroys the value of the mortgage as a security and makes it available only to protect the property from creditors and secure it to the mortgagor. Such a transaction is necessarily fraudulent, whether it is contained in the mortgage or not. *Southard v. Pinckney*, 5 Abb. N. C. 196; 8 C. sub' nom. *Southard v. Benner*, 72 N. Y. 425.

A mortgage which is made with the purpose and effect of allowing the mortgagor to continue in possession and to sell the mortgaged goods at retail, and receive the proceeds to his own use, is fraudulent and void as against creditors because it furnishes conclusive evidence of fraudulent intent. The instrument cannot operate according to its intent without defrauding creditors. *Marston v. Vultor*, 12 Abb. Pr. 144, 8 Bosw. 159.

In discussing the effect of the statute making

court would have held the mortgage void in the case of *Byrd v. Forbes*, on the authority of *Robinson v. Elliott*, if it had had before it the late case of *Etheridge v. Sperry*, 180 U. S. 266, 35 L. ed. 171, in which that case, among others, is reviewed, and its meaning explained. We therefore do not consider the case of *Byrd v. Forbes* as absolutely settling the law of this state upon the question, and we certainly would not be disposed to extend the doctrine there laid down, even if we should apply it to a like state of facts. Moreover, we venture the suggestion that the mortgage under consideration in that case might well have been interpreted as showing an honest intention on the part of the parties to it; and, if that

be true, it could hardly be said to be void as matter of law. When two constructions can be given to a written instrument, one making it consistent, and the other inconsistent, with honesty and fairness, the former should be adopted. It was said by Campbell, J., in *Gay v. Bidwell*, 7 Mich. 519, to be a cardinal rule never to infer a dishonest meaning if an honest one is possible, and consistent with the whole tenor of the instrument. This is a sound and just rule of construction, and furnishes a safe test in determining the validity of chattel mortgages. The tendency of the later decisions appears to be against declaring these instruments fraudulent in law, unless they are necessarily so upon their face, and towards leaving the

fraud a question for the jury one of the courts said that an instrument containing a trust for the benefit of the mortgagor is made void by statute, and that there is no question for the jury. That the question is entirely different from the *onus* arising under the statute declaring void conveyances made with intent to delay or defraud creditors and making the question of intent one for the jury. *Spies v. Boyd*, 1 E. D. Smith, 445.

The doctrine finally became fully settled that if the mortgage contemplates the disposal of the property by the mortgagor in the usual course of business, it is void. *Wagner v. Jones*, 7 Daly, 375; *Ball v. Slaughter*, 20 Hun, 355.

One claiming under the mortgage must affirmatively show, in the absence of change of possession, that the mortgage was made in good faith and without any intent to defraud creditors or purchasers, and also that the mortgage was duly filed. *Otis v. Still*, 8 Barb. 110.

But the court cannot declare the mortgage void unless an agreement has been made either in the mortgage or between the parties to it, the necessary construction of which permits the mortgagor to make sales for his own benefit. *Chatham Nat. Bank v. O'Brien*, 6 Hun, 231.

Construction of particular provisions.

The mere insertion of a provision that the mortgage shall be a continuing lien upon "the stock or goods thereafter brought into the store," is not of itself sufficient to show permission to the mortgagor to deal with the goods which will render the mortgage void *per se*. *Yates v. Olmstead*, 56 N. Y. 632, reversing 65 Barb. 43.

An agreement that the mortgagor may sell for cash or on credit, use the proceeds in the business, pay a certain amount on the debt each year, keep the stock in about the same condition, and give a new mortgage each year to cover additions, renders the mortgage void. *Cook v. Bennett*, 38 N. Y. S. R. 632.

A mortgage purporting to cover all goods that may be substituted for those mortgaged is void. *Carpenter v. Simmons*, 1 Robt. 300; *Spies v. Boyd*, 1 E. D. Smith, 445.

A mortgage of a stock in trade and the "increase and decrease" thereof, with a provision that the mortgagor shall remain in possession, is void as matter of law. *Mittnacht v. Kelly*, 3 Keyes, 407, 3 Abb. App. Dec. 301.

The mere presence of a covenant that the mortgagor shall "keep about the same amount of stock on hand," will not render the mortgage fraudulent as matter of law. *Stedman v. Batchelor*, 23 N. Y. S. R. 436.

A covenant to execute new mortgages upon all goods purchased to replenish stock does not render the mortgage void. *Hincks v. Field*, 37 N. Y. S. R. 724.

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Permission to sell on credit and turn the proceeds over to the mortgagee when the accounts are collected will render the mortgage void. *City Bank of Rochester v. Westbury*, 16 Hun, 453.

But if the accounts are to be assigned when made and credited immediately on the indebtedness the mortgage is not fraudulent *per se*. *Caring v. Richmond*, 22 Hun, 371.

Implied provisions in the mortgage that the mortgagor may sell on credit, taking good business paper which the mortgagee will accept and apply on the debt, and that part of the avails of sales may be used to replenish stock, which shall be substituted in the mortgage in place of the goods sold, by monthly renewals, do not make the mortgage void on its face, but the further agreement to permit the mortgagor to use part of the avails for personal expenses will do so. *Brackett v. Harvey*, 91 N. Y. 220, reversing 25 Hun, 502.

Agreements not in the mortgage.

Contemporaneous agreements render the mortgage void. *Re Cantrell*, 6 Ben. 432.

A tacit understanding is sufficient to avoid the mortgage. *Hangen v. Hachmeister*, 5 L. R. A. 137, 114 N. Y. 566.

If the agreement exists the mortgage is void although the agreement does not appear on its face. *Potts v. Hart*, 90 N. Y. 163.

If the agreement is found to exist from the evidence it renders the mortgage void as matter of law. *Sperry v. Baldwin*, 46 Hun, 125.

Question for jury.

If there was no direct proof of such an agreement, but evidence from which it can be inferred, the case is one for the jury. *Bainbridge v. Richmond*, 17 Hun, 303.

Where the mortgage is lawful upon its face and there is evidence that the transaction was fair and honest but the circumstances tend to show an agreement that the mortgagor should continue making sales as usual, the question of fraud is for the jury. *Gardner v. McEwen*, 19 N. Y. 124.

Mortgage wholly void.

The mortgage is void not only as to the part which can be sold but *in toto*. *Russell v. Winne*, 4 Abb. Pr. N. S. 368, 37 N. Y. 595, 97 Am. Dec. 755; *Dodds v. Johnson*, 3 Thomp. & C. 215; *Spies v. Boyd*, 1 E. D. Smith, 442; *Smith v. Ely*, 10 Nat. Bankr. Reg. 553.

Effect of mortgagee's taking possession.

The mortgage cannot be perfected by taking possession as against existing creditors. *Dutcher v. Swartwood*, 15 Hun, 31; *Quinn & N. B. Brew. Co. v. Hart*, 48 Hun, 336; *Delaware v. Ensign*, 21 Barb. 89; *Smith v. Ely*, *supra*.

Even taking possession and selling the goods and applying the proceeds in satisfaction of the mortgage will not give the mortgagee a right to retain them against attacking creditors. *Mandeville v. Avery*, 124 N. Y. 387, reversing 37 Hun, 73.

question of fraud open to investigation as matter of fact; and this would seem to be not only consonant with reason, but in accord with sound policy.

In *New v. Sailors*, 114 Ind. 407, the mortgagor was authorized by the terms of the mortgage to retain the possession of the property mortgaged, with authority to sell at retail, in the ordinary course of trade. There was no agreement that the proceeds should be applied to the liquidation of the mortgage debt, not anything to show an agreement or understanding that the mortgagor might use the proceeds for his own benefit, and it was held that it could not be judicially inferred that the mortgage was made with fraudulent intent. See also *Fisher v. Syfers*, 109 Ind.

514; *McFadden v. Frits*, 90 Ind. 590; *Morris v. Stern*, 80 Ind. 227. And it may be here remarked that these cases hold the contrary doctrine to that supposed to obtain in Indiana at the time the decision in the case of *Robinson v. Elliott* was rendered; and as the Federal courts follow the decisions of the highest courts of the several states in which the actions arise in determining the validity of chattel mortgages, if the same case were again before the Supreme Court of the United States it would in all probability be decided in accordance with the doctrine of the Indiana decisions to which we have referred. See *Etheridge v. Sperry*, *supra*. In Kansas, mortgages with stipulations like the one before us have, so far as we are aware, been

But it has been held that if the goods are delivered into the possession of the mortgagee with authority to sell immediately and appropriate the proceeds to the payment of the claim before the rights of other creditors attached, the mortgagee's rights will be protected. *Brown v. Platt*, 8 Bosw. 331.

Mortgagor as agent for mortgagee.

A mortgage of a stock of merchandise which requires the mortgagor to take charge of and sell the goods and apply the proceeds to the debt by paying them over weekly to the mortgagee, and to follow the mortgagee's directions in the conduct of the business, is not fraudulent as matter of law. *Ostrander v. Fay*, 8 Abb. App. Dec. 431.

An agreement that the mortgagor shall keep possession and retail the goods for cash only, paying over the money to the mortgagee is not fraudulent as matter of law but presents a question of good faith for the jury. *Ford v. Williams*, 24 N. Y. 359; *Conkling v. Shelley*, 28 N. Y. 360; *Miller v. Lookwood*, 32 N. Y. 300; *Dolson v. Saxton*, 11 Hun, 569.

But all money or credits taken by the mortgagor when acting as the mortgagee's agent will be applied in reduction of the mortgage, whether they have been collected and paid over or not. *Conkling v. Shelley*, *supra*; *Brackett v. Harvey*, 91 N. Y. 220; *Ellsworth v. Phelps*, 80 Hun, 646; *Sperry v. Baldwin*, 46 Hun, 125; *Smith v. Ely*, 10 Nat. Bankr. Reg. 553.

North Carolina.

To find fraud as matter of law it must so expressly and plainly appear in the deed itself as to be incapable of explanation by evidence *dehors*. *Cheatham v. Hawkins*, 78 N. C. 335.

Merely reserving power of sale in the usual course of business is not sufficient to render the mortgage void. *Ibid*.

Retention of possession with power to sell without accounting for the proceeds raises a presumption of fraud which, if not rebutted, becomes conclusive, and there is nothing then for the jury to pass on but the law pronounces the mortgage fraudulent. *Ibid*.

When the necessary consequences of an act are to defraud a creditor as by securing property for the use of the debtor and placing it beyond the reach of his debts, patent on the face of the instrument or proved *alunde*, the fraudulent element cannot be purged by a disavowal of such intent as present in the mind and inducing the act. *Phifer v. Erwin*, 100 N. C. 59.

The presumption of fraud is not rebutted by facts that the debt secured was bona fide and that the insolvency of the debtor was unknown to the mortgagee. *Holmes v. Marshall*, 78 N. C. 262.

The presumption of fraud cannot be removed by proof of want of fraudulent intent. *Cheatham v. Hawkins*, 80 N. C. 164.

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A mortgage to secure the purchase price of a stock of goods which contemplates that the mortgagor shall carry on the business, make sales, and from the profits pay for the stock is valid. *Kreth v. Rogers*, 101 N. C. 263.

A provision requiring the employment of the mortgagor at a stipulated salary in disposing of the property does not render the deed void on its face. *Frank v. Robinson*, 96 N. C. 30.

Money received by the mortgagor as agent for the mortgagee will be applied in satisfaction of the mortgage whether received by the mortgagee or not. *Weill v. First Nat. Bank*, 106 N. C. 1.

Ohio.

Permitting the mortgagor to retain possession with power of sale renders the mortgage void as against subsequent purchasers and execution creditors. *Collins v. Myers*, 16 Ohio, 547.

An extraneous agreement when shown will render the mortgage void. *Freeman v. Rawson*, 5 Ohio St. 12.

Intent may be inferred from acts. *Re Manley*, 3 Bond, (Ohio) 261.

A stipulation that the mortgagee should at all times hold absolute and exclusive possession against all purchasers but the mortgagor and release all claims to the mortgaged property as soon as the debt should be fully paid will not render the mortgage valid. *Harman v. Abbey*, 7 Ohio St. 218.

The attendance of the mortgagee and his permission to the mortgagor to sell and transfer the entire stock to a third person is not equivalent to his taking possession of the property. *Morris v. Devon*, 2 Disney, (Ohio) 218.

The Recording Act has no effect to validate a mortgage in which the power of disposition is retained. *Freeman v. Rawson*, *supra*.

Taking possession before the rights of other creditors attach perfects the rights of the mortgagee. *Brown v. Webb*, 20 Ohio, 339.

A lower court in Ohio held that a provision that the proceeds should be applied upon the mortgage debt would not validate the mortgage. *Goodenough v. Harris*, 1 Disney, (Ohio) 63.

But the Supreme Court has held that permitting the mortgagor to sell as agent for the mortgagee does not render the mortgage void. *Kleine v. Katzenberger*, 20 Ohio St. 110.

Oregon.

Where it appears either by the face of the mortgage or by parol evidence that the mortgagee has given to the mortgagor an unlimited power to dispose of the mortgaged property for the use of the mortgagor the mortgage is void as to purchasers and attaching creditors. *Orton v. Orton*, 7 Or. 473, 33 Am. Rep. 717; *Aiken v. Pascall*, 19 Or. 493.

Such mortgage is within the provisions of a statute making void all conveyances containing a trust

universally sustained, if made in good faith. In *Whitson v. Griffith*, 30 Kan. 211, a case quite parallel with this, a chattel mortgage on a stock of goods containing a provision that the mortgagor might retain possession and sell the property in the course of trade, and account for the proceeds, and receive out of such proceeds the expenses of operating the business, together with compensation and the means of subsistence of the family of the mortgagor, during the continuance of the business, was upheld and sustained by the court; and the earlier decisions of that court are to the same effect. See *Frankhouser v. Ellett*, 22 Kan. 127, 31 Am. Rep. 178; *Howard v. Rohlfing*, 86 Kan. 357. In Michigan, as in Indiana, the question of fraudulent

intent is declared by statute to be a question of fact for the determination of the jury. But the decisions of the supreme court of that state discuss the question quite as much upon principle as with reference to the statute, and we infer from the adjudged cases that the rulings of the court would have been the same had no statute been enacted upon the subject. In the leading case of *Oliver v. Eaton*, 7 Mich. 108, which was very similar in point of fact to the one now before us, the question of fraudulent chattel mortgages is very exhaustively discussed, and the law applicable to the subject very clearly and forcibly stated. In speaking of what instruments are void upon their face, and why they are so, the court said: "The law,

for the person making the same. *Catlin v. Currier*, 1 Sawy. 7.

A contemporaneous agreement will avoid the mortgage. *Jacobs v. Ervin*, 9 Or. 80.

Foreclosure and sale under the mortgage will not alter the relations of the parties. *Bremer v. Fleckenstein*, 9 Or. 270.

A power to assign subject to the mortgage does not render it void. *Jacobs v. McCalley*, 8 Or. 123.

Pennsylvania.

In Pennsylvania chattel mortgages are not sanctioned, except in certain special statutory cases. *Buwer v. Van Glenssen*, 6 W. N. C. 363.

A mortgage without delivery of possession or other indicia of ownership is void. *Welsh v. Bekey*, 1 Penr. & W. 57.

Continuing in possession without recording, renders the mortgage void. *Clow v. Woods*, 5 Serg. & R. 275.

Rhode Island.

Power to sell and replace does not render the mortgage void on its face. *Williams v. Winsor*, 12 R. I. 12.

South Carolina.

The court must adjudge the existence of legal fraud whenever it appears upon the face of the instrument itself. *Hirshkind v. Israel*, 18 S. C. 168.

A provision that the mortgage shall cover "such goods, etc., as may from time to time hereafter be acquired in lieu and place thereof in the current business of the mercantile establishment," does not render the mortgage void as matter of law. *Ibid*.

South Dakota.

Inserting in the mortgage a clause excepting "such goods as are sold in the usual course of retail trade" is an implied permission to the mortgagor to make such sales, and if there is no agreement that the proceeds are to be turned over to the mortgagee the mortgage is presumptively fraudulent. *Greeley v. Winsor* (S. Dak.) May 12, 1890.

The mortgage if fraudulent at law is so altogether. *Greeley v. Winsor* (S. Dak.) March 4, 1891. Permitting the mortgagor to sell as agent for the mortgagee does not avoid the mortgage. *Lane v. Starr* (S. Dak.) May 1, 1890.

But the proceeds cancel the debt *pro tanto*. *Ibid*.

Tennessee.

In this state it was at first held that permission to the mortgagor to continue his daily sales from the stock unless the mortgagee should deem himself insecure and take possession does not render the mortgage void. *Hickman v. Perrin*, 6 Coldw. 135. But the doctrine of that case seems to have been somewhat modified by later decisions.

Where the entire stock is to be held under a trust conveyance it is void. *McCrausly v. Haslock*, 4 Bart. 2.

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Leaving possession in the mortgagor with power to sell renders the mortgage void. *Tennessee Nat. Bank v. Ebbert*, 9 Heisk. 153.

The mortgage is void whenever the intention is shown whether in the mortgage or outside of it. *Bank of Rome v. Haselton*, 15 Lea. 216.

The mortgage is entirely void. *Ibid*.

The mortgage of future additions to stock is void upon the ground that such a transaction irrespective of fraud is against public policy throwing open wide a door for possible fraud and the contract does not fall within that class of which a court of equity will decree specific performance. *Phelps v. Murray*, 2 Tenn. Ch. 743.

The deed is not void if it contains a provision that the mortgagor shall account for the proceeds. *Saunders v. Turbeville*, 2 Humph. 272.

Texas.

In this state there appear to have been two changes of doctrine, the first by the court's changing its opinion; the second by statute. It was at first held that power to sell in the usual course of trade without applying the proceeds upon the mortgage but requiring the substitution of other goods renders the mortgage void. *Peiser v. Petcolas*, 50 Tex. 644.

But the doctrine of that case was limited to some extent, and changed by a subsequent case which decided that power to the mortgagor to conduct his business as usual in the ordinary course of trade will not render the mortgage void as matter of law. *Scott v. Alford*, 53 Tex. 92.

The court in that case said that it is only where the fact or intention which avoids the deed is apparent on its face, or a necessary deduction therefrom, that the court can pronounce it void.

But under a statute subsequently passed the court held that if the mortgagor is insolvent he cannot retain possession with power of sale, either by an express provision in the mortgage or by a contemporaneous agreement, without rendering that mortgage void. *Texas Nat. Bank v. Lovenberg*, 63 Tex. 510.

In *Wilber v. Kray*, 73 Tex. 534, the statute is construed to cover a case in which it did not appear that the mortgagor was insolvent. And in *Cook v. Halsell*, 85 Tex. 6, a charge was approved that told the jury that if they found that the mortgagee intended to permit the mortgagor to continue in possession of the goods and sell the same in the ordinary course of trade the mortgage would be void.

Employing the mortgagor to sell the stock as agent for the mortgagee is not prohibited. *Bettis v. Weir Plow Co.* (Tex.) May 6, 1892.

If the mortgagor act as agent for the mortgagee the mortgage is not void. *Crow v. Red River County Bank*, 52 Tex. 362.

But no lien is valid which allows the debtor to carry on his business and account for the profits

where an instrument contains illegal provisions, and such as are not reconcilable, on any possible hypothesis, with an honest or legal intent, declares it void upon its face, because no evidence could change its character. The cases in which this absolute and unchangeable presumption arises are not numerous. There are other cases in which, upon the face of the instrument, a statutory presumption arises which is only prima facie evidence of fraud; and there are still more cases in which the whole illegality charged must be made out by extrinsic evidence. In both of the classes last named the jury must determine all the facts." And in the same case the court makes this pertinent observation: "By leaving each case to the jury, each instrument is made to stand upon its own actual merits; which is much safer in questions of fraud whose manifestations are infinitely various than the adoption of fixed rules, which must fail to meet numerous cases." See also *Gay v. Bidwell*, *supra*, and *People v. Bristol*, 35 Mich. 28. In Iowa, the same doctrine has been maintained by an unbroken line of decisions for more than a quarter of a century. *Torbert v. Hayden*, 11 Iowa, 485; *Hughes v. Cory*, 20 Iowa, 399; *Meyer v. Gage*, 65 Iowa, 606; *Meyer v. Evans*, 66 Iowa, 179.

In the latter case, by the terms of the instrument the mortgagor reserved the right to sell the stock of goods at retail, in the ordinary course of trade; and there was a parol understanding that the mortgagor should keep up the stock, and that the expenses of carrying on the business should be paid out of the proceeds of the sales; and there was no provision in the mortgage, nor any parol agreement that any portion of the proceeds of

the sales should be applied on the mortgage debt, but by the terms of the mortgage the mortgagee had the right at any time to take possession of the property and sell the same for the satisfaction of the debt. And it was held that the validity of the mortgage depended upon the good faith of the parties to the transaction. In *Etheridge v. Sperry*, *supra*, the Iowa decisions above cited are referred to, and the doctrine held by them approved. In that case the question to be determined was whether, as matter of law, a mortgage given by a merchant on his stock of goods to secure debts not yet due, which upon its face had no imperfections, contained no reservations for the benefit of the mortgagor, and was apparently only for the security of the mortgagee, and gave him full power to take possession on default in payment, or on any misconduct of the mortgagor, or whenever he pleased, was invalidated by the fact of a parol understanding, at the time of its execution, that the mortgagor might use the proceeds of his sales to support himself, and to keep up the stock by purchases, applying all of the surplus to the mortgage debt, or whether such an agreement was simply to be taken into consideration, together with the other circumstances, as bearing upon the question of good faith of the parties. The Supreme Court of Iowa held the mortgage valid, and an appeal was prosecuted to the Supreme Court of the United States. The plaintiff in error relied on the cases of *Second Nat. Bank of Leavenworth v. Hunt*, 78 U.S. 11 Wall. 391, 20 L. ed. 190; *Robinson v. Elliott*, 89 U.S. 23 Wall. 513, 22 L. ed. 758; and *Means v. Dowd*, 128 U.S. 273, 32 L. ed. 429,—all cited by the respondents in this case,—as sustaining his contention that the instruments were in-

only to the person holding the lien. *Duncan v. Taylor*, 63 Tex. 646.

The effect of the Recording Act is not to make a recorded mortgage prima facie valid which prior thereto would have been fraudulent in law. *Pelzer v. Petcolas*, 50 Tex. 646.

The Chattel Mortgage Act does not make valid that which the law pronounces void. *Duncan v. Taylor*, 63 Tex. 646.

Vermont.

Permitting the mortgagor to sell from time to time does not render the mortgage void, at least where he is required to replace the property sold by other of similar kind and value. *Peabody v. Landon*, 61 Vt. 818.

Virginia.

Where it was proved that the goods were to remain in the mortgagor's possession and he was empowered to make sales of them but to account to the mortgagee if called on, the mortgage was held void because the possession and power of sale were incompatible with the avowed purpose of the deed. *Lang v. Lee*, 3 Rand. (Va.) 424.

The provision that the mortgagor shall keep possession of and sell the stock of goods in the usual line of business until default in payment of the debts secured renders the mortgage void. *Adlington v. Etheridge*, 12 Gratt. 436.

The power to continue the business will render the mortgage void where it arises by clear and irresistible implication. *Perry v. Shenandoah Nat. Bank*, 27 Gratt. 758.

Reservation of power to sell the goods and apply the proceeds as the mortgagor should see fit, ren-

ders the mortgage void. *Saunders v. Waggoner*, 82 Va. 322.

A provision that if any of the goods are sold the proceeds shall be invested in other like goods which shall be subject to the mortgage followed by the mortgagor carrying on a briek trade with the mortgaged goods for more than a year renders the mortgage void. *Wray v. Davenport*, 79 Va. 20.

The court cannot presume fraud unless the terms of the instrument preclude all other inferences. *Williams v. Lord*, 75 Va. 390.

Permitting the continuance of the business and replenishing of the stock by a mortgagor under control of the mortgagee with a view to realizing the fund and winding up the business is not fraudulent per se. *Marks v. Hill*, 15 Gratt. 400.

The invalidity of the deed is not affected by the fact of its being recorded. *McCormick v. Atkinson*, 78 Va. 10.

Washington.

The Recording Acts do not change the rules of the common law as to the validity of such mortgages. *Wineburgh v. Schaer*, 2 Wash. Terr. 328.

Permitting the mortgagor to sell for the sole purpose of applying the proceeds on the mortgage debt does not avoid the mortgage. *Langert v. Brown*, 3 Wash. Terr. 108.

But a provision that the goods shall be disposed of for the sole benefit of the mortgagee either by applying the money on the mortgage or in keeping up the security by adding to the stock renders the mortgage void if it provides for an indefinite continuing lien. *Byrd v. Forbes*, 3 Wash. Terr. 319.

Money received under a power to sell for the

valid in law. And in reference to those cases *Mr. Justice Brewer*, in delivering the opinion of the court, said: "While there are some points of similarity between each of those cases and this, and while there are observations in the opinions filed in them pertinent and correct with reference to the special facts, which, if disconnected from those facts and applied here, might seem authoritative, yet there are clear and sufficient reasons why neither the decisions nor the opinions should control this case." After referring to the facts appearing in each of those cases, and fully explaining the intent and meaning of the case of *Robinson v. Elliott*, the court proceeded to say: "In neither of those cases is it affirmed that a chattel mortgage on a stock of goods is necessarily invalidated by the fact that either in the mortgage or by parol agreement between the parties the mortgagor is to retain possession with the right to sell the goods at retail. On the contrary, it is clearly recognized in them that such an instrument is valid, notwithstanding these stipulations, if it appears that the sales were to be for the benefit of the mortgagee. What was meant was that such an instrument should not be used to enable the mortgagor to continue in business as theretofore, with full control of the property and business, and appropriating to himself the benefits thereof, and all the while holding the instrument as a shield against the attacks of unsecured creditors." In determining the question before it the court accepted the law of Iowa upon the subject, as settled by the decisions of the supreme court of that state, as decisive, and accordingly held the mortgages in controversy valid. The concluding portion of the opinion is devoted to a discussion of the question upon general principles, without

special reference to local decisions; and, as it is the latest expression of the views of the court upon the subject to which our attention has been directed, we feel fully warranted in quoting it at length. It is as follows: "Indeed, if this were an open question, we could not be blind to the fact that the tendency of this commercial age is towards increased facilities in the transfer of property, and to uphold such transfers so far as they are made in good faith; and it is at least worthy of thought whether the rulings made by the supreme court of Iowa do not tend to make chattel mortgages more valuable for commercial purposes, without endangering the rights of unsecured creditors. The law now generally requires a record of all such instruments, and that, like the recording of a real estate mortgage, gives notice to all parties interested of the fact and extent of incumbrances. Why should a transaction like this be condemned if made in good faith, and to secure an honest debt? The owner of a stock of goods may make an absolute sale of them to his creditor in payment of a debt. If an absolute, why not a conditional, sale, with such conditions as he and his creditor may agree upon? As between the parties, no court would question this right or refuse to enforce the conditions. The interests of the general public are not prejudiced by any such transaction between debtor and creditor. Indeed, they are rather promoted by any arrangement under which the mortgagor can continue in business, for in ninety-nine cases out of a hundred the taking of possession by a creditor results in closing the business, and turning the debtor out of employment. The only parties who can claim to be injuriously affected are unsecured creditors. But they are notified by

benefit of the mortgagee must be applied in satisfaction of the mortgage whether received by the mortgagee or not. *Warren v. His Creditors*, 3 Wash. 48.

West Virginia.

Reservation of the power to sell the stock in the usual course of trade renders the mortgage void as being inconsistent with the trust and adequate to the defeat thereof, and it is not made valid by the further provision to supply the place of any goods sold by additional purchases. *Kuhn v. Mack*, 4 W. Va. 194.

The insertion in a mortgage of a clause obligating the mortgagor to keep always on hand a stock equal in quality, description, and value to that mortgaged until the debt was paid, avoids the mortgage. *Garden v. Bodwing*, 9 W. Va. 121.

The deed is void *in toto*. *Clafin v. Foley*, 22 W. Va. 434.

Wisconsin.

Giving the mortgagor possession with power of sale renders the mortgage void. *Bowen v. Clark*, 1 Biss. 128, 5 Am. Law Reg. 206.

If the power of sale appears on the face of the mortgage the court must declare the mortgage void, if not the question of its existence is for the jury under the instruction that such power, if it exists, renders the mortgage void. *Re Kahley*, 2 Biss. 383.

The agreement will avoid the mortgage although it is oral. *Steinart v. Deuster*, 28 Wis. 136.

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The fraud may be inferred from the conduct of the parties. *Baum v. Bosworth*, 68 Wis. 196.

The mortgage is so fraudulent as to be ground for attachment. *Anderson v. Patterson*, 64 Wis. 557.

A stipulation that the mortgagor shall apply one-half of the proceeds upon the mortgage gives him by implication the absolute disposition of the other one half and renders the mortgage void. *Blakelee v. Rosman*, 43 Wis. 116.

The mere fact of leaving the goods in the mortgagor's possession with instructions to sell and make remittances to the mortgagee does not amount to fraud as matter of law. *Flak v. Harshaw*, 45 Wis. 666.

Permission to the mortgagor to remain in possession of the goods upon his promising to keep the stock in as good condition as it then was will not be construed as authorizing sales to be made so as to avoid the mortgage. *Kalk v. Fielding*, 50 Wis. 339.

The fact that the mortgagor is authorized to sell goods and replace them with others to be paid for out of the proceeds does not render the mortgage void. *Roundy v. Converse*, 71 Wis. 524.

The mortgagor may be left in possession with power to sell for the benefit of the mortgagee. *Cotton v. Marsh*, 3 Wis. 221.

Taking possession will not perfect the mortgagee's title. *Blakelee v. Rosman*, 43 Wis. 116.

The mortgage is void only as to the goods to which the power of sale relates. *Re Kahley*, 2 Biss. 383.

H. P. F.

the record of the exact relations between the mortgagor and mortgagee, and surely subsequent creditors have no right to complain if these deal with the mortgagor with full knowledge of such relations. Existing creditors may, of course, challenge the good faith of the transaction; but, if they cannot disturb an absolute sale when made in good faith, why should they be permitted to challenge a conditional one, if made in like good faith? The fact that fraudulent relations are possible is hardly a sufficient reason for denouncing transactions which are not fraudulent. So, if the question were open or a new one, unaffected by any settled law of the state, we incline to the opinion that the question is not one of law, so much as it is of fact and good faith; and that the decision of the supreme court of Iowa rests on solid principles."

While the decisions of the courts of the various states on this subject are irreconcilably in conflict, it seems to us that the rule adopted in the foregoing decisions not only rests on sound principles but is dictated by wisdom and justice. It is claimed, however, by the learned counsel for respondents, that this mortgage is fraudulent in fact, if not in law. But we have carefully examined all the testimony in the case, and we are not convinced by the evidence that appellant was actuated in accepting this mortgage by any other motive than a desire to secure indemnity from liability upon the debts therein set forth. From the evidence before us there can be no doubt of appellant's liability upon the notes and accounts mentioned in the mortgage, or that Kelleher, in consideration of appellant's interest in the firm of Kelleher & Co., at the time of its dissolution, promised and agreed to pay the notes, and to indemnify appellant against all liability thereon, and all loss or damage resulting therefrom; and the fact that Kelleher was indebted to others at the time the mortgage was given did not render the transaction fraudulent. There is nothing in our statutes preventing a debtor, even in failing circumstances, from preferring one creditor over another in paying his debts. Nor is it illegal for one creditor to take security from his debtor, though others may thereby be prevented from collecting their claims, if the transaction is entered into solely for the purpose of security, and not for the purpose of aiding the debtor to defraud his other creditors. While conceding that the assignee of Kelleher was properly permitted by the court to intervene in the foreclosure proceeding, it is contended by appellant that the court erred in permitting certain attaching creditors to so intervene, and that the court further erred in refusing to strike out the complaints of the intervenors, after the assignment, for the

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alleged reason that the attachments were dissolved by force of the Assignment Law of March 6, 1890, and that a mere creditor at large had no legal right to intervene for the purpose of contesting the validity of the mortgage. But if we concede that the attachments were discharged by Kelleher's assignment for the benefit of his creditors, after levy but before judgment, and that, generally, a creditor at large cannot intervene in such an action, we are nevertheless of the opinion that these creditors were authorized by section 1997 (Code of 1881) to contest the right of appellant to foreclose the mortgage, which was all they undertook to do. They asked no affirmative relief whatever, but simply that the instrument be declared invalid as to them.

From all the facts in this case, we are satisfied that this mortgage was valid between the parties when made, and we are not satisfied that it was rendered invalid by any subsequent conduct of the parties. We are therefore constrained to conclude that the court erred in holding the instrument void as to respondents. But we think the mortgage should not be declared a lien for the whole amount of the judgment rendered in favor of appellant. According to its own showing, he paid the three notes mentioned in the mortgage, amounting to \$9,401.80, by giving his bond for \$900 of that sum, and paying or securing the remainder, which is \$8,501.40, at the rate of 70 cents on the dollar, including the expenses. The whole sum actually paid on the notes by him by reason of the default of Kelleher amounts to \$6,850.98, which, added to the accounts for which he became responsible, makes the aggregate sum of \$7,615.98. From this should be deducted the sum of \$400, received by him from Kelleher out of the proceeds of the mortgaged goods. This leaves the sum of \$7,215.98 as the amount, exclusive of the attorneys' fees provided for in the mortgage, and costs, for which the mortgage should be declared a lien. We have included no interest, for the reason that we have discovered no evidence showing that any was paid.

The judgment of the court below is reversed, and the cause remanded, with directions to enter judgment for plaintiff, and against defendant W. T. Kelleher, for said sum of \$7,215.98, together with 10 per cent of said sum as attorneys' fees, and for costs, and a decree foreclosing said mortgage lien, and applying the proceeds of said mortgaged property to the satisfaction of said judgment and decree.

Hoyt, Stiles, Scott, and Dunbar, JJ.,
concur.

Petition for rehearing overruled.

WEST VIRGINIA SUPREME COURT OF APPEALS.

W. S. LAWSON, *Pff. in Err.*,

v.

E. B. CONAWAY.

(..... W. Va.)

*1. In an action against a physician for malpractice, a witness testified that he was "well acquainted with the physical ability of the plaintiff to perform manual labor, both before and since the breaking of his arm; that the said plaintiff, before the injury, was a strong able-bodied man; that since he has been hurt the plaintiff has been unable to perform no more than one half a man's work; that witness had worked with plaintiff both before the arm was broken and since; that witness and plaintiff were both farmers, and lived near together." This testimony was competent, and ought not to have been excluded.

2. The general rule is that, where a party is competent to prove the motives and intentions which have governed his own conduct, he may state in general terms that he did or refrained from doing a particular thing, material to the issue, on account of information received from a third person; but he cannot go into details, or give conversations with third persons, held not in the hearing of the opposite party.

3. When a physician is employed to attend upon a sick person, his employment continues while the sickness lasts, unless put to an end by the assent of the parties, or revoked by the express dismissal of the physician. The physician is bound to bestow such reasonable ordinary care, skill and diligence as physicians in the same neighborhood, in the same general line of practice, ordinarily have and exercise in like cases. Time and locality are to be taken in the account, and the physician is bound to exercise the average degree of skill possessed by the profession in such locality. In the absence of special agreement, his engagement is to attend the case as long as it requires attention, unless he gives notice of his intention to discontinue his visits, or is dismissed, as aforesaid; and he is bound to exercise reasonable and ordinary care and skill in determining when his attendance should cease. But his engagement is not to cure the patient; that is, he does not insure that his treatment will be successful. The mere failure to effect a cure does not even raise a presumption of a want of proper care, skill, and diligence. It is the duty of the patient to co-operate with the physician, and to conform to his prescriptions and directions, and if he neglect to do so he cannot hold the physician responsible for his own neglect. On the other hand, he has a right to rely upon the instructions and directions of his physician, and incurs no liability by so doing.

4. If a physician sue for his services, and there is no appearance by the patient, defendant in that suit, recovery by the former does not estop the latter from bringing a cross-action for malpractice; but if he appear,

*Headnotes by LUCAS, P.

NOTE.—The very elaborate review of the disputed question as to the effect of a judgment for a physician's compensation upon a suit for malpractice is so complete that annotation on the question would appear superfluous.

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unless the record show that it was not to defend, but solely to disclaim the waiver to his own right, he is estopped by the recovery.

5. A declaration charged that the defendant after having entered upon the treatment and cure of the plaintiff, "carelessly, negligently, and unskillfully conducted himself in that behalf," etc., and that by means of the defendant's "careless, negligent, improper, and unskillful attention," etc., the injury resulted. Under these averments, the plaintiff might recover for abandonment of his treatment by the physician.

(Holt, J., dissents from proposition 4.)

(December 8, 1892.)

ERROR to the Circuit Court for Tyler County to review a judgment in favor of defendant in an action brought to recover damages against defendant, a physician, for alleged malpractice. *Reversed.*

The facts are stated in the opinion.

Messrs. G. D. Smith and Stuart & Farr, for appellant:

It was the duty of defendant to use reasonable care and diligence in treating plaintiff's arm, and the plaintiff had a right to presume the defendant had discharged his duty in treating his arm, and had the right to rely on the treatment, instructions, and directions given him by the defendant.

See *Riley v. West Virginia, O. & P. R. Co.* 27 W. Va. 150; *Patten v. Wiggin*, 51 Me. 594, 81 Am. Dec. 598; *Leighton v. Sargent*, 37 N. H. 460, 59 Am. Dec. 888.

Plaintiff if entitled to recover could recover for "costs and expense paid out in endeavoring to be cured."

Riley v. West Virginia, O. & P. R. Co. *supra*; *Shearm. & Redf. Neg.* § 606; *Wilson v. Wheeling*, 19 W. Va. 825, 42 Am. Rep. 780.

If plaintiff had a right to recover, he had a right to recover according to the permanent reduction of his power to earn money.

See *Riley v. West Virginia, O. & P. R. Co.* *supra*; *Shearm. & Redf. Neg.* § 606; *Ransom v. New York & E. R. Co.* 15 N. Y. 415; *People v. Hays*, 20 How. Pr. 84; *Starkie*, Ev. p. 526.

There is not one word of evidence even tending to prove that Lawson ever accepted Smith as his physician instead of Conaway. Conaway had notice that Lawson relied on him, by the efforts of Lawson to get him to come back. This was sufficient. If he had not had notice, it might be considered that he waived Conaway's services for Smith's. Notice to either one was sufficient. By analogy the same rule would apply to a physician as to an attorney. An attorney cannot delegate his authority.

See *Crotty v. Eagle*, 35 W. Va. 143; *Story*, Ag. § 18.

Conaway had no right to testify to a conversation between him and Smith in the absence of Lawson.

1 Greenl. Ev. §§ 98, 99.

If Conaway had the right to employ Smith, and if he should be credited with Smith's visits, then Smith was his agent, and he would

be responsible for Smith's acts, conduct, declarations, and treatment of the arm.

Hyrne v. Erwin, 28 S. C. 226, 55 Am. Rep. 15.

Smith's admissions, declarations, directions, statements, and acts bound Conaway.

Baltimore & O. R. Co. v. Christie, 5 W. Va. 325; 1 Greenl. Ev. § 118.

By instructing that treatment by the physicians to the 11th of the month, so it was done with ordinary skill, etc., was all that was required of them, the court virtually instructed the jury that Conaway was by Lawson discharged on the 11th.

This was an instruction as to weight of evidence.

2 Whart. & S. Medical Jurisprudence, § 1092; *McDowell v. Crawford*, 11 Gratt. 405; *State v. Thompson*, 21 W. Va. 741.

This instruction said to jury if they found that "the plaintiff accepted the services of Smith instead of Conaway, and made no objection, etc." There is no evidence to warrant any such instruction. All the evidence on the subject is in substance that Conaway sent Smith, and Lawson was all of the time sending for Conaway and not recognizing Smith as the physician.

McMeehan v. McMeehan, 17 W. Va. 684, 41 Am. Rep. 852; *Schuykill & D. Imp. & R. Co. v. Munson*, 81 U. S. 14 Wall. 447, 20 L. ed. 871; *Storrs v. Felsch*, 24 W. Va. 606.

Physicians and surgeons are bound to exercise such reasonable care and skill as is usually possessed and exercised by physicians and surgeons in good standing in the vicinity or locality of his practice, having due regard to the advanced state of medical or surgical science at the time, where he holds himself out and accepts employment as such physician or surgeon.

Nelson v. Harrington, 1 L. R. A. 719, 72 Wis. 591, 7 Am. St. Rep. 900.

There might be mere quacks as a profession in a community, and if the instructions given are right then it would be by these that a standard would be set, but the law does not recognize such standard. The comparison is between physicians in good standing.

Gramm v. Boener, 56 Ind. 497; *Howard v. Grover*, 28 Me. 97, 48 Am. Dec. 481.

The burden of showing contributory negligence is on the defendant.

Washington v. Baltimore & O. R. Co. 17 W. Va. 216; *Ohio Valley Iron Works v. Moundsville*, 11 W. Va. 80; Whart. Neg. §§ 428, 425.

It was not negligence for Lawson to obey the physician's instruction.

See *Dimmey v. Wheeling & E. G. R. Co.* 27 W. Va. 32, 55 Am. Rep. 292; Shearm. & Redf. Neg. § 80.

The presumption is that plaintiff was not guilty of contributory negligence.

Adams v. Iron Cliffs Co. 78 Mich. 271, 18 Am. St. Rep. 441.

It was for the jury to say whether abandonment was negligently done, even if it was abandonment.

2 Wharton & S. Medical Jurisprudence, § 1092.

Defendant is as liable for neglect in application of skill as for want of skill.

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Long v. Morrison, 14 Ind. 595, 77 Am. Dec. 72.

Conaway impliedly contracted with Lawson that he possessed a reasonable degree of learning and skill when he undertook the treatment of the arm.

Leighton v. Sargent, 27 N. H. 460, 59 Am. Dec. 888; *Nelson v. Harrington*, 1 L. R. A. 719, 72 Wis. 591, 7 Am. St. Rep. 900.

A physician cannot turn a case of this character over to another who never treated a case of like kind, and escape responsibility for his acts, just because the patient did not drive the one sent off and refuse his advice or instructions.

If Lawson did suggest that it was not necessary for physicians to come back in the absence of warning by them to him of the danger, yet Conaway would be responsible. He could not escape responsibility unless patient acted contrary to his advice.

Moor v. Vazie, 31 Me. 875; *Hibbard v. Thompson*, 109 Mass. 286.

Physicians are presumed to know the danger of ceasing their visits in case of this kind on eleventh day, and it was their duty to have so warned the patient. Then if he, contrary to the advice, discharged them, he no doubt would be responsible for consequences, but otherwise not.

Chamberlain v. Porter, 9 Minn. 260.

Messrs. D. F. Pugh and Henry M. Russell, for appellee:

The ability of one to labor is not matter for expert testimony.

Welch v. Franklin Ins. Co. 23 W. Va. 288.

One not shown to be an expert cannot testify as such.

Rogers, Expert Testimony, § 8.

The decision of the court below on the preliminary question of the witness's qualification will not be reviewed unless plainly erroneous. *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401.

Where the conduct of a party is in question it is proper to show the information on which he acted.

1 Taylor, Ev. 518.

A physician is only liable for a failure to exercise ordinary care, diligence and skill.

Shearm. & Redf. Neg. §§ 433, 434; *Ely v. Wilbur*, 49 N. J. L. 685, 60 Am. Rep. 668.

He is not bound to possess the highest skill.

Quinn v. Donoran, 85 Ill. 194; *Smothera v. Hanks*, 34 Iowa, 286, 11 Am. Rep. 141.

The skill of the profession in the community is a proper criterion.

Cooley, Torts, 643, 649; Shearm. & Redf. Neg. § 436; *Kelsey v. Hay*, 84 Ind. 189; *Hathorn v. Richmond*, 48 Vt. 557; *Gates v. Fleischer*, 67 Wis. 504; *Nelson v. Harrington*, 1 L. R. A. 719, 72 Wis. 591, 7 Am. St. Rep. 900.

A physician is not bound to continue his visits after he has been dismissed or after the emergency has passed.

Shearm. & Redf. Neg. § 441; *Ballou v. Prescott*, 64 Me. 805; *Dale v. Donaldson Lumber Co.* 48 Ark. 188.

In an action for malpractice contributory negligence is a complete defense.

Lover v. Francis, 116 Ind. 384; *Jones v. Angell*, 95 Ind. 876; *Chamberlain v. Porter*, 9

Minn. 260; *Potter v. Warner*, 91 Pa. 362, 36 Am. Rep. 668; *Reber v. Herring*, 115 Pa. 599.

If the plaintiff sue for abandonment of the case, he should declare specifically upon that feature of it.

Bemus v. Howard, 3 Watts, 255; *Hawker v. Baltimore & O. R. Co.* 15 W. Va. 628, 36 Am. Rep. 825.

The plaintiff cannot recover his expenses in being cured of the original injury, but only those consequent upon the malpractice.

Field, Damages, § 600; *Leighton v. Sargent*, 31 N. H. 119, 64 Am. Dec. 323.

A recovery by the physician in an action for his bill for services is a bar to an action for negligence.

Ely v. Wilbur, and *Dale v. Donaldson Lum. ber Co. supra*; *Bellinger v. Craigue*, 31 Barb. 534; *Blair v. Bartlett*, 75 N. Y. 150, 81 Am. Rep. 455; 1 Field, Lawyers' Briefs, § 91.

Lucas, P., delivered the opinion of the court:

This was an action on the case for damages against a physician for malpractice. The plaintiff sued in the circuit court of Tyler county for \$10,000 damages, but the jury found for the defendant, and the court gave judgment. The plaintiff moved for a new trial, and took sundry exceptions, and the case comes before this court on the bills of exception reserved in the court below, and made a part of the record. We will take these up in their order, and dispose of such of them as are material to the issue involved.

The first exception is to the ruling of the circuit court in excluding the following testimony of one C. W. Smith, called for the plaintiff: "Witness testified that he was well acquainted with the physical ability of the plaintiff to perform manual labor both before and since the breaking of his arm; that the said plaintiff, before the injury, was a strong, able-bodied man; that since he has been hurt the plaintiff has been unable to perform no more than one half a man's work; that witness had worked with plaintiff both before the arm was broken and since; that witness and plaintiff are both farmers, and live near together." We think that this was competent testimony, and was improperly excluded. It is the expression of neither an opinion nor a conclusion, but a fact going to show the inability to work on the part of the plaintiff, as compared with his former condition, and was relevant and proper. In the form given, it was certainly not very valuable testimony, but that was for the jury. Its relevancy and competency were unquestionable. 1 Greenl. Ev. § 440.

The second bill of exceptions was taken because the court admitted the following testimony given by the defendant, E. B. Conaway, in his own behalf: "State whom you employed to treat plaintiff's arm after the 5th day of October, 1888. *Answer.* On the 6th day of October, 1888, A. Lawson came for me to go to see plaintiff, and I sent Dr. Smith to attend him. On October 11, 1888, I sent Smith again. *Question* by same: State what, if anything, Dr. Smith told you plaintiff said to him (Smith) about

coming back to see plaintiff on the visit of October 11, 1888. *A.* In the morning Dr. Smith told me that Lawson had discharged us,—this was at my office, in Centreville, the morning after the visit,—and that he wanted me to take a haystack on the bill." The general rule is, where a party is competent to prove the motives and intentions which have governed his own conduct, he may state in general terms that he did or refrained from doing a thing on account of information received from third persons; but he cannot go into details as to conversations with third persons, held not in the hearing of the opposite party. In this case the witness could have stated that he refrained from paying another visit to the plaintiff, who was his patient, on account of information received from Dr. Smith, and this would have been competent. But the conversation itself, or the words of Dr. Smith, were incompetent. No injury can be perceived, however, inasmuch as Dr. Smith was himself called, and proved the conversation. 1 Greenl. Ev. § 124.

The third bill of exceptions embraces instruction No. 1 given for the defendant over the objection of the plaintiff. That instruction is as follows: "Instruction No. 1: Gentlemen of the jury, it is claimed by the plaintiff that the defendant was employed to treat professionally, as a surgeon, his injured arm. By the defendant accepting the employment he bound himself to use in his treatment of the arm a reasonable, ordinary degree of care and skill of the profession in his community, but he did not undertake to use the highest degree of care and skill, nor, in the absence of a special agreement, did he undertake to perform a cure. Nor can you infer that the defendant was negligent simply because a cure was not effected. The burden of proving his case by a preponderance of the evidence rests upon the plaintiff." This instruction is substantially correct. *Kuhn v. Brownfield*, 84 W. Va. 256, 11 L. R. A. 700. The objection urged against it by counsel is that it uses the word "profession," instead of the more accurately descriptive term, "physicians in good standing." Perhaps the latter words would have been better, but I think we may say that the word "profession," used in this connection, is equivalent to "physicians and surgeons," and the qualifying words, "in good standing," are not generally inserted by the text-writers. For example, Mr. McClelland defines the contract as follows: "The implied contract of a surgeon is not to cure, but to possess and employ in the treatment of a case such reasonable skill and diligence as are ordinarily exercised in his profession by thoroughly educated surgeons; and, in judging of the degree of skill required, regard is to be had to the advanced state of the profession at the time." The author further adds the following qualifications: "Time and place must be taken into consideration. Reasonably, as much cannot be expected of physicians in remote localities, where he is cut off from opportunities of improvement, as from physicians living in communities where opportunity is afforded of seeing dis-

ease and accidents under more varied forms; nor from this latter class should as high a degree of attainments be exacted as from physicians connected with large hospitals, or who reside in large cities. If it were otherwise, we should find but few physicians except in populous communities. The very favorable rule has been laid down in the law that the least amount of skill, therefore, with which a fair proportion of the practitioners of a given locality are endowed, is taken as the criterion by which to judge the physician's ability or skill." McClelland, *Civil Malpractice*, 18, 19. In the case of *Smother's v. Hanks*, 34 Iowa, 286, 11 Am. Rep. 141, the rule is laid down that the measure of skill and diligence "is that ordinarily exercised in the profession by the members thereof as a body; that is, the average of the reasonable skill and diligence ordinarily exercised by the profession as a whole." The instruction is therefore, I think, couched in language substantially correct, and not calculated to mislead the jury.

Instruction No. 2 was excepted to by the plaintiff for the same reasons he urged against No. 1, and his objections have already been answered. The same may be said of instruction No. 3, which relates to the discharge of his physicians by the plaintiff. That instruction is as follows: "Instruction No. 3: If the jury find from the evidence that the plaintiff, through Dr. W. A. Smith, on the 11th day of October, 1888, discharged the defendant from the management and treatment of his arm, and if you further find from the evidence that prior to the 11th day of October, 1888, the defendant and Dr. W. A. Smith exercised the ordinary care, skill, and diligence of their profession in their community in the management and treatment of the arm, then you must return a verdict for the defendant." All of the authorities admit that the patient may at any time discharge or dismiss his physician, and from that moment such physician is relieved from responsibility. It would be very strange if the law were otherwise.

The fourth instruction is as follows: "If the jury believe from the evidence that the plaintiff, W. S. Lawson, by his own negligence, directly contributed in any degree to the injury sued for, they will find for the defendant." As an abstract proposition of law, this instruction might perhaps be correct; but, under the evidence set out in this record, I am inclined to think it ought not to have been given, except with modifications. Supposing the theory of the defense to have been correct,—that the patient had dismissed his physician on the 11th of October, and that subsequent to that date the patient was negligent. Would it be seriously contended that this neglect on his part would interfere with his right of recovery, provided he proved that the conduct and treatment of his physician up to the 11th October had been utterly unskillful, and totally careless and negligent? I think not, and therefore the instruction, in the form propounded, was calculated to mislead, and should not have been given. So, also, if

the physician, at a certain period, wrongfully abandoned his patient, and left him to his fate, any subsequent neglect on the part of the patient would not prevent his recovery. In other words, the contributory negligence must be contemporaneous with the main fact charged as negligence, in order to prevent a recovery; and the instruction should have been so framed as to adapt it to the evidence, and to leave no room for misapprehension on the part of the jury.

The fifth instruction for the defendant is as follows: "Instruction No. 5: The jury are instructed that there is no issue in this case, for them to consider, as to whether Dr. Conaway or his agent abandoned the treatment of plaintiff's arm. The only issue is whether the defendant, Dr. Conaway, or his agent, Dr. Smith, failed to exercise the ordinary care and skill of their profession in their community while they treated the arm." This instruction is plainly erroneous, and should not have been given. The charge in the amended declaration is that the defendant, after having been employed as physician and surgeon, entered upon the treatment and cure of the plaintiff, and so "carelessly, negligently, improperly, and unskillfully conducted himself in that behalf, and then and there so carelessly, negligently, improperly, and unskillfully applied his cure and treatment upon the said grievous hurts, broken bones, injuries, cuts, bruises, and fractures of the arm," etc., as to produce damage. The declaration further charges that injury resulted to the plaintiff "by means of the careless, negligent, improper, and unskillful attention" on the part of the defendant. This, then, is the complaint and averment of the declaration; and it did charge and give full notice to the defendant that he was required to defend himself against a want of attention, which includes abandonment, almost as plainly as if that term had been used. Counsel have urged that abandonment was not charged in the declaration, and in support of their proposition cite us to the case of *Hawker v. Baltimore & O. R. Co.* 15 W. Va. 628, 36 Am. Rep. 825, and *Bemus v. Howard*, 8 Watts, 255. In the first of these cases the declaration charged that the engineer on a railway train saw the plaintiff's stock, and, after seeing it, so negligently conducted his train, etc., as to injure or kill it. Under this declaration, this court refused to permit the plaintiff to prove that if the engineer did not see the stock it was his own fault and neglect, and that he ought to have seen it. Now, admitting this to be a correct decision, (and I myself have always thought it too technical,) that case has no application to the facts of the one we are now considering. In the latter the averments of the declaration do, by necessary implication cover the charge of abandonment, as the equivalent of neglectful attention or want of attention. The language of the declaration carefully distinguishes between the unskillful treatment of the fracture and the negligent personal or professional conduct of the physician, and distinctly charges both species of negligence and carelessness. The Pennsylvania case re-

ported in 3 Watts, 255, to which we have been cited, is inapplicable, for the reason that, if it be correctly stated by the court, the declaration did not charge a want of attention on the part of the physician. At any rate, all we can say is that, if there is anything in that case contrary to the views herein expressed upon the pleadings and evidence in the present case, the former is manifestly wrong.

The ninth bill of exceptions embraces instruction No. 1, asked for by the plaintiff, which the court refused, and gave an instruction of its own in lieu thereof, against the objection of the plaintiff's counsel. The instruction asked for, and the modification, are as follows: "Instruction No. 1: The court instructs the jury that it was the duty of the defendant, after entering upon the treatment of the plaintiff's fractured arm, to use all reasonable care and diligence in treating the injuries thereof, and that the plaintiff had a right to presume that the defendant had discharged his duty as such physician, and also had the right to rely upon the treatment, instructions, and directions given to him by the defendant." To the giving of said instruction the defendant, by counsel, objected, which objection was sustained by the court; and the court, in lieu thereof, gave the following instruction, in the words and figures following, to wit: "No. 1: If the jury believe that defendant undertook the treatment of plaintiff's fractured arm as surgeon, it was his duty to bring to its treatment reasonable and ordinary care, skill, and diligence; and if the jury believe that the defendant failed to discharge such duty with ordinary skill and care, and that the injury complained of resulted from such failure, without fault or negligence on the part of the plaintiff, which by ordinary care and prudence on his part could have been avoided, then defendant is liable." It will be observed that the modified instruction given by the court has no relation to that asked for by the plaintiff, and totally omits all reference to the point of law upon which the plaintiff was insisting. The instruction, in form, is not hypothetical, but the hypothesis, if framed, could only have included a fact which seems to have been taken for granted, and may be considered as a concession upon all hands, viz., that the defendant did actually enter upon the treatment of the plaintiff's fractured arm. If the instruction had said that, if the jury found the defendant entered upon the treatment of the plaintiff's fractured arm, then the defendant was bound to use all reasonable care, etc., and the plaintiff had a right to rely on instructions and directions, if any, given by the defendant, the proposition would have been correct, and the instruction unobjectionable in form.

I think there was no error in refusing the plaintiff's third instruction, because it fails to distinguish between the expenses and damages resulting from the original fracture and those consequent upon malpractice. Field, Damages, § 600; *Leighton v. Sargent*, 81 N. H. 119, 64 Am. Dec. 323.

Before closing, it is perhaps necessary to define with more accuracy than we have yet

done the implied contract between physician and patient, the violation of which on the part of the former constitutes malpractice. When a physician is employed to attend upon a sick person, his employment continues while the sickness lasts, and the relation of physician and patient continues, unless it is put an end to by the assent of the parties, or is revoked by the express dismissal of the physician. The physician is bound to bestow such reasonable, ordinary care, skill, and diligence as physicians and surgeons in the same neighborhood, in the same general line of practice, ordinarily have and exercise in like cases. Time and locality are to be taken into the account, and the physician is bound to exercise the average degree of skill possessed by the profession in such localities. In the absence of special agreement, his engagement is to attend the case as long as it requires attention, unless he gives notice of his intention to discontinue his visits, or is dismissed by the patient, and he is bound to exercise reasonable and ordinary care and skill in determining when his attendance should cease. But his engagement is not to cure the patient, nor does he insure that his treatment will be successful. The mere failure to effect a cure does not even raise a presumption of a want of proper care, skill, and diligence. It is the duty of the patient to co-operate with the physician, and to conform to his prescriptions and directions, and if he neglect to do so he cannot hold the physician responsible for the consequence of his own neglect. On the other hand, he has a right to rely upon the instructions and directions of his physician, and incurs no liability by doing so. McClelland, Civil Malpractice, 18, 19, 109; 14 Am. & Eng. Encyclop. Law, 80, 82; 15 Am. & Eng. Encyclop. Law, 439.

A feature in the case, yet to be noticed, is the fact that the plaintiff introduced a justice of the peace, who proved, substantially, that for his services in this behalf the defendant recovered a judgment against the plaintiff. The docket or record, if it may be called such, of said justice, was before the jury, but seems to have been omitted intentionally from the record here. It is claimed in this court by counsel for defendant in error that this judgment against the plaintiff below estopped him from prosecuting his cross-action for malpractice. As the case will have to go back to the circuit court, we deem it our duty to decide this interesting question. As a general rule, estoppel by a former judgment has to be introduced by a special plea of *res judicata*. No such plea was offered by the defendant in this case: but, on the other hand, the plaintiff himself introduced this record of the magistrate's court; and, if we had it before us, we should be able to decide whether the plaintiff had proved himself out of court,—a privilege which he always has and, through his counsel, not unfrequently, though unwittingly, exercises. The question involved is this: In a suit for malpractice, is the plaintiff estopped by a judgment in an action against him, brought by the physician, to recover compensation for services rendered in

the same case. Upon this subject the decisions are much divided. In New York, in the leading case of *Gates v. Preston*, 41 N. Y. 118, and in *Bellinger v. Craigie*, 31 Barb. 584, the affirmative was held, and such has been the uniform current of decision in that state. *Blair v. Bartlett*, 75 N. Y. 150, 31 Am. Rep. 455; *Dunham v. Bower*, 77 N. Y. 76, 33 Am. Rep. 570. New Jersey, Arkansas, and perhaps other states, have followed the New York decision. *Ely v. Wilbur*, 49 N. J. L. 685, 60 Am. Rep. 668; *Dale v. Donaldson Lumber Co.* 48 Ark. 188. Upon the other hand, in Indiana, Ohio, Wisconsin, and perhaps other states, a contrary doctrine has been held. *Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 808; *Sykes v. Bonner*, 1 Cin. R. 464; *Ressequie v. Byers*, 52 Wis. 650, 38 Am. Rep. 775.

The dividing line between the New York decisions and those of the states which have taken a contrary view is upon the fact whether the judgment obtained by the physician was a judgment by default; for all the cases concede that if the patient has appeared, and defended the action on the ground of neglect or want of skill, the judgment against him is an estoppel, and he cannot bring his cross-action for malpractice. But when the judgment is by default, and no defense whatever has been made, the majority of the cases would seem to hold that the question of malpractice or diligence and skill was not involved, and that the patient has not impaired his right of action by neglecting or refusing to appear to the suit against him. Finding this contrariety of opinion in the courts of last resort, we naturally recur to the text-writers to ascertain how the scale ought to be adjusted, and what held to be the better opinion. But, instead of resolving our doubts, we find the conflict renewed with an energy almost acrimonious in its vigor. We find that Mr. Bigelow (1886) dissents from the New York decisions upon the ground that the right to sue for malpractice was a cross-demand, and the defendant might elect to litigate it in the first suit, but if he declined to do so it was reserved to him for future action. On page 175 of Bigelow on Estoppel, he thus comments upon the New York decisions: "Such an argument, however, like the view taken by the courts of New York, that the former judgment has shown that the services or property, according to the case, were of value, while the second suit declares or may declare the same to be worthless, is only plausible; for a judgment on default is not equivalent, in principle or on authority, to a judgment on an issue fought out. Judgment on default is good for the primary purpose of a judgment for plaintiff. It gives him the right to have the sum adjudged collected. But it has not the full effect of a *res judicata*, because in reality it has been *ex parte*. There is the best authority for saying that judgment by default does not conclude defenses in confession and avoidance in a different action. And if the view here presented, that the cross-demand is an independent cause of action, is correct, it cannot matter that the former judgment was

rendered upon an issue contested, if that issue did not embrace the cross-demand." Upon the other hand, Mr. Herman (1886) takes the opposite view, and denies that the action for malpractice can be, in strict legal sense, a counterclaim, and hence it cannot, he argues, in the absence of statutory regulations, be the subject of an independent action. 1 Herman, Estoppel, § 235. In section 236 he states his argument, in earnest and vigorous language, as follows: "Courts maintaining a doctrine contrary to that of *Gates v. Preston* do so, except where otherwise compelled by statute, by violating every principle on which the doctrine of *res judicata* is founded. Without citing again the long and unbroken line of cases which will be found in another portion of this work, we may state the following as the substance of the decisions: *First*, the maxim, *interest reipublice ut sit finis litium*, has never yet been questioned; and, *second*, whenever a matter is adjudicated, such judgment decides every matter which pertains to that cause of action, or the defense set up, or which is involved in the measure of relief to which the cause of action or defense entitles the party, even though such matter may not be set forth in the pleadings so as to admit proof and call for an actual decision upon it. This principle prevails throughout the civilized world, with but few exceptions, and includes, not only what actually was determined, but also extends to every other matter which, under the issues, the parties might have litigated in the case,—to everything within the knowledge of the parties which might have been set up as a ground of relief or defense. This principle is but the repeated reiteration of the maxim above cited, which is so deeply fixed in the law of fundamentals. This maintenance of this principle is one of the necessities in all civilized communities, and it has been handed down, from generation to generation, without ever being questioned, until the present time; and we doubt whether there ever can be a so well-established and universally sustained principle of law. A court that cannot doubt, distinguish, or make an exception to a well-settled rule of law is among the impossibilities of this age. The case of *Gates v. Preston* follows the universal rule above cited. In the early case of *Marriot v. Hampton*, 7 T. R. 269, it was held that where, in an action, a party had a complete defense, as payment, and failed to maintain it, he was concluded by that judgment, and, although he had the written receipt of the plaintiff, yet he was compelled to pay the same money twice. This principle has never been questioned. So a party having a defense like that of usury, limitation, coverture, a statutory right of exemption, or any defense which will defeat a plaintiff's claim, and fails to set up such defense, cannot thereafter relitigate matter which would have defeated the plaintiff's action in another cause between the same parties by simply reversing their positions as parties." A later writer, (1891.) as umpire in the dispute between Herman and Bigelow, decides against the New York

view, and supports the western cases, as having the better reason, (2 Black, Judgm. § 769:) "Thus, where a physician sued a party for services rendered by him in treating a broken limb, and the defendant appeared and pleaded general denial, it was held that the fact of performance of plaintiff's contract was impliedly averred and denied by the pleadings, and that a judgment in favor of the plaintiff for the services as claimed necessarily included the fact of due performance by the plaintiff, and that the question of malpractice was involved in the issue, and concluded by the judgment, so that the patient could not thereafter sue upon that cause of action. And a similar rule has been applied in Massachusetts, though the services were of an entirely different nature, where defense was taken to the first action on the ground of negligence, but without seeking to recoup the damages. But these cases have been vigorously criticised and resolutely denied in decisions rendered in other states, which seem to us to be much better supported by legal reason and the best considerations of convenience and justice. This may be illustrated by the judgment in the case of *Resseguie v. Byers*, 53 Wis. 650, 38 Am. Rep. 775, where, after an action was commenced for malpractice in attendance upon a certain case, defendant instituted a suit before a justice of the peace for the value of his services for such attendance, in which suit the defendant interposed a general denial as to the value of the services, but afterwards failed to appear at the trial, and judgment was given for the physician for the amount he claimed. It was held that such judgment was no defense to the action for malpractice, and a supplementary answer setting it up as a plea in bar was demurrable."

Amidst this great contrariety of opinion, we must draw our conclusions in conformity with the spirit of our own decisions, and according to the dictates of a sound adherence to general principles. No court has insisted more strenuously upon the doctrine of *res judicata* than has our own. *Western M. & M. Co. v. Virginia O. C. Co.* 10 W. Va. 250; *Henry v. Davis*, 18 W. Va. 280; *Corrothers v. Sargent*, 20 W. Va. 351; *Mason v. Harper's Ferry Bridge Co.* Id. 228; *Wandling v. Straw*, 25 W. Va. 692; *McCoy v. McCoy*, 20 W. Va. 794; *Seabright v. Seabright*, 33 W. Va. 152; *Parsons v. Riley*, 33 W. Va. 464, *Sayre v. Harpold*, 33 W. Va. 558. Nevertheless, I think a safe conclusion to be reached is that if the physician sue for compensation for his services, and there is no appearance by the patient, a recovery by the former does not estop the latter from bringing his cross action for malpractice; but if he appear, (unless the record show that it was not to defend, but solely to disclaim the waiver of his own right,) he is estopped by the recovery. The right to sue for malpractice is both a defense and a subject for cross-action, and if used for either purpose—that is, either by way of defense or recoupment—it destroys the vitality of the claim, if sought to be used in an independent action; and, if the patient has appeared in the suit by the phy-

sician, he was bound to make all the defenses he had, and hence he is estopped by the fact that he had a defense of malpractice, of which he failed to avail himself. But, if he has not appeared, then the question of malpractice has never been adjudicated, and he is at liberty to assert his claim by an independent action.

For the reasons stated, *the judgment of the Circuit Court must be reversed*, the cause remanded, the verdict set aside, and a *verdict de novo* awarded, and in the new trial the circuit court will conduct its proceeding in accordance with the principles herein announced.

Holt, J., dissenting:

We still retain the common-law system of pleading, though greatly modified, and the well-known common-law classification of personal actions into actions *ex contractu* and *ex delicto* is still kept up. In fact, the classification must be a somewhat natural one, for we see it carefully observed under the modern systems of code pleading. Even the substantive law itself, treating of correlative civil rights and duties, is now classified and discussed, for the most part, under the general heads of contracts and torts. It is fair, therefore, to conclude that the distinctions which have led to this classification, in both the substantive and objective law, are founded somewhat in the nature of the things themselves, or have been found to be useful and convenient in practice, and so should not be lightly disregarded and confounded; for system depends upon science, and science upon classification. This was a common-law action of trespass on the case, in tort, brought by the plaintiff, Lawson, against defendant, Conaway, to recover damages for malpractice in treating a fracture of plaintiff's arm, with damages laid at \$10,000. The case was tried on a plea of not guilty, and no other, and the jury found in favor of defendant. During the trial it came out in evidence on plaintiff's side that Dr. Conaway had sued the plaintiff before a justice for his services in treating the plaintiff's arm, and had recovered a judgment for \$18, to show, I suppose, that defendant had collected his fee. Counsel for the defendant, Dr. Conaway, contend that when the doctor sued for his bill there was involved in that the very question which was passed upon by the jury in the case at law, citing as authority for such contention *Ely v. Wilbur*, 49 N. J. L. 685, 60 Am. Rep. 668; *Dale v. Donaldson Lumber Co.* 48 Ark. 183; *Bellinger v. Craigue*, 31 Barb. 534; *Blair v. Bartlett*, 75 N. Y. 150, 31 Am. Rep. 455. I think it could be shown that the weight of authority is the other way, under code practice, as well as at common law. I understand our law upon the subject, apart from chapter 50 of the Code, to be as follows: The malpractice described in plaintiff's declaration is a common-law tort, and properly made the subject of an action in case. But because it is a tort which results from a breach of duty, and relating to and directly growing out of the services of Dr. Conaway as a surgeon, for which service Lawson had agreed expressly or im-

pliedly to pay, it may, at Lawson's option, be filed as a recoupment against the surgeon's suit for his services. But Lawson is not compelled to put it in, by way of recoupment or counterclaim, on pain of being thereafter barred by the judgment in the action for such services. Our practice is to leave this to the choice of Lawson, so that he may act upon such considerations of fitness, convenience, and the like, as the circumstances of his case may dictate, in regard to the time and the mode of enforcing his claim for damages; and no better illustration can be given of the fitness of leaving to him such choice than the case in hand, for in this state the jurisdiction of a justice, though large, is special, and limited to \$300, while the plaintiff's account for \$18 could not be sued for in the courts of general jurisdiction, because too small. The patient's claim could not be recovered before a justice, though fully proved, because too large. See sections 52, 56, chap. 50, Code, where it is perhaps included under the term "Counterclaim," but the option is given to sue for the whole amount in any court having jurisdiction. If the plaintiff, Lawson, had appeared before the justice, and filed his claim of \$10,000 for malpractice as a counterclaim in defense or reduction of the doctor's claim of \$18 for his services, and \$18 had been thus used, it is by no means clear that he could afterwards have sued for the excess. But this involves questions that I do not care now to discuss; for if Lawson's demand for \$10,000 is a counterclaim, within the meaning of the term as used in section 55 of chapter 50, then the option is given him to sue for the whole amount in any court having jurisdiction, and so he would not be precluded from maintaining this action *ex delicto*, although, when sued by Dr. Conaway, before the justice, for \$18, he appeared and otherwise answered the action, yet did not produce his claim for the \$10,000, with his evidence in support thereof. For these reasons, I am constrained to dissent from the doctrine laid down in point No. 4 of the headnotes, especially as I do not regard such question of *res judicata* as fairly arising on this record.

U. D. McCLAIN, Admr., etc., of A. J.
Lowther, Deceased, *Plff. in Err.*,

v.
W. H. H. DAVIS.

(.....W. Va.....)

*On the eighth day of April, 1886, two justices presided at a trial at which a verdict was rendered, but no judgment thereon was entered. Subsequently, nearly two years afterwards, the same justices, without notice, met and undertook to enter a judgment upon the verdict

*Headnote by LUCAS, P.

NOTE.—The strict rules governing the exercise of the limited jurisdiction of justices of the peace are well illustrated in the above case, in which the prevailing and dissenting opinions exhaustively discuss the question involved while the majority hold

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nunc pro tunc. Held, such entry *nunc pro tunc* was unauthorized and illegal, and was properly treated by the circuit court as a nullity.

(Brannon J., *dissentia*.)

(December 17, 1892.)

ERROR to the Circuit Court for Doddridge County to review a judgment affirming a judgment of a justice of the peace refusing to revive in favor of plaintiff as representative of the estate of A. J. Lowther, deceased, a judgment alleged to have been recovered by Lowther against defendant. *Affirmed*.

The facts are stated in the opinions.

Messrs. John Bassel and S. D. Turner for plaintiff in error.

Mr. Jackson V. Blair, for defendant in error:

Had the two justices jurisdiction of the case on the 20th of March, 1888, and the power to enter the so-called *nunc pro tunc* judgment? If not, then their act was *coram non judge*, and an absolute nullity.

Sibley v. Howard, 3 Denio, 72, 45 Am. Dec. 448.

If the motion to revive is a substitute for the writ of *scire facias* as counsel for plaintiff concede, and the writ is a new action on the judgment, the fact that such "motion was opposed" by the defendant was equal, before the justice, to the formal plea of *nul tiel record*, which not only denied the existence of any such record as that claimed by plaintiff, but put in issue the validity of the *nunc pro tunc* judgment.

1 Rob. Old. Pr. (Va.) 585; *Eppes v. Smith*, 4 Munf. 466; *Burk v. Treggs*, 3 Wash. (Va.) 216.

Had this been an action on a judgment which by appeal, limitation, or otherwise had become vacated, or that was void, could not such defense have been successfully interposed? If so, then why should a motion or *scire facias* to revive a judgment that never had any legal existence be sustained?

Evans v. Taylor, 28 W. Va. 184; *Kanawha & O. R. Co. v. Ryan*, 81 W. Va. 364; *King v. Bates*, 80 Mich. 367, 20 Am. St. Rep. 518.

Our statute provides that judgment shall be entered within twenty-four hours after the trial.

W. Va. Code, chap. 50, § 114.

The rendition of the judgment would necessarily have to be first.

Justices of the peace being required to render judgment within a given time cannot do so afterwards. If required to render judgment immediately after receiving the verdict, he has no authority to render it the next day thereafter.

Sibley v. Howard, 3 Denio, 72, 45 Am. Dec. 448.

Taxing costs is a judicial act, and therefore a justice of the peace who does not render judgment for costs within the time allowed him to render judgment, cannot do so afterwards.

that the entry of a judgment after the time specified by statute is an absolute nullity. The opinions and briefs very fully present the authorities on the question.

See *Smith v. Briggs*, 3 Denio, 78.

A judgment entered by a justice by virtue of a statutory authority must show that the requirements of the statute have been complied with, and if it fails in this, it is void.

Beach v. Botsford, 1 Dougl. (Mich.) 199, 40 Am. Dec. 45.

Originally justices were only "peace officers," having no jurisdiction in civil causes, their duties being chiefly ministerial.

1 Bl. Com. 849.

Their judicial powers have been created by statutes that are in derogation of the common law. Hence they must follow strictly the statute in the performance of judicial acts. It must appear from the face of their proceedings that they have acted within the scope of their jurisdiction, otherwise their judgments may be impeached collaterally. "No presumptions are indulged in favor of their jurisdiction."

King v. Bates, 80 Mich. 367, 20 Am. St. Rep. 518, and notes; *Ragan v. Kennedy*, 1 Overt. (Tenn.) 94; 1 Starkie, Ev. 252, and note; *Horton v. Elliott*, 90 Ala. 480; *Corrigan v. Morris*, 48 Mo. App. 456; *Duel v. Sykes*, 59 Hun, 117; *Bonney v. Paul*, 89 N. Y. S. R. 596; *Todd v. Doremus*, 89 N. Y. S. R. 589; *Vickburg v. Briggs*, 85 Mich. 502.

When Justices Nutter and Randolph failed to render and enter judgment on the verdict within the twenty-four hours, jurisdiction was lost, and their power at an end.

Watson v. Davis, 19 Wend. 371; *Robinson v. Kious*, 4 Ohio St. 594; *Stallcup v. Baker*, 18 Ohio St. 544; *McNamara v. Spees*, 25 Wis. 539; 12 Am. & Eng. Encyclop. Law, 458, note 5, 466-474, notes; *Tomlinson v. Litze*, 82 Iowa, 32.

To warrant the entry of a *nunc pro tunc* judgment, there must be record evidence; that is, that such entry can only be made upon the production of some note, entry, or memorandum from the records or quasi records of the court, which shows in itself, without the aid of parol evidence, that the alleged judgment was rendered and what were its character and terms.

Black, Judgm. §§ 132, 135.

The entry must purport to be an actual judgment conveying the sentence of the law, as distinguished from a mere memorandum, note, or recital that a judgment had been or would be rendered.

Black, Judgm. § 115.

In *Putnam v. Van Allen*, 46 Hun, 492, the justice impaneled a jury which tried the case, and returned a verdict in favor of the defendant. The justice immediately made his memorandum on his minutes of testimony, specifying the items of costs, the amount thereof, and indorsed "Verdict for defendant," and "Judgment for costs against plaintiff, rendered." It being suggested that the costs were excessive, he determined the amount allowable, notified counsel thereof, and entered the items in his minutes, informed counsel that certain witness fees were included but did not enter them in the minutes. Four days thereafter he wrote down the amount of the witness fees, entered and signed judgment, dating it back as of the day of trial. Held, that the judgment was not rendered until the later date, and was void.

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See also *Kuklo v. Kleis*, 18 N. Y. S. R. 724; *Bowden v. Taylor*, 81 Ga. 199.

The defendant was by this clandestine and unauthorized act of the justices deprived of his right to obtain a writ of certiorari within the time allowed by law.

Long v. Ohio River R. Co. 35 W. Va. 883.

When a trial miscarries, or when by some act or omission of the court, jurisdiction is lost, the plaintiff is in the first instance entitled to a new trial, and in the second, to bring a new action.

Dunlap v. Robinson, 12 Ohio St. 530.

If it be true that the justices actually performed their judicial functions within the statutory period, and only failed or neglected to perform their ministerial duties, then the plaintiff has his remedy against them on their official bonds.

Gannon v. Donn, 7 D. C. 264; 12 Am. & Eng. Encyclop. Law, p. 397, note 7.

Lucas, P., delivered the opinion of the court:

A. J. Lowther brought an action before a justice in Doddridge county, and a verdict of the jury was rendered in favor of the plaintiff, on the 8th of April 1886, for \$184. No judgment was entered upon this verdict. The docket showed, however, that an execution had issued at the date of the verdict. On the 31st December, 1887, a renewed execution was issued. This execution recited that a judgment had been rendered by W. E. Nutter, J. P., and L. F. Randolph, J. P., on the 8th day of April, 1886. On the 17th of January, 1888, the defendant, Davis, by his counsel, moved before the justice to quash the execution which motion the justice denied, and the defendant appealed. The case was tried by the circuit court on this appeal, and was there dismissed upon the ground that the appeal was improvidently awarded. Thereupon a further appeal from the decision of the circuit court refusing to quash the execution, was prosecuted to this court, and here the judgment of the circuit court, overruling the motion to quash the execution, was reversed, and the case remanded. Point 1 of the syllabus of the case as tried here was, (*Lowther v. Davis*, 83 W. Va. 132:) "An execution purporting to be issued upon the judgment of a justice, where there is in fact no such judgment, but simply the verdict of the jury, is void, and the justice should quash such execution upon notice and motion." The judgment of this court proceeded upon the ground that there was no such judgment as the one recited by such execution. The concluding paragraph of the opinion of this court upon this branch of the case is as follows: "These provisions [that is, the provisions of the Code previously cited] clearly show that no execution can be issued by the justice until there is a judgment rendered upon which it can be issued. It is clear that no execution can be issued on the verdict of a jury, but that there must be a judgment entered on the verdict by the justice to authorize the execution; and unless there is such judgment, the execution is void, and should be quashed on a proper motion by the defendant therein."

While this appeal was pending, viz., on the 20th of March, 1888, the two justices who tried the case originally met together, and entered the following order: "A. J. Lowther v. W. H. H. Davis. March 20th, 1888. We, W. E. Nutter and L. F. Randolph, justices of the peace who presided at the trial of this cause on, to wit, the 8th day of April, 1888, in which trial a verdict was rendered by the jury in favor of the plaintiff, having failed to enter judgment as prescribed by law, do enter the judgment now for that time in the following words and figures, to wit: It is therefore considered by the court that A. J. Lowther recover from W. H. H. Davis the sum of \$221.93, with interest from the 8th day of April, 1888, until paid, and his cost by him in this behalf expended, which is ascertained to be thirty-two dollars and 50 cents, (\$32.50.) Given under our hands this 20th day of March, 1888. W. E. Nutter, J. P. L. F. Randolph, J. P."

The plaintiff afterwards died, and his administrator made a motion before the justice to revive the judgment in his name, and defendant opposed the motion, and the justice refused to revive; and on appeal to the circuit court that action was affirmed, and the administrator brings the case here on appeal.

In this action of the circuit court, in refusing to revive this judgment, we think there was no error, but that it was clearly right on several grounds. In the *first* place the case may be regarded as a *res judicata*, this court having in effect directed the execution to be quashed upon the ground that no such judgment had been rendered or entered. It is true that the record now produced, of an attempt on the part of the two justices to enter a judgment *nunc pro tunc*, was not then before this court; but the principle, often announced, is that everything litigated on the former trial, or which might and ought to have been litigated, is closed by the final adjudication here. The attempt to enter a judgment *nunc pro tunc* might have been made before the execution issued which was here quashed; and the parties, having failed to make the attempt before bringing the case to this court, ought not to be permitted to do so after this court had decided that no judgment had been rendered. Moreover, the language of this court, as above quoted from the opinion, precluded the idea that the entry of a judgment within the time prescribed by the statute is not essential to its validity. But, *secondly*, were it otherwise the language of the Code, (see section 114, chap. 50,) taken in connection with other provisions *in pars materia*, is too unequivocal to admit of misconstruction. Where the language is unambiguous, no ambiguity can be authorized by interpretation. Five or six sections of the Code, immediately succeeding section 114, show that the object of the Legislature was to draw a marked distinction between the rendition of a judgment and its entry. When, therefore, in section 114, the Legislature provides, "In other cases judgment shall be entered within twenty-four hours, (Sundays excepted,) after the trial," it is taking unwarranted liberty

with their language to say that when they used the word "entered" they meant "rendered;" or to hold that the judgment, if rendered, might be entered after the lapse of not only twenty-four hours, but of two years after its rendition, as was attempted in this case. The question as to what constitutes the entry is an entirely different one. All that can be said upon that subject is that the very least required to give validity to the judgment is some written evidence contained in the papers or on the docket that it has been rendered, and this writing must be made within the twenty-four hours, (Sundays excepted,) as prescribed by the statute. In the *third* place, this entry of the judgment made by these justices seems to have been done upon their own mere motion and without any notice whatever to the defendant in the court below. It is a well-established rule that, if they regarded the omission of the entry as a mere clerical error, they could only correct such error upon reasonable notice to the other party. This is the well-established practice in the circuit courts, and in this court. See Code, chap. 184, §§ 1, 5. In any point of view, we must regard this action of the justices as absolutely without warrant of law and entirely null and void. It is well known that the justice's court has no regular term, and if his proceedings are to be carried in his own breast for years, and then entered in a case no longer pending, his docket and proceedings would soon be in a chaotic condition, and absolutely useless for any practical purpose. In the case of *Powell v. Com.*, 11 Gratt. 823, in construing the power of the court over a judgment rendered at a previous term, and the power of amendment of judgments and decrees by the judge in vacation, after the adjournment of the term, it was said: "It was intended to authorize amendments in support of a judgment in cases in which there was something in the record by which they could safely be made. It could not have been intended to authorize an amendment to be made upon the individual recollection of the judge, or by proof *abundant*." So in regard to the correction of clerical errors generally. Mr. Black thus lays down the rule: "That a court has a right at a term, subsequent to one at which a judgment is rendered, to correct, by an order *nunc pro tunc*, a clerical error or omission in the original entry, is indisputable. The error, whether of omission or commission, must appear from the record of the proceedings in which the entry of judgment is made." 1 Black, Judgm. § 181. In *Halley v. Baird*, 1 Hen. & M. 24, it was held that the "district court has no power or jurisdiction to reverse, alter, or amend a judgment given at a former term of the said court which had been entered on the order book and signed by a judge in open court." Upon the other hand, in *Shelton v. Welch*, 7 Leigh, 175, it was held that a clerical error might be corrected at a subsequent term. In the present case, if it were conceded that a justice of peace could at any time enter a judgment *nunc pro tunc*, after the termination of his session at which it was rendered,

he certainly could not do so except upon reasonable notice to the parties interested, nor could he at any time do so from his own recollection of what had occurred, but would have to rely exclusively upon some sufficient evidence appearing in the record or papers in the case, showing that such a judgment had been rendered.

We think it quite evident, therefore, in the present case, the justices acted without warrant of law, in excess of their jurisdiction, and that the action of the Circuit Court in refusing to renew the pretended judgment was correct and must be affirmed.

Brannon, J., dissenting:

A. J. Lowther brought an action before a justice in Doddridge county, and a verdict of a jury was rendered in favor of the plaintiff for \$184. No entry of a judgment was made in the docket. The docket shows that an execution issued on the date of the verdict. On December 31, 1887, another execution issued, which by the final action of this court was quashed. *Lowther v. Davis*, 83 W. Va. 132. This execution recites that judgment had been rendered April 8, 1886, for the debt. On 20th March, 1888, the two justices who tried the case entered in the docket an order reciting that they had presided at the trial on the 8th day of April, 1886, in which a verdict had been rendered by a jury in favor of the plaintiff, and, having failed to enter judgment, they entered a formal judgment *nunc pro tunc* in accordance with the verdict. The plaintiff afterwards died, and his administrator made a motion before the justice to revive the judgment in his name, and the defendant opposed the motion and the justice refused to revive the judgment, and upon appeal to the circuit court the court also refused to revive it, and the administrator brings the case here. The question is, Was there any judgment to be revived? Is the judgment entered March 20, 1888, nearly two years after the rendition of the verdict, void because it was not entered within twenty-four hours after the trial, as required by Code, § 114, chap. 50? If void because the jurisdiction of the justices had lapsed, there cannot be a revival; but if not void, there can be. Were it an open question, I should be inclined to say that the statute is directory, made for the benefit of the plaintiff, not the defendant; that a justice's court would fall under that general principle applicable to all courts,—that is, that the court once in possession of the cause can go on until final judgment the verdict being merely an interlocutory occurrence while the proceeding is going on, and standing good until judgment on it. Otherwise a costly trial comes to naught because, merely, the justice takes a little too much time to consider. But there have been too many decisions in states where similar statutes prevail to allow this construction. They hold that judgment must be rendered within the prescribed time. Our statute says the judgment must be "entered" within the time. What does the word "entered" here mean? It means that judgment must be rendered—pronounced—within the time, but

not necessarily entered in the docket within that time.

In *Conwell v. Kuykendall*, 39 Kan. 707, though the section of the statute required judgment within four days, the court said, to obviate difficulty, the word, "entered," should be interpreted as "rendered;" that when the justice formed his mind, and announced it, that was judgment, while recording it afterwards would do; that it was the almost universal practice in all courts to announce judgments, and afterwards record them. That the word "entered," in section 114, means "rendered," is shown from the fact that the justice is to ascertain balance after credits, and enter judgment, thus showing that it means the formation and decision of the mind as to the legal result of the case, and it is shown by the further important fact that it is other sections (178 and 179) which command him to enter certain things in the docket, among them the judgment. The judgment of the justice shall be stated; that is, the one already entered or announced. What is a judgment? Upon such a question as that involved in this case, we must have a correct conception of what it is. The docket entry is not the judgment, but only evidence that a judgment was rendered. Judgment is what is ordered and considered; not the mere entry of what is ordered and considered. We sometimes speak of the record entry as the judgment, but it is no more the judgment, accurately speaking, than a note for money is the money or debt itself. *Hickey v. Hinesdale*, 8 Mich. 267. A judgment is the "decision or sentence of the law, pronounced by a court or other competent tribunal, upon the matter contained in the record." 3 Bl. Com. 395; Jacobs, Law Dict.; Freeman, Judgm. § 2. When, after the facts are found, the court pronounces the decision on them, that is the judgment. That is the judicial act,—the act of the court as a court speaking the sentence of the law,—whereas the entering it in the roll, the docket, or the order or judgment book, call it by whatever name, is an act of different nature, a clerical or ministerial act, one to constitute merely a memorial to attest that the judicial act of pronouncing judgment was in fact done. In view of these principles a justice must pronounce his judgment within twenty-four hours after the trial; but if he does so, his failure to enter it in his docket within that time will by no means rob the party of his judgment. He could, weeks later, compel him by mandamus to enter it. At common law, magistrates, after pronouncing judgments, have been justified in entering up the written record even after commitments to prison under them, and after proceedings by certiorari or other process had been commenced to impugn them for informality. *Massey v. Johnson*, 12 East, 67, 81, 82. In *Gray v. Cookson*, 16 East, 18, the record was drawn up six months after judgment rendered. See *Rex v. Barker*, 1 East, 186. In *Hall v. Tuttle*, 6 Hill, 33, 40 Am. Dec. 383, the court, of a justice's judgment, said: "This shows the formal entry of the judgment to be quite an unimportant matter. Where it is necessary for

the purpose of evidence, it may be made at any time." Suppose a justice, after a verdict, announce judgment thereon, but omits to record it in his docket. You can compel him to do so by mandamus. You show the docket and verdict, and prove his rendition of judgment. You need not have record evidence to prove his announcement of judgment. This is the rule as to proceedings of inferior courts. 2 Freem. Judgm. § 410. It is otherwise as to courts of record. The law fixes no limitation for such entry or for a *nunc pro tunc* entry. 2 Freem. Judgm. § 56. Suppose the justices in this case had entered a memorandum of judgment on the summons. That would not be a docket entry. No law requires them to make such memorandum. It, however, would be used as evidence of a judgment, and from it judgment in the docket could be afterwards entered.

But we are acting under the statute. The court in the case just cited, having spoken of the law independently of the statute, then adverted to the New York statute requiring judgment to be forthwith rendered and entered in the docket, and held the same principle, saying the judgment must be rendered forthwith; but not so with the docket entry, notwithstanding the statute as to both declared that it must be done forthwith. The reason given was that the one act was judicial, the other merely ministerial. The court held the statute in reference to the docket, specifying various things which it must show, to be directory, and the acts to be performed by the justice in reference thereto ministerial. These principles are sustained by authority in New York, whence our statute came, and other states where similar ones prevail. *Walrod v. Shuler*, 2 N. Y. 184; *Rish v. Emerson*, 44 N. Y. 876; opinion, *Sibley v. Howard*, 8 Denio, 72, 45 Am. Dec. 448, and note; opinion, *McNamara v. Spees*, 25 Wis. 589; *Mattheus v. Houghton*, 11 Me. 877; *Lynch v. Kelly*, 41 Cal. 284; Freem. Judgm. §§ 53, 58a; *Digges v. Dunn*, 1 Munf. 56; *Shadrack v. Woolfolk*, 82 Gratt. 707, 718; 1 Black, Judgm. § 106. In Wisconsin where the statute requiring judgment forthwith exists and where its construction is more rigid than elsewhere it has been twice held that "if judgment is rendered at the proper time (by being audibly pronounced so that it may be heard by the parties and others present) that is sufficient and the justice may subsequently enter it on his docket and tax the costs." *Wearne v. Smith*, 82 Wis. 412; *Kleinsteuer v. Schumacher*, 85 Wis. 608. The cases of *Sibley v. Howard*, 8 Denio, 72, 45 Am. Dec. 448; *Watson v. Davis*, 19 Wend. 871, and *McNamara v. Spees*, 25 Wis. 589, were cases where not only the docket entry but the judgment—the decision—was not announced till after the time limited. It must not be thought because in ordinary courts judicial acts are performed by a judge but the ministerial ones by a clerk that in the case of a justice who performs both, all his acts are judicial. The nature of the act is tested by its nature not by the accident of the person performing it. In *Hickey v. Hensdale*, *supra*, the court said the acts of the justice in making docket entries were

ministerial like those of a clerk. I repeat then that if a justice does announce judgment within twenty-four hours after verdict the judgment is not void because the entry in the docket is not made within that time. It is however important that justices who perform such important functions in the administration of justice should promptly enter their proceedings in the docket, just as much as it is that judges of superior courts should record their action, and they are culpable for not so doing.

But now comes another question,—the only question which has given me any serious concern. The judgment shows on its face that it was entered long after the date of the verdict, not purporting to have been done while the proceeding was *in fieri*, but is one entered *nunc pro tunc*; and it may be that it is not itself conclusive of the fact that judgment was pronounced within 24 hours after the trial, and that it is necessary to ascertain by other evidence that it was then rendered, where it purports to be *nunc pro tunc*. Our Statute (Code, chap. 50, § 182) makes the docket evidence of a judgment, but it does not make it the sole evidence, for it may be proven by entries or memoranda among the papers required by law to be kept, even by oral evidence of the justice. 1 Greenl. Ev. § 513; Freem. Judgm. § 410; note, 40 Am. Dec. 886. *Re Wight*, 184 U. S. 136, 83 L. ed. 865, the United States Supreme Court held that a *nunc pro tunc* order could be made on the recollection of the judge that an order had been made. The justices making this entry of judgment are the same who received the verdict. It is a circumstance to show such judgment. I hardly think this case ought to be regarded as a judgment *nunc pro tunc*, but simply as the performance of a ministerial act of entry of judgment announced at date of verdict, on the knowledge of the justices, nothing appearing tending to show that judgment was not so announced, but I am treating it, in the strongest light against its validity, as a judgment *nunc pro tunc*, holding that there is sufficient evidence to warrant such judgment, and, if there is, certainly such data would warrant the mere clerical act of entry in the docket. Here the docket shows that, on the date of the verdict, execution issued. We can read this entry, and could read the execution, were it in the record, but we are to presume it following the law, reciting the judgment, date, parties, and amount, as section 185, chap. 50, requires. The docket entries and verdict give us certainty as to parties, amount, dates, etc., necessary for judgment. The note of the execution follows right after the verdict in the docket. Is it not cogent evidence that judgment had been given on the verdict? For law of *nunc pro tunc* judgment, see opinion *Mitchell v. Overman*, 103 U. S. 64, 26 L. ed. 870. Upon such data I think a judgment could be entered at any time. Here was a verdict, and judgment would follow as a matter of course, in the absence of motion to set it aside, and we would perhaps presume its rendition; but the docket shows the issue of an execution the very day of the verdict. Is not

privilege or immunity of citizens, or otherwise contravene the 14th Amendment of the United States Constitution.

3. In such matters, equality and not identity or community, of accommodations, is the extreme test of conformity to the requirements of the Amendment.
4. The regulation of domestic commerce is as exclusively a state function as the regulation of interstate commerce is a Federal function. This statute is an exercise of the police power, and expresses the legislative conviction that the separation of the races in railway conveyances, with proper sanctions for substantial equality of accommodations, is in the interest of public order, peace, and comfort. It is a matter of legislative power and discretion, with which courts cannot interfere.
5. A proper construction of the statute does not, as contended by relator, authorize a conductor to assign a passenger to a coach to which his race does not belong, nor does it bind the passenger to accept such wrongful assignment, nor exempt the officers from action for damages in case of such wrongful assignment, and refusal to carry when disobeyed. The discretion vested in the conductor to decide primarily the coach to which each passenger belongs is only the necessary discretion attending every imposition of any duty, to determine whether the circumstances under which the duty arises exist. He exercises such discretion at his peril, and that of his employer.

(December 19, 1892.)

APPPLICATION for writs of certiorari and prohibition to determine the validity of certain proceedings instituted under Acts 1890,

privileges in violation of that Amendment. *Britton v. Atlantic & C. Air Line Co.* 88 N. C. 536, 48 Am. Rep. 749.

In *Day v. Owen*, 5 Mich. 520, 72 Am. Dec. 62, which was decided prior to the adoption of the 14th Amendment, it was held that the legality of a regulation for steamboat passengers which denied cabin passage to colored persons depended on the reasonableness of such regulation and that this was a mixed question of law and fact to be found by the jury. An answer setting up such a regulation in an action on the case by a colored passenger for denying him such privileges was held good against general demurrer and judgment rendered thereon for the defendant.

It was admitted in *West Chester & P. R. Co. v. Miles*, 55 Pa. 209, that a person could not be excluded by a public carrier on account of color, but the contention was as to the separation of colored and white passengers, and it was held that in the absence of any statute to the contrary the passengers might be separated if their accommodations were equal.

So in *McGinn v. Williams* (C. C. D. Md.) 5 Gen. Dig. 350, it was held that a steamer might furnish separate tables for white and colored passengers provided they were in all respects equal in the quality of their accommodations.

And it has been held in several cases that where the accommodations were equal in all respects the colored passengers on a railroad might be compelled to take a separate car. *Cherapeaks, O. & S. W. R. Co. v. Wells*, 95 Tenn. 433; *Council v. Western & A. R. Co.* 1 Inters. Com. Rep. 636; *Heard v. Georgia R. Co.* 1 Inters. Com. Rep. 712; *Houck v. Southern Pac. R. Co.* 83 Fed. Rep. 235.

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No. 111, to punish petitioner for alleged failure to occupy the compartment to which he had been assigned by the officer in charge of a railroad train as being the one in which, because of his race, he was entitled to ride. *Writs refused.*

The facts are stated in the opinion.

Messrs. Albion W. Tourgee and James C. Walker for relator.

Mr. Lionel Adams for respondent.

Fenner, J., delivered the opinion of the court:

We have held that when a party is prosecuted for crime under a law alleged to be unconstitutional, in a case which is unappealable, and where a proper plea setting up the unconstitutionality has been overruled by the judge, a proper case arises for the exercise of our supervisory jurisdiction, in determining whether the judge is exceeding the bounds of judicial power by entertaining a prosecution for a crime not created by law. *State v. Orleans Parish Crim. Dist. Ct. Judge*, 39 La. Ann. 132; *State v. Hicks*, 44 La. Ann. —. Relator's application conforms to all the requirements of this rule. He alleges that he is being prosecuted for a violation of Act No. 111 of 1890; that said Act is unconstitutional; that his plea of its unconstitutionality has been presented to, and overruled by, the respondent judge; and that the case is unappealable. He therefore applies for writs of certiorari and prohibition, in order that we may determine the validity of the proceedings, and, in case we find him entitled to such relief, may restrain further proceedings against him in the cause. The judge, in his

But such separation of the colored passengers cannot be justified unless the cars set apart for their exclusive use are as safe and comfortable and otherwise equal in the quality of their accommodations to those furnished to white persons who pay the same fare. *Houck v. Southern Pac. R. Co. supra*; *Logwood v. Memphis & C. R. Co.* 23 Fed. Rep. 318; *Murphy v. Western & A. R. Co.* 23 Fed. Rep. 637; *Gray v. Cincinnati S. R. Co.* 11 Fed. Rep. 684; *Civil Rights Bill*, 1 Hughes, 541; *Council v. Western & A. R. Co. supra*; *Heard v. Georgia R. Co.* 2 Inters. Com. Rep. 508.

Where a respectable colored woman was compelled to ride on the platform of a car because she was not allowed to go in the first-class car and was afraid to ride in the other car known as the "Jim Crow" car because it was occupied by rough men, both white and colored, a recovery of damages was allowed. The amount found being \$2,000 punitive damages and \$3,000 actual damages; a *remittitur* of \$2,500 from the actual damages was required as a condition of refusing a new trial. *Houck v. Southern Pac. R. Co. supra*.

A colored woman of good character and proper behavior having a first-class ticket is entitled to ride in the "ladies' car" which is set apart for ladies, and men accompanied by ladies, where there is but one such car and the other cars are occupied mostly by men. *Chicago & N. W. R. Co. v. Williams*, 55 Ill. 185, 8 Am. Rep. 841.

The same requirement of equality as to accommodations is made in respect to accommodations on steamboats, and it is held that the separation of colored persons must be from any actual discrimination in comfort, attention, or appearance of inferiority. *The Sue*, 23 Fed. Rep. 842.

answer, maintains the constitutionality of the law and the validity of his proceeding.

The legislative Act in question is entitled "An Act to promote the comfort of passengers on railway trains; requiring all railway companies carrying passengers on their trains in this state to provide equal, but separate, accommodations for the white and colored races, by providing separate coaches or compartments, so as to secure separate accommodations; defining the duties of the officers of such railways; directing them to assign passengers to the coaches or compartments set aside for the use of the race to which such passengers belong; authorizing them to refuse to carry on their trains such passengers as may refuse to occupy the coaches or compartments to which he or she is assigned; to exonerate such railway companies from any and all blame or damages that might proceed from such refusal; to prescribe penalties for all violations of this Act," etc. The first section of the Act requires that "all railway companies carrying passengers in their coaches in this state shall provide equal, but separate, accommodations for the white and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition, so as to secure separate accommodations," and that "no person or persons shall be permitted to occupy seats in coaches other than the ones assigned to them on account of the race they belong to." The second section provides "that the officers of such passenger trains shall have power, and are hereby required, to assign each passenger to the

coach or compartment used for the race to which such passenger belongs. Any passenger insisting on going into a coach or compartment to which by race he does not belong, shall be liable to a fine of \$25, or, in lieu thereof, to imprisonment for a period of not more than twenty days in the parish prison." And a like penalty is imposed on "any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs;" and it is further provided that, "should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company shall be liable for damages in any of the courts of this state." The third section provides penalties upon officers, directors, conductors, and employés of railway companies who shall refuse or neglect to comply with the provisions of the Act.

We have had occasion very recently to consider the constitutionality of this Act, as applicable to interstate passengers, and held that if so applied it would be unconstitutional, because in violation of the exclusive right vested in Congress to regulate commerce between the states. *State v. Hicks*, 44 La. Ann.—. The instant case presents no such application of the statute; but it appears on the face of the information that relator was proceeded against as "a passenger traveling wholly within the limits of the state of Louisiana, on a passenger train belonging to

If the accommodations furnished colored persons by interstate carriers are not equal to those furnished to white persons it is a violation of the Act of Congress to Regulate Commerce, § 3. *Heard v. Georgia R. Co.* 2 Inters. Com. Rep. 508; *Council v. Western & A. R. Co.* 1 Inters. Com. Rep. 668.

A colored passenger on a steamboat cannot be compelled to take inferior accommodations although at reduced prices. *Oger v. North Western U. Packet Co.* 37 Iowa, 147.

In this case the court declared generally that a colored person was entitled to the same rights and privileges that white people have, but the question of separate but equal accommodations was not involved and the language of the court was used in respect to a denial of equal accommodations.

The same protection against drunken and violent men seeking to molest, outrage, and humiliate a passenger must be given to both white and colored passengers. *Richmond & D. R. Co. v. Jefferson (Ga.)* 17 L. R. A. 571.

Statutory regulations.

The Civil Rights Act of Congress does not give a right to a penalty for discrimination by a carrier against colored persons as the right denied is not one of the rights of a citizen of the United States as such, and therefore is not the subject of legislation by Congress. *Cully v. Baltimore & O. R. Co.* 1 Hughes, 536.

Equal accommodations in public conveyances cannot be compelled by Act of Congress. Congress can enforce the rights guaranteed by the 14th Amendment only by corrected legislation such as may be necessary or proper for counter-acting and 18 L. R. A.

redressing the effect of wrongful state laws or Acts. *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 835.

A state law requiring separate but equal accommodations to be furnished for colored and white passengers is void so far as it applies to interstate commerce. *State v. Hicks*, 44 La. Ann.—.

But a state statute which applies only to commerce within the state is not unconstitutional regulation of commerce because it requires railroads to provide equal but separate accommodations for white and colored passengers by providing separate cars or separate divisions of a car for colored persons. *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587, 33 L. ed. 784, affirming 5 L. R. A. 132, 66 Miss. 662.

So state laws prohibiting any discrimination as to color between passengers are unconstitutional so far as they apply to interstate commerce, such as the carriage of passengers by vessel making voyages between different states. *Ball v. De Cuir*, 95 U. S. 485, 24 L. ed. 547.

In *Central R. Co. of N. J. v. Green*, 86 Pa. 427, it was held that a state statute might impose a penalty on a carrier for making any distinction based on the color of passengers. No question of interstate commerce was decided in this case.

The same case decides that under the Pennsylvania Act of March 22, 1897, making it unlawful to exclude "any person or persons" on account of color, only one penalty was incurred for the exclusion of man and wife at the same time.

On the general subject of constitutional equality of privileges, immunities, and protection, see *note to Louisville Safety Valve & Trust Co. v. Louisville & N. R. Co. (Ky.)* 14 L. R. A. 579.

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the East Louisiana Railroad Company, carrying passengers in their coaches within the state of Louisiana." It thus appears that the interstate commerce clause of the Constitution of the United States is not involved.

The relator's plea of the unconstitutionality of the statute contains no less than fourteen enumerated paragraphs, which do not require reproduction, because most of them are argumentative, and no provisions of the state or Federal Constitutions are referred to, as violated by the statute, except the 13th and 14th Amendments to the Constitution of the United States. The whole gravamen of relator's plea is contained in the fourteenth ground, which is as follows: "That the statute in question establishes an insidious distinction and discrimination between citizens of the United States, based on race, which is obnoxious to the fundamental principles of national citizenship, perpetuates involuntary servitude, as regards citizens of the colored race, under the merest pretense of promoting the comforts of passengers on railway trains, and in further respects abridges the privileges and immunities of the citizens of the United States, and the rights secured by the 13th and 14th Amendments of the Federal Constitution." So far as the 13th Amendment is concerned, its application to this statute may be at once eliminated, because the Supreme Court of the United States has clearly decided that it does not refer to rights of the character here involved. We will, for the sake of brevity, quote only the syllabus of the decision, as follows: "The 13th Amendment relates only to slavery and involuntary servitude, which it abolishes; and although, by its reflex action, it establishes universal freedom in the United States, and Congress may probably pass laws directly enforcing its provisions, yet such legislative power extends only to the subject of slavery and its incidents; and the denial of equal accommodations in inns, public conveyances, and places of public amusements imposes no badge of slavery or involuntary servitude upon the party, but, at most, infringes rights which are protected from state aggression by the 14th Amendment." *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 835. We may, therefore, confine ourselves to the question whether or not the statute violates the 14th Amendment, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." A further elimination may be made of the question whether a statute requiring separate accommodations for the races, without requiring the accommodations to be equal, would contravene the amendment, because the statute here explicitly requires that the accommodations shall be equal.

We thus reach the sole question involved in this case, which is whether a statute requiring railroads to furnish separate, but equal, accommodations for the two races,

and requiring domestic passengers to confine themselves to the accommodations provided for the race to which they belong, violates the 14th Amendment. The first branch of the above question, as to the binding effect of the statute on railways, has been definitely decided by the Supreme Court of the United States, on a statute almost identical, holding that the provision requiring railroads to furnish separate, but equal, accommodations was valid. *Louisville, N. O. & T. R. Co. v. Mississippi*, 188 U. S. 587, 88 L. ed. 784. But the court said: "Whether such accommodation shall be a matter of choice or compulsion [on the part of passengers] does not enter into this case." The validity of such statutes, in so far as they require passengers, under penalties, to confine themselves to the separate and equal accommodations provided for the race to which they belong, has not, as yet, been directly presented to, or decided by, the Supreme Court of the United States. But the validity of such statutes, and of similar regulations made by common carriers in absence of statute, and the validity of similar regulations or statutes as applied to public schools, has arisen in very many cases before the highest courts of the several states, and before inferior Federal courts, resulting in an almost uniform course of decision to the effect that statutes or regulations enforcing the separation of the races in public conveyances or in public schools, so long, at least, as the facilities or accommodations provided are substantially equal, do not abridge any privilege or immunity of citizens, or otherwise contravene the 14th Amendment. We refer to the following, among other numerous, decisions: *West Chester & P. R. Co. v. Miles*, 55 Pa. 209; *State v. McCann*, 21 Ohio St. 210; *People v. Gallagher*, 93 N. Y. 488, 45 Am. Rep. 232; *Cory v. Carter*, 48 Ind. 387, 17 Am. Rep. 738; *State v. Duffy*, 7 Nev. 842; *People v. Easton*, 13 Abb. Pr. N. S. 160; *Louisville, N. O. & T. R. Co. v. State*, 66 Miss. 662, 5 L. R. A. 132; *Lehev v. Brummell*, 103 Mo. 546; *Dawson v. Lee*, 83 Ky. 49; *Ward v. Flood*, 48 Cal. 36, 17 Am. Rep. 405; *Chesapeake, O. & S. W. R. Co. v. Wells*, 85 Tenn. 618; *Bertonneau v. City Schools Board of Directors*, 3 Woods, C. C. 177; *The Sue*, 22 Fed. Rep. 848; *Logwood v. Memphis & C. R. Co.* 23 Fed. Rep. 318; *Murphy v. Western & A. R. Co.* Id. 637.

It would little boot for us to make extensive quotations from these decisions. They all accord in the general principle that, in such matters equality, and not identity or community, of accommodations, is the extreme test of conformity to the requirements of the 14th Amendment. The cogency of the reasons on which this principle is founded perhaps accounts for the singular fact that, notwithstanding the general prevalence throughout the country of such statutes and regulations, and the frequency of decisions maintaining them, no one has yet undertaken to submit the question to the final arbitrament of the Supreme Court of the United States. In a case which arose as far back as 1849, the Supreme Court of Massachusetts, through its great *Chief Justice*, Shaw, con-

sidered this subject, saying: "Conceding, therefore, in the fullest manner, that colored persons, the descendants of Africans, are entitled by law to equal rights, constitutional and political, civil and social, the question then arises whether the regulation in question, which provides separate schools for colored children, is a violation of any of these rights." And the court held that it was not, saying in conclusion: "It is urged that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law, and cannot be changed by law. Whether this distinction and prejudice, existing in the opinions and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together may well be doubted." *Roberts v. Boston*, 5 Cush. 198. The general rule applied to carriers is well stated by Mr. Hutchinson: "If the conveyance employed be adapted to the carriage of passengers separated in different classes, according to the fare which may be charged, the character of the accommodations afforded, or of the persons to be carried, the carrier may so divide them; and any regulation confining those of one class to one part of the conveyance will not be regarded as unreasonable, if made in good faith, for the better accommodation and convenience of the passengers." Hutchinson, Carr. par. 542. In applying this rule, the supreme court of Pennsylvania said: "The right to separate passengers being clear, in proper cases, and it being the subject of sound regulation, the question remaining to be considered is whether there is such a difference between the white and the black races in this state, resulting from nature, law, and custom, as makes it a reasonable ground of separation." The court then proceeds to discuss these differences, taking care to say: "To assert separateness is not to declare inferiority in either. It is simply to say that, following the order of Divine Providence, human authority ought not to compel these widely separated races to intermix." Concluding, the court said: "Law and custom having sanctioned a separation of races, it is not the province of the judiciary to legislate it away. . . . Following these guides, we are compelled to declare that at the time of the alleged injury there was that natural, legal, and customary difference between the white and black races in this state which made their separation, as passengers in a public conveyance, the subject of a sound regulation to secure order, promote comfort, preserve the peace, and maintain the rights both of the carriers and passengers." *West Chester & P. R. Co. v. Miles*, 55 Pa. 209. Both the decisions from which we have quoted were rendered before the adoption of the 14th Amendment, but in states where the civil rights of the colored race were fully recognized. We have referred to them as indicating the germinal principles which have been followed in the numerous decisions cited above, applying to the 14th Amendment. That Amendment, it is well 18 L. R. A.

settled, created no new rights whatever, but only extended the operation of existing rights, and furnished additional protection for such rights. *Barbier v. Connolly*, 118 U. S. 27, 28 L. ed. 923; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Slaughter House Cases*, 83 U. S. 16 Wall. 86, 21 L. ed. 394.

The statute here in question is an exercise of the police power, and expresses the conviction of the legislative department of the state that the separation of the races in public conveyances with proper sanctions enforcing the substantial equality of the accommodations supplied to each, is in the interest of public order, peace, and comfort. It undoubtedly imposes a severe burden upon railways, but the Supreme Court of the United States has held that they are bound to bear it. It impairs no right of passengers of either race, who are secured that equality of accommodations which satisfies every reasonable claim. The regulation of domestic commerce is as exclusively a state function as the regulation of interstate commerce is a federal function. It is as much within the control of state legislation as the public school system or the law of marriage. To hold that the requirement of separate, though equal, accommodations in public conveyances, violated the 14th Amendment, would, on the same principles, necessarily entail the nullity of statutes establishing separate schools, and of others, existing in many states, prohibiting intermarriage between the races. All are regulations based upon difference of race; and, if such difference cannot furnish a basis for such legislation in one of these cases, it cannot in any. The statute applies to the two races with such perfect fairness and equality that the record brought up for our inspection does not disclose whether the person prosecuted is a white or a colored man. The charge is simply that he did "then and there, unlawfully, insist on going into a coach to which, by race, he did not belong." Obviously, if the fact charged be proved, the penalty would be the same whether the accused were white or colored.

We have been at pains to expound this statute because the dissatisfaction felt with it by a portion of the people seems to us so unreasonable that we can account for it only on the ground of some misconception. Even were it true that the statute is prompted by a prejudice on the part of one race to be thrown in such contact with the other, one would suppose that to be a sufficient reason why the pride and self-respect for the other race should equally prompt it to avoid such contact, if it could be done without the sacrifice of equal accommodations. It is very certain that such unreasonable insistence upon thrusting the company of one race upon the other, with no adequate motive, is calculated, as suggested by *Chief Justice Shaw*, to foster and intensify repulsion between them, rather than to extinguish it.

We will conclude by noticing some charges made against the statute by relator, based, as we think, on an utterly unwarranted construction. He claims that the statute vests

the officers of the company with a judicial power to determine the race to which the passenger belongs; that they may assign the passenger to a coach to which by race he does not belong, and that such assignment is binding on the passenger; and that, though wrongfully made, the officers and the railway company are exempted from any legal responsibility. The reading of the statute utterly repels these charges. Not only does not the statute authorize the conductor or other officer "to assign a passenger to a coach to which, by race, he does not belong, but it affirmatively requires him to assign each passenger to the coach used for the race to which such passenger belongs," and it punishes for failure to make such assignment. When the statute authorizes the conductor to refuse to carry any passenger who shall "refuse to occupy the coach to which he or she is assigned by the officer of such railway," it obviously means an assignment according to the requirements of the Act, *i. e.* to the coach to which the passenger, by race, belongs; and the exemption from damages is subject to the same construction. It is too clear for discussion that a refusal to carry a

passenger because he had refused to obey an assignment to a coach to which his race did not belong would not be exempted from redress in an action for damages. The discretion vested in the officer to decide primarily the coach to which each passenger, by race, belongs, is only that necessary discretion attending every imposition of a duty, to determine whether the occasion exists which calls for its exercise. It is a discretion to be exercised at his peril, and at the peril of his employer. It is very certain that if relator shall prove, in this prosecution, that he did not, as charged, "insist on going into a coach to which, by race, he did not belong," an erroneous assignment by the conductor would not stand in the way of his acquittal, or exempt the officer and the railway from an action for damages, whatever defenses might lie open to them based on good faith and probable cause.

It is therefore ordered that the provisional writ of prohibition herein issued be now dissolved and set aside, and that the relief sought be denied, at relator's cost.

Rehearing denied January 2, 1893.

MINNESOTA SUPREME COURT.

A. C. FRARY, *Appt.*,

v.

AMERICAN RUBBER CO., *Respnt.*

(.....Minn.....)

***A stipulation in a contract employing plaintiff for a specified time to carry on defendant's business, "to our satisfaction,"—Held, to reserve to the defendant the absolute right to discharge the plaintiff whenever defendant might become in good faith dissatisfied with him.**

(January 13, 1893.)

A PPEAL by plaintiff from an order of the District Court for Ramsey County denying a motion for new trial after judgment in favor of defendant in an action brought to recover the unpaid balance of salary alleged to be due to plaintiff under a contract for personal services for a definite period of time. *Affirmed.*

The facts are stated in the opinion.

Mr. William G. White, for appellant:

Wherever the object of a contract is to gratify taste, serve personal convenience or satisfy individual preference in regard to the purchase of a given article, the right of decision is absolutely reserved to the promisor, and cannot be reviewed.

But wherever the contract involves those more gross considerations of operative fitness or mechanical utility, or any considerations which are not strictly personal in their nature,

*Headnote by GILFILLAN, *Ch. J.*

NOTE.—On the subject of contracts to give "satisfaction," see *note* to *Church v. Shanklin* (Cal.) 17 L. R. A. 207.
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but are capable of being understood and appreciated by others, then and in all such cases the promisor undertakes that he will act reasonably and fairly, and found his determination on grounds that are just, reasonable and sensible. In this last class of cases his decision in point of correctness is, of course, subject to review by judicial triers.

Duplex Safety Boiler Co. v. Garden, 101 N. Y. 387; *Wood R. & M. Mach. Co. v. Smith*, 50 Mich. 565.

Cases falling in the first class are:

Gibson v. Cranage, 39 Mich. 49, 33 Am. Rep. 851; *Hoffman v. Gallaher*, 6 Daly, 42,—where a portrait was to be satisfactory; *Brown v. Foster*, 113 Mass. 186, 18 Am. Rep. 463,—in which plaintiff had agreed to make a suit of clothes for defendant; *Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446,—where plaintiff had agreed to make a bust of defendant's deceased husband; *McCarren v. McNulty*, 7 Gray, 189,—in which plaintiff agreed to make a book case satisfactory to a certain person; *Hartman v. Blackburn*, 7 Pittsb. L. J. 140,—where a dentist made a set of teeth and agreed that they should be satisfactory; *Hart v. Hart*, 22 Barb. 606,—where a son agreed to support his father during his lifetime and agreed to pay his board if he should become dissatisfied with living with him.

Cases falling in the second class of cases, and where the right of decision is not absolutely reserved to the promisor, but is subject to review by judicial triers, are:

Folliard v. Wallace, 2 Johns. 895; *Burns v. Munger*, 45 Hun, 75,—where there was an agreement to pay money three months after he should be "well satisfied" that the title to certain property was good; *Brooklyn v. Brooklyn City R. Co.* 47 N. Y. 475, 7 Am. Rep. 469,—which was an agreement to keep certain streets

in repair; *Duplex Safety Boiler Co. v. Garden*, *supra*,—which was a contract to repair boilers and to be paid “when defendants were satisfied that the boilers so changed were a success;” *Grinnell v. Kiralfy*, 55 Hun, 423,—where plaintiff contracted as a soubrette in a theatrical troupe upon condition that her employer might annul the contract if he should “feel satisfied” that she was incompetent or inattentive to business, etc.; *Doll v. Noble*, 5 L. R. A. 554, 116 N. Y. 230,—where a written contract provided that the polishing, staining and rubbing of the wood-work on defendant’s houses was to be done “to the entire satisfaction of the owner.”

In *Tyler v. Ames*, 6 Lana. 280, and *Spring v. Ansonia Clock Co.*, 24 Hun, 175, it was held that under a contract similar to the present one, the employer might discharge his employé arbitrarily and without disclosing any reasons therefor.

Neither case was decided by a court of last resort, and are evidently overruled by the later cases of *Duplex Safety Boiler Co. v. Garden* and *Doll v. Noble*, *supra*, and are practically overruled in the cases of *Weaver v. Klaw*, 43 N. Y. S. R. 675, and *Hydecker v. Williams*, 45 N. Y. S. R. 637.

Gray v. Central R. Co. of N. J. 11 Hun, 70, and *Heron v. Davis*, 8 Bosw. 336, are both New York cases, and are controlled by the later decisions in the same court.

In all cases the dissatisfaction must be real and not pretended, and must be honestly entertained in good faith.

Exhaust Ventilator Co. v. Chicago M. & St. P. R. Co. 66 Wis. 218; *Hartford S. Mfg. Co. v. Brush*, 48 Vt. 528; *Daggett v. Johnson*, 49 Vt. 345; *Lynn v. Baltimore & O. R. Co.* 60 Md. 404; *Baltimore & O. R. Co. v. Brydon*, 65 Md. 193; *Sibley Mfg. Co. v. Chico*, 24 Fed. Rep. 893.

Where one party has substantially complied with the terms of a contract which he is to perform to the satisfaction or approval of the other party, whereby the property of the latter has been benefited, the benefits being of such a character that they must necessarily be appropriated and retained by the party for whom they were made, the contractor is entitled to compensation.

O’Dea v. Winona, 41 Minn. 424, and cases there cited; *Addison*, Cont. §§ 393, 394.

Mr. Henry J. Horn for respondent.

Gillilan, Ch. J., delivered the opinion of the court:

Plaintiff, then a resident of Boston, Mass., and the defendant, a corporation, whose principal place of business was the same place, entered into this contract:

“Boston, Dec. —, 1890. We agree to pay A. C. Frary (\$250) two hundred and fifty dollars per month from Jan. 1, 1891, to April 1, 1892, for his services in carrying on our business in St. Paul, to our satisfaction and under our control. American Rubber Company. R. D. Evans, I hereby accept the above. A. C. Frary.”

May 27, 1891, defendant discharged plaintiff from July 1st following, giving no other reason for it than that his conduct of its business was not to its satisfaction. If this contract reserved to defendant the right to discharge plaintiff at

any time merely because it might be dissatisfied with his conduct of the business, whether it had sufficient reason to be so or not, it may have been an injudicious one for plaintiff to consent to; but there can be no question that the parties might make such a contract, and, if that is what this contract was intended to be, they must abide by it. In *Buller v. Winona Mill Co.*, 28 Minn. 205, a contract of hiring left it to the hirer to determine what it should consider right and proper to pay for the services, and it was held that if it did so honestly and in good faith its determination was final. The cases—of which there are a great many in the books—involving stipulations more or less similar to that in this contract do not deny the capacity of the parties to stipulate that what is to be done by one of them shall be to the satisfaction of the other before any liability on the part of the latter shall arise, and to make his decision that he is not satisfied final. It would hardly be profitable to review the decisions in detail. Those which have refused to hold the parties to such a stipulation according to its letter have generally done so, we apprehend, not because the parties were not bound, if such were their contract, but because it was not the contract. It is a matter of construction. In construing such contracts the nature or character of the thing stipulated to be done, the chief purpose the parties had in view, are potent considerations. Where they have had in view to satisfy the taste, feelings, sensibility, or judgment of the party, the decisions have generally held that the stipulation that the thing to be done must be to his satisfaction was absolute, and his decision that it was not to his satisfaction was intended to be final and unquestionable. On the other hand, where the chief thing the parties have had in mind was to effect some definite purpose or end, of the performance of which others could judge just as well as the parties could, and which involved no considerations strictly personal, the stipulation that it should be done to the satisfaction of the party has been generally held not to be controlling. Of the first of these classes of cases, the painting of a portrait to the party’s satisfaction is one instance. *Folliard v. Wallace*, 2 Johns. 895, where the contract sued on stipulated that, in case the title conveyed to the parties in fee should prove good and sufficient in law against all other claims whatsoever, they would pay a specified sum three months after they should be well satisfied that they held the land undisputed by any person whatsoever, and against all claims, is an instance within the second class. A contract employing a servant not to do a fixed and definite work (as, for instance, to build a specified kind of fence), but to render personal services, general in their nature, and especially where the employment involves considerations of fitness, business capacity, integrity, trust, and confidence, such as in this case, comes within the first class. Certainly no third person could judge whether the performance should come up to what was expected when the contract was made so well as the employer could. There is every reason to suppose that when the parties inserted the words “to our satisfaction” they meant just what they said. There is nothing in the evidence to suggest

that the defendant did not discharge plaintiff for the sole reason that it was in good faith dissatisfied with his conduct of the business.

There is nothing in any assignment not covered by what we have already said.
Order affirmed.

NEW HAMPSHIRE SUPREME COURT.

STATE of New Hampshire, *ex rel.* RHODES
et al., Petitioners,

v.

John B. SAUNDERS.

(.....N. H.)

1. Equity as a great branch of the law of their native country was brought over by the Colonists and has always existed as a part of the common law in its broadest sense in New Hampshire.
2. There is no right of trial by jury in equity proceedings.
3. An injunction against the unlawful use of buildings as a nuisance is not beyond the jurisdiction of equity on the ground that it is in the nature of a punishment of a criminal offense.
4. A statute declaring the use of a building for either of several unlawful purposes to be a nuisance abatable in equity does not introduce an exceptional mode of trial or change the ordinary course of procedure on questions properly triable by jury.
5. A nuisance cannot be abated with or without legal process if it has been discontinued and has not been renewed when proceedings are begun against it.

(December 26, 1880.)

EXCEPTIONS by defendant to rulings of the Trial Court for Hillsborough County made during the trial of an equity suit under the Laws of 1887, chap. 77, to abate a liquor nuisance. *Case discharged.*

The questions raised by the exceptions were:

1. As to the validity of the chapter under which the petition was filed.
 2. Whether or not defendant was entitled to trial by jury.
 3. Whether or not the state was required to prove the existence of the illegal use of the building on the day the petition was filed.
- Chapter 77 of the Laws of 1887 is as follows:
"Section 1. Any building, place, or tenement in any town or city that is resorted to for prostitution, lewdness, or illegal gaming, or that is used for the illegal sale or keeping for sale of spirituous or malt liquors, wines, or cider, is declared to be a common nuisance. Section 2. The supreme court shall have jurisdiction in equity, upon information filed by the solicitor for the county, or upon petition

of not less than twenty legal voters of such town or city, setting forth any of the facts contained in section 1 of this Act, to restrain, enjoin or abate the same; and an injunction for such purpose may be issued by said court, or any justice thereof."

The further facts appear in the opinion.

Messrs. J. H. Andrews, D. F. O'Connor, William Little and A. R. Simmons, with Messrs. W. L. Foster and J. P. Bartlett, for defendant.

Messrs. Robert M. Wallace and Samuel Upton, for plaintiffs:

The maintaining a common nuisance by using a building for liquor purposes would be a crime.

The fact that this statute is silent as to what the punishment or penalty for this offense is makes no difference, for it is punishable in the discretion of the court, like most common nuisances.

When the forbidding statute is silent as to the punishment, it is an indictable misdemeanor at common law.

Bishop, *Crim. Law*, §§ 84, 849; Bishop, *Statutory Crimes*, §§ 138, 873; *State v. Fletcher*, 5 N. H. 257.

If a statute makes a thing a public nuisance and directs how it shall be punished, probably the common-law right of abatement still attaches.

1 Bishop, *Crim. Law*, 150c, and cases cited.

This statute does just the reverse; it establishes a way of abatement and prohibition for the future, and is silent as to the penalty, leaving that to the courts.

There is no constitutional right of trial by jury in equity cases.

Copp v. Henniker, 55 N. H. 210, 20 Am. Rep. 194; *Perkins v. Scott*, 57 N. H. 81; *Bellows v. Bellows*, 58 N. H. 60; *Mugler v. Kansas*, 123 U. S. 623, 81 L. ed. 205.

The object of the injunction in cases of this kind is not alone or perhaps mainly, to abate the nuisance, but to restrain the respondent from a repetition of the offense in the future.

2 Story, *Eq.* § 862.

By a perpetual injunction the remedy is made complete through all future time; whereas, an information or indictment at common law can only dispose of the present nuisance, and for future acts new prosecutions must be brought.

2 Story, *Eq.* § 924.

To have an injunction against a private nul-

NOTE.—The exhaustive and able review of the subject of jury trials in chancery which the court has given in the opinion leaves no opportunity for annotation on that question.

In connection with this subject and as illustrating special departments of it we refer to preceding notes in this series as follows:

For constitutional right to trial by jury in equity 18 L. R. A.

table cases on account of a demand for damages, see *note* to *Lynch v. Metropolitan Elevated R. Co.* (N. Y.) 15 L. R. A. 287.

For constitutional right to jury by assessment of damages on default, see *note* to *Dean v. Willamette Bridge Co.* (Or.) 15 L. R. A. 614.

For a case similar to that above, see *Carlston v. Bugg*, 5 L. R. A. 193, 149 Mass. 550.

sance, it is not necessary to show that it exists when the petition is filed.

Ford v. Burleigh, 60 N. H. 279; *Milan Steam Mills v. Hickey*, 59 N. H. 242; *Winnepesaukee Camp-Meeting Assn. v. Gordon*, 63 N. H. 505; *Bridge v. Sargent*, 64 N. H. 294.

The Legislature recognized the injurious effect of such nuisances as these, and sought to prohibit and prevent them in the future in proper cases.

Statutes of this kind are to be construed so as not to defeat the obvious intentions of the Legislature.

Bishop, *Statutory Crimes*, § 193, *note*.

Neither are they to be construed so as to work an absurdity.

Bishop, *Statutory Crimes*, § 200.

We have a reasonable time to file our petition.

Mr. James W. Remick, also for plaintiffs:

The power of the Legislature to condemn, regulate, restrain and if necessary to prohibit and destroy, whatever is injurious to the public health and morals, or offensive to the public sense, is universally recognized, and nowhere more distinctly than in New Hampshire.

State v. Noyes, 80 N. H. 279; *State v. Marshall*, 1 L. R. A. 51, 64 N. H. 549; *State v. Campbell*, 64 N. H. 402; *State v. Freeman*, 83 N. H. 426; *State v. Clark*, 28 N. H. 176, 61 Am. Dec. 611; *Train v. Boston Disinfect. Co.* 144 Mass. 523, 59 Am. Rep. 113; *Mugler v. Kansas*, 128 U. S. 623, 81 L. ed. 205; *Kidd v. Pearson*, 128 U. S. 16, 32 L. ed. 348.

For more than three hundred years, independent of any statute, the enjoining of common nuisances, on information, by some one representing the public, has been an established branch of equity jurisdiction. It is supported by a chain of precedents, extending back to the time of the Virgin Queen.

Bond's Case, Moore, 238, decided in the Exchequer, 29 Eliz.; *Anon.* 3 Atk. 750; *Atty-Gen. v. Richards*, 2 Anst. 603; *London v. Bolt*, 5 Ves. Jr. 129; *Atty-Gen. v. Cleaver*, 18 Ves. Jr. 211; *Crowder v. Tinkler*, 19 Ves. Jr. 618; *Atty-Gen. v. Johnson*, 2 Wils. 87; *Atty-Gen. v. Forbes*, 2 Myl. & C. 129; *Eastern Dist. Dist. Atty. v. Lynn & B. R. Co.* 16 Gray, 245; *Atty-Gen. v. Chicago & N. W. R. Co.* 35 Wis. 533; *State v. Mobile*, 5 Port. (Ala.) 279; *Mugler v. Kansas*, *supra*; *State v. Crawford*, 28 Kan. 726, 42 Am. Rep. 182; *Littleton v. Fritz*, 65 Iowa, 488, 54 Am. Rep. 19; *Atty-Gen. v. New Jersey R. & Transp. Co.* 3 N. J. Eq. 139; *Atty-Gen. v. Hunter*, 16 N. C. 18; *Atty-Gen. v. New Jersey R. & T. Co.* 3 N. J. Eq. 136; *Pennsylvania v. Wheeling & B. Bridge Co.* 54 U. S. 13 How. 513, 14 L. ed. 249; *Georgetown v. Alexandria Canal Co.* 37 U. S. 12 Pet. 91, 9 L. ed. 1012; *Atty-Gen. v. Blount*, 10 N. C. 334; *People v. Davidson*, 30 Cal. 379; *State v. Saline County Ct.* 51 Mo. 381.

All the great equity commentators, both English and American, declare it broadly and unqualifiedly.

Story, *Eq. Jur.* 921-923; Daniell, *Ch. Pl. & Pr. chap.* 36, p. 1636; Pomeroy, *Eq. Jur.* 1349; Adams, *Eq.* 211; Fonblanque, *Eq.* 4; Maddock, *Ch.* 128; Kerr, *Inf.* 384; High, *Inf.* 520, 521; Wood, *Nuisance*, 811.

18 L. R. A.

The ground and theory of the jurisdiction must commend itself to every judicial mind.

Story, *Eq. Jur.* 924; *Coker v. Birge*, 9 Ga. 425, 54 Am. Dec. 350; *Eastern Dist. Dist. Atty. v. Lynn & B. R. Co.* 16 Gray, 245.

The Legislature which created the office of attorney-general and prescribed its duties may, in the exercise of the same power, create supplemental agencies to share its authority.

Littleton v. Fritz, 65 Iowa, 488, 54 Am. Rep. 19; *Carleton v. Rugg*, 5 L. R. A. 193, 149 Mass. 550.

Of the saloon as a nuisance, and for the simple purpose of restraint and prevention, by the process of injunction, the jurisdiction of courts of equity is certain, and in no way altered or affected by the fact that the maintenance of the saloon is also a crime.

Bishop, *Crim. Proc.* 1415; Wood, *Nuisances*, p. 814; High, *Inf.* § 524; *State v. Crawford*, 28 Kan. 726, 42 Am. Rep. 182; *Littleton v. Fritz*, *supra*; *Carleton v. Rugg*, *supra*; *Hamilton v. Whitridge*, 11 Md. 128, 69 Am. Dec. 184.

A thing may be criminal and yet be the subject of civil proceedings.

Nobody ever pretended, so far as I know, that these proceedings, with their fishing depositions, and other incidents of civil trial, were in violation of any provision of the Constitution, because the act which gave rise to them was criminal.

Bishop, *Crim. Law*, §§ 264, 265; Bishop, *Crim. Proc.* 1418.

Nor is this right to civil proceeding limited to private individuals who have sustained injuries distinct from the state, as suggested by defendant; but the state itself is entitled to a civil remedy in addition to its criminal remedy, to accomplish any allowable civil object.

State v. Barrels of Liquor, 48 N. H. 369; Bishop, *Crim. Law*, § 266.

Whenever and wherever the question has been discussed, the authority of the Legislature has been emphatically declared, and always without dissent, except in recent case of *Carleton v. Rugg*, where the court was divided.

Mugler v. Kansas, 123 U. S. 623, 81 L. ed. 205; *Littleton v. Fritz*, 65 Iowa, 488, 54 Am. Rep. 19; *Carleton v. Rugg*, 149 Mass. 550, 5 L. R. A. 193.

In this case, since the act fails to designate the mode of trial, it is the duty of the court to presume that the Legislature intended a constitutional mode.

Cooley, *Const. Lim.* § 186; *Willard v. Harvey*, 24 N. H. 344; *Cheshire Co. Teleph. Co. v. State*, 63 N. H. 169; *Gage v. Ruess*, 107 Ill. 11.

Though the Legislature had affirmatively declared that every question of fact should be determined by the court, yet you would be bound to sustain the act so far as it declares liquor saloons common nuisances, and so far as it provides for their restraint by the injunction process.

East Kingston v. Towle, 48 N. H. 65, 97 Am. Dec. 575, 2 Am. Rep. 174.

In proceedings for an injunction against a common nuisance, so declared by statute, there is no constitutional right to a jury trial.

Profatt, *Jury Trial*, pp. 84, 85.

Constitutions in preserving the right to trial by jury speak of the time of their adoption.

Profatt, Jury Trial, pp. 87, 88; Pomeroy, *note* to 2d ed. of Sedgwick, Constr. Stat. & Const. Law, p. 487.

They continue the trial where it previously existed, according to the common law in its English sense.

Cooley, Const. Lim. 894; Profatt, Jury Trial, p. 88; *Kimball v. Connor*, 3 Kan. 415; *Littleton v. Fritz*, 65 Iowa, 488, 54 Am. Rep. 19; *Allen v. Anderson*, 57 Ind. 388; *Anderson v. Caldwell*, 91 Ind. 451, 46 Am. Rep. 615; *Pierce v. State*, 13 N. H. 557; *Opinion of Justices*, 41 N. H. 551; *East Kingston v. Towle*, 48 N. H. 64, 97 Am. Dec. 575, 2 Am. Rep. 174; *Perkins v. Scott*, 57 N. H. 80; *King v. Hopkins*, 57 N. H. 834; *Gould v. Raymond*, 59 N. H. 260.

But jury trial is not secured by article 20 in every case even, where it was had at common law, but only in those cases where it was had as a matter of right.

Cooley, Const. Lim. p. 512; Profatt, Jury Trial, § 87; Pomeroy, *note* to the 2d ed. of Sedgwick Stat. & Const. Law, p. 487; *Littleton v. Fritz*, *supra*; *Ioom v. Mississippi Cent. R. Co.* 36 Miss. 300.

In proceedings in equity, in a matter proper for equitable cognizance, while the court has always been at liberty to send questions of fact to a jury for its own enlightenment, there is not, was not, and never has been, independent of express statutory or constitutional provision for it, any absolute right, in behalf of the parties, or either of them to demand a jury trial, except in two cases, which are peculiar to the English civilization and in no way related to the present subject, or applicable to American conditions.

It has always been the undoubted prerogative of the equity court, with the exceptions hinted at, to hear and determine for itself, every question of fact putting issue upon the record, in any matter truly belonging to equity jurisdiction.

Daniell, Ch. Pl. & Pr. 1072, 1080; 2 Maddock, Ch. 363; Fonblanque, Eq. (Laussat), pp. 81, 663-666; Adams, Eq. 875, and *note*; 1 Spence, Eq. Jur. 336; Story, Eq. Jur. §§ 31, 702, 1404; Profatt, Jury Trial, §§ 90, 91; 3 Greenleaf, Ev. §§ 260, 261; 8 Cooley's Bl. p. 47, *note*; *O'Connor v. Cook*, 6 Ves. Jr. 67; *O'Connor v. Cook*, 8 Ves. Jr. 536; *Warden & Canons of St. Paul's v. Morris*, 9 Ves. Jr. 155; *Jervis v. White*, 7 Ves. Jr. 414; *Newman v. Milner*, 2 Ves. Jr. 488; *Le Guen v. Gouverneur*, 1 Johns. Cas. 486, 1 Am. Dec. 121; *Smith v. Carll*, 5 Johns. Ch. 116, 1 L. ed. 1029; *Townsend v. Graves*, 3 Paige, 453, 3 L. ed. 282; *Dale v. Roosevelt*, 6 Johns. Ch. 255, 2 L. ed. 117; *Apthorp v. Comstock*, 2 Paige, 483, 2 L. ed. 997; *Root v. Lake Shore & M. S. R. Co.* 105 U. S. 189, 26 L. ed. 975; *Pennsylvania v. Wheeling & B. Bridge Co.* 54 U. S. 18 How. 565, 14 L. ed. 268; *Parsons v. Bedford*, 28 U. S. 3 Pet. 440, 7 L. ed. 784; *State v. Crawford*, 28 Kan. 736, 42 Am. Rep. 182; *Littleton v. Fritz*, 65 Iowa, 488, 54 Am. Rep. 19; *Bank of the State v. Cooper*, 2 Yerg. 599, 24 Am. Dec. 517; *Call v. Perkins*, 65 Me. 439; *Ward v. Hill*, 4 Gray, 595; *Tyson v. Post*, 108 N. Y. 217; *Cushman v. Thayer Mfg. Jewelry Co.* 76 N. Y. 872, 82 Am. Rep. 815; *Hudson v. Caryl*, 44 N. Y. 555; *Curnow v. Happy Valley Blue Gravel & H. Co.* 18 L. R. A.

68 Cal. 262; *Flaherty v. McCormick*, 113 Ill. 538; *Helm v. First Nat. Bank of Huntington*, 91 Ind. 44; *Lane v. Schlemmer*, 114 Ind. 296; *Flint River S. B. Co. v. Roberts*, 2 Fla. 102, 48 Am. Dec. 183, *note*.

Mr. Profatt, § 90 says: "As a matter of right, the jury trial, could not be claimed in a court of equity, except in the two cases of an heir and rector."

An attempt has been made to show that proceedings to enjoin common nuisances constituted a further exception to the rule.

But if there were nothing else, the fact that no English or American text-writer, ancient or modern, has recognized such exception, would be conclusive that it never existed.

Among the earlier English cases, where the jurisdiction to enjoin without trial was exercised or recognized, we mention—

Dond's Case, Moore, 288, decided in the Exchequer, 29 Eliz.; *Atty-Gen. v. Burrige*, 10 Price, 350; *Atty-Gen. v. Richards*, 2 Anst. 603; *Atty-Gen. v. Forbes*, 2 Myl. & C. 123; *Atty-Gen. v. Johnson*, 2 Wils. 87.

Even in the cases where the court declines to enjoin without trial at law, the rule is not absolute. It is a practice founded more on conscience than necessity. It always rests in the sound discretion of the court.

Goodyear v. Day, 2 Wall. Jr. 288; *Root v. Lake Shore & M. S. R. Co.* 105 U. S. 189, 26 L. ed. 975.

In Eden, chap. 11, after asserting and proving the jurisdiction, the commentator says: "But notwithstanding the jurisdiction, the courts of equity are extremely unwilling to interpose in cases of public nuisance, without a trial at law."

See also *Burnham v. Kempton*, 44 N. H. 95; *Wason v. Sanborn*, 45 N. H. 171; *Bassett v. Salisbury Mfg. Co.* 47 N. H. 487, 82 Am. Dec. 179.

This unwillingness explains why precedents of trial by the court were so rare, prior to 1792, and precludes any inference of want of jurisdiction.

Where the matter complained of is not *ipso facto* a nuisance, but may be so according to circumstances, the court will require those circumstances to be ascertained by a verdict; but where it is in itself a nuisance the court (if there is sufficient evidence of its existence,) will restrain it without verdict.

Eden, chap. 11; *Yard v. Ford*, 2 Saund. 172; *Atty-Gen. v. Doughty*, 2 Ves. Sr. 453; *Ripon v. Hobart*, 3 Myl. & K. 169; *Kirkman v. Handy* 11 Humph. 406, 54 Am. Dec. 45; *Mohawk Bridge Co. v. Utica & S. R. Co.* 6 Paige, 554, 3 L. ed. 1099; High, Inj. 271; *Burnham v. Kempton*, 44 N. H. 97.

The nuisances within the provisions of the Act under consideration are all nuisances *per se*.

Train v. Boston Disinfect. Co. 144 Mass. 523, 59 Am. Rep. 113; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205; *Carleton v. Rugg*, 5 L. R. A. 193, 149 Mass. 550.

Hence, in proceedings to enjoin them, there is no right to trial by jury, because, certainly, at the time of the adoption of our Constitution, jury trial in such cases, however it may have been in regard to other nuisances, could not be demanded, as a matter of right.

The court may decree perpetual injunctions without trial.

Kerr, Inj. 217; 1 Pomeroy, Eq. Jur. § 252; *Bond's Case*, Moore, 238; *Brackett v. Persons*, 53 Me. 228; *Oxford & C. Universities v. Richardson*, 6 Ves. Jr. 706; *Inchbald v. Barrington*, L. R. 4 Ch. App. 888; Wood, Nuisances, 777; Story, Eq. Jur. 927e; *Pennsylvania v. Wheeling & B. Bridge Co.* 54 U. S. 18 How. 518, 14 L. ed. 249; *Minke v. Hofeman*, 87 Ill. 450, 29 Am. Rep. 63; *Atty-Gen. v. Hunter*, 46 N. C. 12; *Wahle v. Reinbach*, 76 Ill. 323; *Wolcott v. Melick*, 11 N. J. Eq. 204, 66 Am. Dec. 790.

Even under the peculiar jurisprudence of New Hampshire before 1792 there is no right to jury trial.

State v. Rollins, 8 N. H. 560; *Perkins v. Scott*, 57 N. H. 79; *Copp v. Henniker*, 55 N. H. 185, 20 Am. Rep. 194.

Judge Parker, in *State v. Rollins*, 8 N. H. 562, after an exhaustive consideration of this subject, held that the common law in its widest sense, and whether it had been previously practiced upon in the province or not, was continued in force by act of the provisional assembly.

The common law, in its widest sense, includes the doctrines of equity.

Bouvier, Law Dict. title, *Common Law*; *Williams v. Williams*, 8 N. Y. 541; Story, Eq. Jur. 57; Preface to 1 Johns. Ch. Rep.; *Parsons v. Bedford*, 28 U. S. 3 Pet. 445, 7 L. ed. 736.

Furthermore, it is distinctly held, in *Wells v. Pierce*, 27 N. H. 513, and in *Copp v. Henniker*, 55 N. H. 210, 211, "that the principles of equity were practiced upon after the revolution and before the creation of any distinct equity jurisdiction, by the courts of law.

If article 20 of the Bill of Rights is to be interpreted on the basis that equity formed no part of our jurisprudence when the Constitution was adopted, then, certainly, we must resort to the mother country, for the true application of the terms, "heretofore used and practiced."

Perkins v. Scott, 57 N. H. 82; *Jones v. Boston Mill Corp.* 4 Pick. 507, 16 Am. Dec. 358; *Pomeroy v. Winslip*, 12 Mass. 525, 7 Am. Dec. 91; Aldrich, Eq. Pl. & Pr. 160.

In *Marston v. Brackett*, 9 N. H. 849, and *Hoitt v. Burleigh*, 18 N. H. 889, 890, trial by jury, in equity, of all controverted questions of fact, is held to be a constitutional right.

The principle they declared was questioned by counsel, and considered as not settled by the court, in *Clark v. First Congregational Soc. of Keene*, 45 N. H. 384.

But it remained for Judge Ladd to drive the entering wedge into the anomalous doctrine of these early cases in *Copp v. Henniker*, 55 N. H. 210.

The court again assailed the soundness of those cases and drove the wedge still further into the doctrine in *Perkins v. Scott*, 57 N. H. 81.

In *Bellows v. Bellows*, 58 N. H. 60, the wedge was driven home and the doctrine of *Marston v. Brackett*, *supra*, riven in twain. The court said: "In proceedings in equity the parties have no constitutional right of trial by jury."

See also *Davis v. Dyer*, 62 N. H. 236, 18 L. R. A.

Allen, J., delivered the opinion of the court:

"Equity, as a great branch of the law of their native country, was brought over by the colonists, and has always existed as a part of the common law, in its broadest sense, in New Hampshire." *Wells v. Pierce*, 27 N. H. 503, 512; *Copp v. Henniker*, 55 N. H. 179, 210, 20 Am. Rep. 194; *Penhallow v. Kimball*, 61 N. H. 596, 598, 599; *Carroll v. McCullough*, 63 N. H. 95, 98; *Eckstein v. Downing*, 64 N. H. 248, 259. "Until the case of *Marston v. Brackett*, 9 N. H. 836, decided in 1838, it had not been intimated in this state, or anywhere else, that there was a right of trial by jury in equity proceedings. I venture to say that if such a right ever existed in this state, it was after, and not before, the observation of Chief Justice Parker in that case. It is not necessary, in the view I take, to inquire whether that observation established such a singular and anomalous doctrine in this state or not. It is enough that up to that time all the books and cases where the common law prevails are the other way."

Ladd, J., in *Perkins v. Scott*, 57 N. H. 55, 81. The novel doctrine, adopted "without consideration," was abandoned as soon as it was examined. *Copp v. Henniker*, 55 N. H. 179, 210, 211; *Bellows v. Bellows*, 58 N. H. 60; *Sargent v. Putnam*, 58 N. H. 182; *Proctor v. Green*, 59 N. H. 350, 352; *Davis v. Dyer*, 62 N. H. 231, 236. "In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has been heretofore otherwise used and practiced, the parties have a right to a trial by jury." Bill of Rights, art. 20. If this clause had been re enacted in 1792, 1851, 1876, and 1889, when constitutional amendments were submitted to the people it is not to be assumed that its original meaning would have been changed by repeated adoptions. But it has not been adopted since it took effect in June, 1784. The impression that a Constitution was adopted in 1792 (Gen. Laws, p. 40, note; *Copp v. Henniker*, 55 N. H. 190-192), is erroneous. Journal of the Convention in 10 Prov. and State Papers, 57, 63, 110-114, 141-168. The state has had but one permanent Constitution. The government of 1776 was intended to be temporary. *Brewster v. Hough*, 10 N. H. 143; *Gould v. Raymond*, 59 N. H. 272. "The Constitution of 1792" is a misnomer. In article 20 of the Bill of Rights, and in article 90 of the second part of the Constitution, "heretofore" means before 1784. "All the laws which have heretofore been adopted, used, and approved in the province, colony, or state of New Hampshire, and usually practiced on in the courts of law, shall remain and be in full force until altered and repealed by the Legislature; such parts thereof only excepted as are repugnant to the rights and liberties contained in this Constitution." Article 90. "All the laws which have heretofore been . . . usually practiced on in the courts" can be read in a sense that includes only such legal rules as can be shown to have been applied in New Hampshire cases. But this is not the meaning. The English common law, modified by American conditions, is one of "the laws which have heretofore been adopted, used, and

approved in the province . . . of New Hampshire, and usually practiced on in the courts." This body of New Hampshire law (being the common law of England, such parts excepted as are not consistent with the Constitution, or not applicable to the institutions and circumstances of the country) is to "remain and be in full force until altered and repealed by the Legislature." *State v. Rollins*, 8 N. H. 550, 563, 564; *Lord v. State*, 16 N. H. 325, 330, 41 Am. Dec. 729. In 1836, when the defendant in *State v. Buckman*, 8 N. H. 203, 29 Am. Dec. 646, was found guilty of the common-law offense of maliciously tainting and corrupting a well of water by putting the carcass of an animal in it, the state was not required to show an actual or usual practice in the New Hampshire courts in this branch of criminal law before 1784. The defendant's motion in arrest of judgment would not have prevailed if the state had admitted that this was the first American case in which the rights of person and property had been violated in the manner set forth in the indictment. These rights were brought to this state by the first settlers, and were founded on legal principles, and not on the mere evidence of law furnished by precedents and decisions. These principles would have remained in force if article 90 had not been adopted. A written order was as unnecessary for the continuance of the unwritten law in 1784 as for its introduction in 1623. "The common law of England consisted of those maxims of freedom, order, enterprise and thrift which had prevailed . . . from time immemorial. It was the outgrowth of the habits of thought and actions of the people, and was modified gradually and insensibly, from time to time, as those habits became modified. . . . Springing from the very nature of the people themselves, and developed in their own experience, it was obviously the body of laws best adapted to their needs, and, as they took with them their nature, so also they would take with them these laws whenever they should transfer their domicile from one country to another. . . . From the first, the colonists in America claimed the benefit and protection of the common law. In some particulars, however, the common law as then existing in England was not suited to their condition and circumstances in the new country and those particulars they omitted, as it was put in practice by them." Cooley, Const. Lim. 82, 84. "The first colonists of New England were fishermen and farmers, their leaders were clergymen, and though they brought with them a general idea of English law and English liberty, the registers of writs were sealed books to them, as much as they are to us at this day. Instead of attempting to follow the forms of the register, they devised processes of their own. The recital of some of them will show that no reverence for any ancient forms existed among the courts here.

We regard the ignorance of the first colonists of the technicalities of the common law as one of the most fortunate things in the history of the law; since, while the substance of the common law was preserved, we happily lost a great mass of antiquated and useless rubbish, and gained in its stead a course of practice of admirable simplicity, and one which

seems to us far better than the most improved codes of practice which have been recently introduced elsewhere." *Boston U. & M. R. Co. v. State*, 32 N. H. 215, 230, 231. With substantive rights the first settlers brought over the incidental rights of adequate remedy and convenient procedure. Cases cited in *Boody v. Watson*, 64 N. H. 178, 179. If the jurisdiction of a court of equity were an arbitrary power of violating legal rights, or doing justice in cases in which there is no law and no right, it might be said that equity was not a part of the common law brought over by the colonists, and that it did not exist here before a provincial court of chancery was established. But the work of such a court being the administration of law and the maintenance of rights chiefly in cases in which the power of other courts was formerly supposed to be defective in respect to adequacy of remedy and procedure (3 Bl. Com. 429-442), the theory that equity was not a branch of the provincial law cannot be accepted without overturning the fundamental principle that adequate remedies are incidents of substantive rights, and holding that, from the necessity of sufficient means of protection, the law implies a remedial system that is insufficient. Adequate remedy includes not only real actions, writs of possession, replevin, and judgments for damages, but also the specific performance of some contracts, and specific relief by injunction, receivership, partition, and other forms of equitable decree for trusts, fraud, accident, mistake, confusion of boundaries, partnership, nuisance and other cases of equity jurisdiction.

For some purposes legal rights may be conveniently divided into classes; but every classification does not indicate that they came into existence at different times. The incidental right to an adequate remedy for the infringement of a right derived from the unwritten law is coeval with the right of which it is an incident. The law of right and remedy that was administered in *State v. Buckman* came with the first emigrants who landed at Portsmouth, and not with the first provincial tribunal authorized to enforce it, or the first provincial magistrate authorized to issue a warrant. Before a court was established here to administer any branch of the law, the first English inhabitants were entitled to the protection afforded by the punishment of common-law offenses, the reformation of erroneous deeds, and other adequate civil remedies, compensatory and specific. The establishment of the first provincial courts that had jurisdiction of criminal and equity cases was a recognition of existing rights, substantive and remedial. *Rich v. Flanders*, 39 N. H. 304, 328. If all rights were now left for one year or ten years without a judicial jurisdiction in which they could be maintained, their legal existence during the interval would not be disproved. The obstruction of navigation by a boom across the Piscataqua would have been a nuisance abatable by an injunction from the provincial court of chancery, without the process of indictment and jury trial, which would be inadequate by reason of its dilatory character. The right to an immediate remedy as adequate as an injunction, is an incident of the right of navigation which was not created by the es-

establishment of a court. If there had been no court of chancery here during the provincial period, it would nevertheless be true that adequate remedies are incidents of legal rights, that the specific forms of equitable relief, so far as justice requires them, are required by a settled rule of the ancient unwritten law as interpreted and administered in this state and that by this law the defendant in *State v. Buckman* had a right of jury trial which he would not have had in a suit in equity. The Bill of Rights was not the beginning of law for the state. The general phraseology of article 20 and article 90 assumed the existence of a well-understood system, which was to remain in force. The jury trial given in "the court maritime" by the Act of July 8, 1776, was a peculiarity which the last clause of article 20 authorized the Legislature to abolish. Such a clause, apparently inserted out of abundant caution, does not establish the construction that article 20 excludes common-law procedure by perpetuating every temporary and local method which the Legislature were not specially authorized to alter. The right of jury trial was not introduced or enlarged in 1784. "The constitutional provisions do not extend the right; they only secure it in the cases in which it was a matter of right before." Cooley, Const. Lim. 75, 504. In this elementary doctrine the authorities concur. The provision of the Federal Constitution that in the Federal jurisdiction "the trial of all crimes, except in cases of impeachment, shall be by jury," "is to be interpreted in the light of the principles which at common law determined whether the accused, in a given class of cases, was entitled to be tried by a jury." *Callan v. Wilson*, 127 U. S. 540, 549, 32 L. ed. 223, 226. For the purpose of the present inquiry, jury trial in all cases except those "in which it has been heretofore otherwise used and practiced" is jury trial "in all cases in which it has been heretofore used." Whichever expression is used, the meaning is that the unwritten jury law, brought to this country by the first settlers, is in force so far as it has not been altered by usage or legislation before 1764. *Mt. Washington Road Co's Petition*, 35 N. H. 184, 142-145; *Patrick v. Cowles*, 45 N. H. 553, 555; *Cocheco Mfg. Co. v. Strafford*, 51 N. H. 455, 457-459. So far as the rights of the parties in this case are concerned, the difference between article 90 and the reservation of jury trial in the Bill of Rights is immaterial. The jury law, continued in force by article 90, as a part of the existing body of laws, subject to the legislative power of alteration and repeal, is withheld from that power by the Bill of Rights. As the substance of the jury trial right of 1784 would exist to-day if no Constitution had been adopted and no statute had been enacted, and as it is not claimed that the Legislature have attempted to impair it, the question is whether, by the unwritten law, there would have been a right of jury trial in this case in May, 1784, before the Constitution took effect, if the case had then been pending in a court of equity. The essentials of jury trial, "and the cases in which it had been otherwise used and practiced, are shown by common-law principles and by history." *Wooster v. Plymouth*, 62 N. H. 193, 203. Conflicting precedents of differ-

ent times and places are examined for common-law rules presumed to be founded on reason. A jury trial is a proceeding in which the jury are the judges of the facts, and the courts are the judges of the law. This was the true rule of the common law, and this is the rule adopted by the Constitution, instead of the one practiced on here before and after 1784. *Pierce v. State*, 18 N. H. 536; *State v. Hodge*, 50 N. H. 510, 522, 523. The usage in which the historical right of jury trial is to be found is not merely that of an American province and state but also that of the race among whom this trial was an old institution when they brought it to the new world. "Suppose at some period after the adoption of the Constitution, and before the Act of 1832 conferring general equity powers upon the supreme court, the Legislature had given to the court a single isolated branch of equity jurisdiction and power,—as, for example, that of decreeing the specific performance of contracts, without creating it a court of chancery by name, and without providing that any of the forms of chancery proceedings should be observed,— . . . what difference could it make whether the equity power to enforce the specific performance of a contract had ever been exercised by any tribunal, either in the province or the state, before or not? If it was a power never used or practiced in the province before the Constitution in any form, then to determine the true application of the terms 'heretofore used and practiced,' as used in the Bill of Rights, we must go to the common law with respect to the new right and power thus conferred; and doing that, we find it not to be a case in which it had been used and practiced anywhere before the Constitution to have a trial by jury as matter of legal right." Ladd, J., in *Perkins v. Scott*, 57 N. H. 55, 81, 82. "The modes of seeking and granting relief in equity are different from those of courts of common law. The latter proceed to the trial of contested facts by means of a jury. . . . Courts of equity try causes without a jury." Story, Eq. Jur. § 81. In the construction of statutes and constitutions there is a natural presumption that, if a discontinuance or change of the universal and immemorial usage had been intended, the intention would have been shown by express words or necessary implication. *Basey v. Gallagher*, 87 U. S. 20 Wall. 670, 22 L. ed. 452, was an appeal from the supreme court of the territory of Montana. The organic Act of the territory recognized the distinction between the jurisdictions of law and equity, and required proceedings in both to be in the same court. It was provided by statute that there should be but one form of civil action; and that issues of fact should be tried by jury, unless a jury was waived, or a reference ordered in a certain way. A bill for an injunction was brought in a territorial district court. Questions were submitted to a jury who returned a verdict on which both parties moved for judgment. On these motions the court heard the whole case on the pleadings, evidence, and verdict, and rendered a decree which was affirmed by the supreme court of the territory. In rendering the decree the district court disregarded a portion of the findings of the jury, and adopted others, and this action was ap-

proved by the supreme court of the territory, and was one of the errors assigned for reversal in the Federal court, where the decree was affirmed. "The consideration," says Field, *J.*, delivering the opinion in that case, (page 680,) "which the court will give to the questions raised by the pleadings, when the case is called for trial or hearing, whether it will submit them to a jury, or pass upon them without any such intervention, must depend upon the jurisdiction which is to be exercised. If the remedy sought be a legal one, a jury is essential, unless waived by the stipulation of the parties; but, if the remedy sought be equitable the court is not bound to call a jury, and, if it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment. The decree which it must render upon the law and the facts must proceed from its own judgment respecting them, and not from the judgment of others. Sometimes in the same action both legal and equitable relief may be sought; as, for example, where damages are claimed for a past diversion of water, and an injunction prayed against its diversion in the future. Upon the question of damages, a jury would be required, but upon the propriety of an injunction the action of the court alone could be invoked. The formal distinctions in the pleadings and modes of procedure are abolished, but the essential distinction between law and equity is not changed. The relief which the law affords must still be administered through the intervention of a jury, unless a jury be waived; the relief which equity affords must still be applied by the court itself; and all information presented to guide its action, whether obtained through masters' reports or findings of a jury, is merely advisory. Ordinarily, where there has been an examination before a jury of a disputed fact, and a special finding made, the court will follow it; but whether it does so or not must depend upon the question whether it is satisfied with the verdict. This discretion to disregard the findings of the jury may undoubtedly be qualified by statute, but we do not find anything in the statute of Montana regulating proceedings in civil cases which affects this discretion. That statute is substantially a copy of the Statute of California as it existed in 1851, and it was frequently held by the supreme court of that state that the provision in that Act requiring issues of fact to be tried by a jury, unless a jury was waived by the parties, did not require the court below to regard as conclusive the findings of a jury in an equity case."

"It is often the primary . . . object of a suit in equity, brought by devisees and others, . . . to establish the validity of a will of real estate, and thereupon to obtain a perpetual injunction against the heir-at-law and others, to restrain them from contesting its validity in future. . . . In every case of this sort courts of equity will, unless the heir waives it, direct an issue of *deviseavit vel non* . . . to ascertain the validity of the will; but it will not feel itself bound by a single verdict either way, if it is not entirely satisfactory, but it will direct new trials until there is no longer any reasonable ground for doubt." Story, *Eq. Jur.* § 1447. "There is no doubt upon the right of 18 L. R. A.

this court to grant a new trial after a trial at bar. . . . It is admitted to be the practice of this court, where the issue is directed to inform the conscience of the chancellor, upon this principle, that it was the habit of this court to try upon the report of the circumstances, viz. the trial and all the objections, whether due attention had been given to all the considerations stated; whether, according to the common expression, the conscience of the court was satisfied or not." *St. Paul's Wardens v. Morris*, 9 Ves. Jr. 155, 165, 166. In that case Lord Eldon was of opinion (page 168) that, as the record stood at the original hearing, "the court had a right to refuse, but, if asked, ought to have directed an issue." *O'Connor v. Cook*, 6 Ves. Jr. 665, 671, was a bill for an account of tithes. The defense was immemorial payment of £20 a year in commutation. Upon the evidence the defendant contended that an issue should be sent to a jury. Lord Eldon said (in 1602): "There is no doubt that, according to the constitution of this court, it may take to itself the decision of every fact put in issue upon the record. . . . It is pretty clear that courts of equity in ancient times were more in the habit of taking to themselves the decision of questions of fact than they have thought wise and discreet in later times. As to immemorial payment, if any reasonable doubt has been raised upon it in the evidence, it has been of late thought wise and discreet to send the question of fact to a jury. All the judges have demonstrated their opinion in favor of that practice where any reasonable doubt is raised upon the fact." An issue was directed, and after verdict on a motion for a new trial, Lord Eldon said that, when courts of equity act upon the opinion of a jury, "their own judgment ought to concur with the verdict, to this extent at least, that they are not dissatisfied with the verdict." *O'Connor v. Cook*, 8 Ves. Jr. 585, 536.

No jury could be summoned to attend the English court of chancery, (3 Bl. Com. 452,) and there was no appeal from its decrees to a jury court. If trial by jury in equity had been a common-law right, the means of enjoying it in that jurisdiction, or on appeal, would have been provided by law. The chancellor "is equally competent to decide on disputed facts as on disputed law, and it is a matter of discretion only when he either orders or permits the parties to submit the trial of such facts to the cognizance of a jury." 3 Bl. Com. 48, Coleridge's note. When the chancellor's examination of written evidence left him in such doubt that he desired the advice of a jury, he could send an issue to a court that had power to summon a jury. If he made a decree in accordance with the jury's opinion, it was not because the verdict was a binding decision, but because he was satisfied or not dissatisfied with it. The privilege of a hearing before a jury, whose advisory verdict, obtainable only by an exercise of the chancellor's discretion, depended for its effect upon its being satisfactory or not unsatisfactory to him, was not the common-law right reserved by the Constitution. The reservation had no reference to a discretionary power exercised in *Atty-Gen. v. Cleaver*, 18 Ves. Jr. 211, and other cases (Story, *Eq. Jur.* § 923) decided before and since 1794. In

the cases in which the right was reserved it was not connected with or affected by the reasonable doubts that had induced chancellors to seek the assistance of a jury, or the great or little deference that had been paid to advisory verdicts. In cases of reasonable necessity, organized society, as well as each individual, may defend personal and proprietary interests without judicial process based on the verdict of a jury. Cooley, Const. Lim. pp. 434, 720, 739; Tiedeman, Pol. Powers, chap. 5; Cooley, Torts, 45-59; *Haley v. Colcord*, 59 N. H. 7, 8, 47 Am. Rep. 176; *Weeks v. Sky*, 61 N. H. 89; *State v. Ray*, 63 N. H. 403, 412, 56 Am. Rep. 529; *Hodgden v. Hubbard*, 18 Vt. 504, 46 Am. Dec. 167; *Stone v. Lahey*, 183 Mass. 426; *Com. v. Donahue*, 148 Mass. 529, 2 L. R. A. 623. "By the common law, every private person may lawfully endeavor, of his own authority, and without any warrant or sanction of the magistrate, to suppress a riot by every means in his power." *Rea v. Pinner*, 5 Car. & P. 260, note; *Phillips v. Eyre*, L. R. 6 Q. B. 15. For the better preventing the spreading of the plague, smallpox, pestilential or malignant fever, or other contagious sickness, the infection whereof may be probably communicated to others, the Act of 1714 (Laws 1771, p. 46) empowered selectmen to take care, and make effectual provision in the best manner they could for the preservation of the inhabitants, by removing infected persons to separate houses, and providing nurses and other assistance and necessities. If need so required, any justice of the peace was authorized to make out a warrant to the sheriff, his undersheriff or deputy, or constable or constables, requiring them, with advice and direction of the selectmen, to impress and take up convenient housing, lodging, nurses, tendance, and other necessities for the accommodation, safety, and relief of the sick. It was also provided that if any person coming to the province by sea happened to be visited with the plague, smallpox, pestilential or malignant fever during the voyage, or to come from any place where such sickness prevailed, a justice of the peace should forthwith take care to prevent all persons from coming on shore from the ship; if any be on shore, to send them on board again; to restrain persons from going on board; and to that end to make out a warrant directed to the proper officers, who were empowered and required to execute the same. Similar action is authorized by more recent legislation. Acts 1789, 1792, 1799, 1803, 1807, (Laws 1830, pp. 178, 180, 260-269;) Rev. Stat. chaps. 119-121; Gen. Laws, chaps. 111-113. In some cases health officers may abate nuisances without notice. Gen. Laws, chap. 111, § 5. A vessel attempting to pass into Portsmouth in violation of quarantine regulations made by the health officers may be stopped by the commander of any fort near the harbor. If such vessel attempts to pass after being hailed and forbidden, and after warning given by a shot fired ahead and a shot fired astern, then such vessel shall be fired upon and into until she shall bring to, and submit to the regulations. Act of 1807, in Laws 1830, p. 269; Gen. Laws, chap. 113, § 18. For the introduction of pestilence, a compensation suit, reinforced by indictment, jury trial, fine and imprisonment 18 L. R. A.

is not an adequate remedy. In the interior as well as on the seacoast, the protection of health and life may require measures more expeditious and effective than compensation and punishment. In many cases where public or private rights are infringed in a manner not involving life or health, immediate relief of a specific and preventive character, such as is furnished in the equity jurisdiction may be indispensable. The total obstruction of a main street of Manchester or Concord, by the erection of a building, would be a nuisance for the abatement of which it would not be necessary to wait for a session of court. The issue of an equitable process for the immediate clearance of the street would not be barred by the circumstance that the wrongdoer might suffer as much from a temporary order as from a final decree. It has never been understood that the bill of rights abolished the necessary powers of summary protection exercised by all governments, and rendered it impossible to deprive an infected person of his liberty in quarantine, destroy property and life by forcibly stopping an infected ship, or maintain public or private rights in any case of emergency and irreparable mischief, without a previous trial by jury. The limitation of legislative power by the constitutional reservation of private rights does not destroy the efficiency of government in all cases in which public or private rights require immediate and vigorous action. "In regard to public nuisances, the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. . . . In cases of public nuisances, . . . an indictment lies to abate them, and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction." Story, Eq. Jur. §§ 921, 923. "In modern times, courts of law frequently interfere and grant a remedy under circumstances in which it would certainly have been denied in earlier periods. And sometimes the Legislature by express enactments, has conferred on courts of law the same remedial faculty which belongs to courts of equity. . . . In neither case, if the courts of equity originally obtained and exercised jurisdiction is that jurisdiction overturned or impaired by this change of the authority at law in regard to legislative enactments; for unless there are prohibitory or restrictive words used, the uniform interpretation is that they confer concurrent and not exclusive remedial authority." Story, Eq. Jur. §§ 644, 80. The wrongful fowage of a meadow by a millpond is a nuisance for which the injured party is entitled to damages for the past, recoverable in an action of trespass on the case, and an injunction for the future, recoverable on a bill in equity. Neither of his civil remedies would be taken away by a statute making the wrong a criminal offense, punishable, on indictment, by fine and imprisonment. His right to specific relief on a bill in equity would not be affected by a further statutory provision authorizing the same relief in a criminal prosecution of the offender. *Wells v. Pierce*, 27 N. H. 503, 512, 513; *Alden v. Gibbon*, 63 N. H. 12.

The abatement of a fowage nuisance by an injunction issued in an equity suit is a civil

remedy, and not a punishment of a criminal offense. The legal character of the abatement does not depend upon the ownership of the property. If the land belongs to the state, the abatement of the nuisance is a relief of the plaintiff from future wrong, and not a penalty inflicted upon the defendant for the past. Neither does the legal character of the abating process depend upon the form of the action in which the injured party obtains redress. A prosecution under the Bastardy Act is a civil suit, although the procedure is mostly criminal. The object of the statute is to compel the defendant to indemnify the public and the mother of the child against expenses. *Castles v. Welch*, 68 N. H. 869; *Littleton v. Perry*, 50 N. H. 29-32; *Ford v. Smith*, 62 N. H. 419. Other statutes deal with him as a criminal. Gen. Laws, chap. 274, §§ 1, 2, 4. He is not punished twice for one offense. In some cases of homicide an indictment has been used as a civil action for the recovery of compensation. Gen. Laws, chap. 282, § 14; *State v. Manchester & L. R. Co.* 52 N. H. 528, 548, 549.

On an indictment for larceny, when the defendant is convicted, the owner of the stolen property is entitled to judgment and execution in common form against the convict for the value thereof, deducting the value of such part thereof as has been returned, with reasonable damages; and the defendant, if committed on the execution, has the same relief as if it had issued in an action of trespass. Gen. Laws, chap. 278, § 14. In such a case, the form of action is criminal, and the cause of action and the remedy are both criminal and civil; as they are when a judgment against the defendant on an indictment for nuisance is enforced by a *mittimus* punishing him for a wrong done before the indictment was found, and an abating process for the future specific and equitable relief of the injured party. *Reg. v. Stephens*, L. R. 1 Q. B. 702, 708, 709; 1 Bishop, Crim. Law, § 1074. The public character of the injured party is not a constitutional ground on which the civil remedy can be refused.

In *State v. Crawford*, 28 Kan. 726, 42 Am. Rep. 182 (an action to abate a liquor saloon, declared by statute to be a common nuisance), the court says (pages 735, 736): "While it is unquestionably true that the keeping of the saloon in question is a criminal offense, and its operation involves the commission of many criminal offenses, yet we cannot think that these facts can possibly take away any of the jurisdiction which courts of equity might otherwise exercise. It would seem to us that all sound reason and the great weight of authority is against the objection. . . . At common law all public nuisances were public offenses; and if the proposition is sound that no nuisances can be enjoined except such as are not public offenses, then, where the common law has full force, no public nuisance could ever be enjoined." *Littleton v. Fritz*, 65 Iowa, 488, 54 Am. Rep. 19, was an action upon a statute which provided that "any citizen of the county where such [liquor] nuisance exists, or is kept or maintained, may maintain an action in equity to abate and perpetually enjoin the same." The constitutional reservation of the right of jury trial "secures the right" says the court (pages 491, 491, 495, 65 Iowa), 18 L. R. A.

"In all cases in the trial of which a jury was necessary, according to the principles of the common law. . . . The jurisdiction of courts of equity to enjoin and abate nuisances is of very ancient origin. . . . Such a case being of equitable cognizance, neither party could, at the time of the adoption of the Constitution, demand a jury trial as matter of right. . . . One maintaining a nuisance may not only be punished in a criminal proceeding, but a civil action at law to recover damages in a proper case, and an action in equity to restrain the nuisance, may be prosecuted against him. . . . The defendant, in order to succeed in the defense that the proceeding by injunction is an attempt to enforce a criminal law by civil process, demands, in effect, that the courts must establish the principle that, because the nuisance complained of is a crime, it is entitled to favor and protection in a court of equity. . . . There are many adjudged cases . . . which expressly hold that the fact that a nuisance is a crime, and punishable as such, does not deprive equity of its jurisdiction to restrain and abate it by injunction." *Curleton v. Rugg*, 149 Mass. 550, 5 L. R. A. 193, was a petition upon the Massachusetts Liquor Nuisance Act of 1887, of which our law is a substantial copy. It was held that the Act was constitutional; that the suit was not a proceeding to punish an offender for the crime of maintaining a nuisance; that the fact that keeping a nuisance is a crime does not deprive a court of equity of the power to abate the nuisance; and that the objection that the statute makes no provision for a trial by jury applied as well to nearly all legislation giving jurisdiction in equity. Three judges dissented, on the ground that statutes against the sale of intoxicating liquor had never been enforced by injunction in equity when the Constitution was adopted. The Legislature intended by the Act of 1887 to provide a mode of punishing criminal violations of the liquor law without jury trial, and this purpose was inconsistent with the defendant's protection "by the judgment of his peers or the law of the land." *State v. Noyes*, 80 N. H. 279, was an indictment upon chapter 245, Laws 1845, which provided that a bowling alley within twenty-five rods of a dwelling-house, store, shop, schoolhouse, or place of public worship, should be taken and deemed to be a public nuisance. The defendant objected to judgment on the ground that the Act was unconstitutional; that it did not authorize fine or imprisonment, but only an abatement of the nuisance; and that, as the indictment contained no allegation that the nuisance continued to exist at the time the indictment was found, no judgment of abatement could be rendered. It was held that the Act was constitutional that for the statutory nuisance the defendant was punishable by fine and imprisonment at common law; that a judgment that the nuisance be abated could only be rendered where it was alleged and proved that the nuisance continued to the finding of the indictment; but that the omission of a sufficient allegation on that point did not impair the residue of the indictment. "It is not to be conceded," says Bell, J., delivering the opinion of the court (pages 294, 295), "that places of gambling are not 'nuisances,' in the proper and legitimate sense of

the word. They are certainly nuisances of the worst kind, in the sense in which disorderly houses are so called; and, at common law, keeping a gaming house is a nuisance. . . . It may be said that a bowling alley is not of itself a nuisance, since it may either remain unused, or it may be used only as a place of innocent amusement; that its injurious character depends upon the improper use alone. But the Legislature may well determine that an instrument which tends to facilitate vicious practices is of itself an evil which ought to be prohibited."

Under the Act of 1887, it is the use made of a liquor saloon that makes the building a nuisance, and the nuisance is abated by an injunction against the use. *State v. Marston*, 64 N. H. 603, 604. If an Act were passed authorizing an injunction against the crime of larceny, or against the violation of criminal law in general, it might be argued that punishment was the object of the Act. It would hardly be contended that, for all purposes, every wrong can be made a common nuisance by legislation. "The Legislature cannot do indirectly what it cannot do directly; it cannot change the nature of things by affixing to them new names." Field, J., in *Carleton v. Rugg*, *supra*. But it has not been shown that, for the suppression of nuisances, the power of the Legislature to provide a civil remedy by injunction in equity is limited to such kinds of nuisance as had been invented when the Constitution was adopted, or those that had then been attacked in that way. "It is competent for the Legislature to declare the possession of certain articles of property, either absolutely, or when held in particular places, and under particular circumstances, to be unlawful, because they would be injurious, dangerous, or noxious; and by due process of law, by proceedings *in rem*, to provide both for the abatement of the nuisance and the punishment of the offender. . . .

Putrifying merchandise may be stored in a warehouse, where if it remain it would spread contagious disease and death through a community. Gunpowder, an article quite harmless in a magazine, may be kept in a warehouse always exposed to fire, especially in the night. However secreted, a fire in the building would be sure to find it, and the lives and limbs of

. . . firemen and citizens, engaged in subduing the flames, would be endangered."

Fisher v. McGirr, 1 Gray, 1, 27, 61 Am. Dec. 881. "The repeated, continuous, and persistent violations of the statutes are what makes them [drinking saloons] nuisances, independent of the express terms of the statute declaring them to be such. . . . Every place where a public statute is openly, publicly, repeatedly, continuously, persistently, and intentionally violated is a public nuisance." *State v. Crawford*, 28 Kan. 726, 733. Keeping a gaming house is a nuisance at common law *Ree v. Dixon*, 10 Mod. 325; *Ree v. Rogier*, 1 Barn. & C. 272; *Lord v. State*, 16 N. H. 325, 41 Am. Dec. 729, although gambling was not of itself unlawful at common law, (2 Bishop, Crim. Law, [2d ed.] §§ 606, 532; *Reg. v. Ashton*, 1 El. & Bl. 286); or a house of ill fame, bawdy or assignation house (Bacon, Abr. title *Nuisance* A; *Reg. v. Orrnage*, 1 Salk. 384; *Com. v. Howe*, 13 Gray, 26; *McAlister v. Clark*, 33

Conn. 91; *People v. Rowland*, 1 Wheeler, Crim. Cas. 286; *State v. Bailey*, 21 N. H. 348; *State v. McGregor*, 41 N. H. 407; *State v. Foley*, 45 N. H. 466), although fornication and adultery were offenses only cognizable at common law in the ecclesiastical courts. The doctrine of *Com. v. McDonough*, 13 Allen, 581, 584, that keeping a house for the illegal sale of intoxicating liquor is not a nuisance at common law, may be open to question. In *Smith v. Com.*, 6 B. Mon. 21, it was held that keeping a house for such a purpose is a public nuisance. The court says: "The habitual perpetration of the prohibited offenses in a house kept for the purpose constitutes the house a public nuisance, as it tends in a greater degree to the spread of the evil which was intended to be prohibited by these enactments. There is a specific penalty for fornication and adultery, yet it is an offense and a much higher grade of offense to keep a bawdy house or a house where those practices are indulged; and though the single offense [selling liquor] may be punished by a specific fine, the keeping of a house where those offenses are habitually encouraged and indulged is an offense of a much higher grade, and is punishable as such by an indictment at common law." Bishop says that this doctrine, "though apparently new in the law, is truly as old as the law itself. A man who holds out inducements for people to congregate, and together commit violations of a statute, not only lends the concurrence of his will to their wrongful acts, but also does what most powerfully tends to disrobe the body politic of her virtue, and of the drapery of that order which the hand of government has thrown around her; or, if he thus draws people together that in their presence he may himself infringe a law of his country, he accomplishes likewise the same evil end." 2 Bishop, Crim. Law, §§ 253, 259.

Among the cases to which the Constitution refers for information concerning use and practice are general classes in which such general principles as the common law of nuisance had been established before 1784. This law is applicable to a great variety of wrongs, old and new, that have the essential qualities of a nuisance, and are appropriately dealt with as cases of the class to which they naturally belong. *Crowder v. Tinkler*, 19 Ves. 617, 623; 3 Bl. Com. 5, 216; 4 Bl. Com. 166; High, Inj. §§ 772-784; Wood, Nuisances, chaps. 1, 5, 7, 13-19, 21, 24, 25; Story, Eq. Jur. §§ 920-929. If dynamite, carelessly deposited by its owner on his own land in a farming town, should endanger the property and life of but one neighbor, the civil and private remedy of an injunction would not be withheld on the ground that such relief had never been given in such a case when the Constitution was adopted. If the nuisance were public, the explosive being stored in the most populous part of Manchester, an injunction could not be refused on account of the greater amount of property and life exposed to danger. Whether the wrong was or was not a criminal offense in 1784 or 1889, the public would be entitled to the civil remedy provided by equity law. If the sale of intoxicating liquor had never been, and were not now, a criminal act, and the statute had not alluded to the subject of nuisance, but

had merely provided that the use of a building for the common sale of intoxicating liquor should be stopped by injunction on a bill in equity, there would be no ground for holding that the statute was enacted for the fraudulent purpose of inflicting criminal punishment in a civil suit. And an illegal purpose cannot be judicially found in the Act of 1887. It could have been passed in its present form for the legal purpose of providing a civil remedy, and it would accomplish that object in the same manner, and by the same civil process, whether it was made for that purpose, or with a design to enforce criminal law. The primary object was the suppression of a business that could be directly and constitutionally attacked by civil process in civil suits. There was no occasion to abandon the direct mode of accomplishing that object, or to propose the indirect use of civil process in the suppression of the business by the enforcement of penal statutes. So far as such a design would be circuitous, it would be superfluous. Assuming that it would be fraudulent and illegal, and would invalidate the Act, the only motive the Legislature could have for entertaining it would be a desire to defeat the law they were attempting to make. There is nothing in the Act that can overcome the presumption of constitutional intent. *Dow v. Norris*, 4 N. H. 16, 18, 57 Am. Dec. 400; *Bell v. Glazier*, 18 N. H. 184, 188; *Kennett's Petition*, 24 N. H. 139, 141; *Colony v. Dublin*, 82 N. H. 432, 434; *Opinion of the Justices*, 41 N. H. 555, 556; *Cooley*, Const. Lim. 218-221, 267. If this presumption could be set aside, there is no evidence or argument on which it could be found that the Legislature preferred an illegal purpose to a legal one, in order to nullify their own work and shield a business which they regarded as a nuisance from the process they leveled against it. "The judgment of his peers or the law of the land," in article 15 of the Bill of Rights, is synonymous with "the verdict of a jury or due process of law." *Mayo v. Wilson*, 1 N. H. 53, 55; *Cooley*, Const. Lim. 430. By the common law, judgment may be given *per legem terræ*, without the intervention of a jury in "all cases in the courts of equity. . . . Any legal process which was originally founded in necessity, has been consecrated by time, and approved and acquiesced in by universal consent, must be considered an exception to the right of trial by jury, and is embraced in the alternative, 'the law of the land.'" *State v. Allen*, 2 McCord, L. 55, 59, 60. "Due process of law undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights." *Westerholt v. Gregg*, 12 N. Y. 202, 209, 62 Am. Dec. 160. "It refers to certain fundamental rights, which that system of jurisprudence, of which ours is a derivative, has always recognized." *Brown v. Levee Comrs.* 50 Miss. 468, 479. "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." *Cooley*, Const. Lim. 434. "It refers to that law of the land . . . which de-

rives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . . Any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." *Hurtado v. People*, 110 U. S. 516, 535, 537, 28 L. ed. 232, 238, 239. It was held in that case that due process of law does not require an indictment by a grand jury in a prosecution by a state for murder. "A state cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials of the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings." *Walker v. Sauvinet*, 92 U. S. 90, 92, 93, 23 L. ed. 678, 679; *Kennard v. Louisiana*, 92 U. S. 480, 23 L. ed. 478; *McMillan v. Anderson*, 95 U. S. 37, 41, 42, 24 L. ed. 335, 336; *Davidson v. New Orleans*, 96 U. S. 97, 104, 105, 24 L. ed. 616, 619, 620; *Missouri v. Lewis*, 101 U. S. 22, 31, 25 L. ed. 989, 992. "It is a mistaken idea that due process of law requires a plenary suit and a trial by jury in all cases where property or personal rights are involved. . . . That kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts." *Ex parte Wall*, 107 U. S. 265, 289, 290, 27 L. ed. 552, 562. *Kansas v. Ziebold*, 123 U. S. 623, 637, 638, 654, 31 L. ed. 205, 208, was a petition filed in a state court under section 13 of the Kansas Act of 1885, which provided that "the attorney-general, county attorney, or any citizen of the county where such [liquor] nuisance exists, . . . may maintain an action in the name of the state to abate and perpetually enjoin the same." The suit was removed into the circuit court of the United States, and was there dismissed. On appeal taken by the state, it was held (pages 672, 673, 123 U. S.) that proceedings in equity for the purposes indicated in the thirteenth section of the statute are consistent with due process of law; and "as to the objection that the statute makes no provisions for a jury trial in cases like this one," the decision was that "such a mode of trial is not required in suits in equity brought to abate a public nuisance." The decree dismissing the bill was reversed, and the cause was remanded, with directions to enter a decree granting to the state such relief as the statute authorized. A perpetual injunction, issued on a bill in equity for abatement without the verdict of a jury, was due process of law, because at common law such process, in such a case, did not require a jury trial. *Eilenbecker v. Plymouth County Dist. Ct.*, 134 U. S. 31, 33 L. ed. 801. was a complaint filed in a district court of Iowa, for violation of an injunction issued in an equity suit on the liquor law. Notice being given, the complaint was tried upon affidavits by the court without a jury. The defendant was found guilty, and an alternative judgment

imposing a fine of \$500, or imprisonment for three months, was affirmed by the supreme court of the state, whose judgment was affirmed by the Supreme Court of the United States. The grounds of the defendant's objections were the criminal nature of the entire proceeding under the statute, excessive fine, cruel and unusual punishment, and trial by the court on affidavits, without a jury, without an indictment, without due process of law, and without the equal protection of the laws. It was held that the district court had power to issue the injunction, and that the proceeding on the complaint for violation of the injunction "is due process of law, and always has been due process of law." In the opinion the court says, 134 U. S. 40, 33 L. ed. 805: "If the objection to the statute is that it authorizes a proceeding in the nature of a suit in equity to suppress the manufacture and sale of intoxicating liquors which are by law prohibited, and to abate the nuisance which the statute declares such acts to be, wherever carried on, we respond that, so far as at present advised, it appears to us that all the powers of a court, whether at common law or in chancery, may be called into operation by a legislative body for the purpose of suppressing this objectionable traffic; and we know of no hindrance in the Constitution of the United States to the form of proceedings, or to the court in which this remedy shall be had. Certainly it seems to us to be quite as wise to use the processes of the law and the powers of the court to prevent the evil as to punish the offense as a crime after it has been committed." See *Kidd v. Pearson*, 128 U. S. 1, 16, 32 L. ed. 846, 848, and *Leisy v. Hardin*, 135 U. S. 100, 122, 123, 34 L. ed. 128, 137. In this jurisdiction, a complaint for the violation of an injunction or other decree is not ordinarily tried on affidavits if either party objects to such evidence, nor is it tried by jury; but in our present practice there is a jury trial in many cases in which it is not a constitutional right. *Tasker v. Lord*, 64 N. H. 279, 283. It is sometimes necessary to consider by what method of investigation, and by what tribunal, the rights of the parties will probably be most accurately and completely ascertained and adjusted. Some questions cannot be so conveniently handled by twelve jurors as by a smaller number; some cannot be adequately and properly settled with the means to which jurors are by custom restricted. *Davis v. Dyer*, 63 N. H. 231, 235,

236. *Connecticut River Lumber Co. v. Olcott Falls Co.*, 65 N. H. 290, 391, is a bill in equity for an injunction against the maintenance of a dam across Connecticut river without a suitable sluiceway for the passage of logs. If the question whether the dam in its present form is a nuisance, by reason of the insufficiency of the sluice, were submitted to a jury, and they found the dam a nuisance, the verdict would not inform the defendants what alterations should be made. If a trial is necessary, the interests of both parties require that the decision should specifically determine what sluice would be sufficient. A defective sluice may be no cause for demolishing the whole dam, and the case ought not to be tried upon a misleading issue. "On the question of the proper form, dimensions, and place of a sluice, the jurisdiction of equity is as plain as in a partition of water power between millowners, the ascertainment of lost boundaries, or the laying out of a private way. At the trial term the court can cause the log way to be located and defined by a jury, and put upon them the duty of drawing a report containing a specification for the construction of the dam and sluice. But it has not been shown that the law of any country requires such work to be done by twelve unanimous persons." In the present case, if the alleged use of a building is proved, the nuisance is to be abated by injunction. There is no occasion for the trial of any other issue than the simple one of use, and there is no legal reason why that issue should not be tried by jury. It is as properly determinable in that way as the question of fraud in such cases as *Tasker v. Lord*. The Act of 1897, declaring the use of a building for either of several purposes to be a nuisance abatable in equity, does not introduce an exceptional mode of trial, or change the ordinary course of procedure on questions properly triable by jury. A nuisance cannot be abated, with or without legal process, if it has been discontinued, and has not been renewed when proceedings are begun against it. *State v. Noyes*, 80 N. H. 279, 298. A suit in equity is not commenced until the bill is filed. *Clark v. Slayton*, 63 N. H. 402. The statute does not authorize the maintenance of a suit and the rendition of judgment upon a cause of action that ceased to exist before the suit was brought. *Case discharged*.

Doe, Ch. J., did not sit; the others concurred.

KANSAS SUPREME COURT.

STATE of Kansas
v.

William C. PHIPPS *et al.*, App'ts.

(.....Kan.....)

1. The word "trade," as defined by this *Headnotes by SIMPSON, C.

NOTE.—An important case applying an "Anti-Trust Law" to a combination fixing rates of insurance in which corporations of other states are involved is above reported. The claim that insur-

court in the case of *Re Pinkney*, 47 Kan. 89, does not mean interstate commerce, nor was such a meaning within the contemplation of the court at the time the decision was rendered.

2. The business of insurance, as ordinarily conducted in this state by insurance companies organized under the legislation of other states is not interstate commerce.

3. Foreign insurance companies doing

ance by such companies constitutes interstate commerce is, in view of prior decisions, interesting chiefly by reason of its forcible and elaborate presentation by counsel. On the general subject

business in this state, that combine to control and increase the rates of insurance on property within a city in this state, violate the provision of chapter 257 of the Laws of 1889, being "An Act to Declare Unlawful Trusts and Combinations in Restraint of Trade and Products, and to Provide Penalties therefor;" and their local agents who attempt to, and do, enforce such combined rates, are subject to prosecution under the provisions of said Act.

4. The Legislature of this state has the power to prescribe the conditions upon which an insurance company organized under and by virtue of the laws of another state can do business within the limits of the state of Kansas.

(January 7, 1893.)

APPEAL by defendants from a judgment of the District Court for Labette County convicting them for violating chapter 257 of the Laws of 1889 prohibiting unlawful trusts and combinations in restraint of trade. *Affirmed.*

The facts are stated in the commissioner's opinion.

Mr. E. F. Ware, for appellants:

The Anti-Trust Law of Kansas was passed in 1889, chap. 257. Its title is: "An Act to Declare Unlawful Trusts and Combinations in Restraint of Trade and Products, and to Provide Penalties therefor."

The said law, when read parenthetically, as pertains to insurance, is as follows:

Section 1. "All arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed or which tend to control the cost or rate of insurance are hereby declared to be against public policy, unlawful, and void."

Section 8. "Any person who shall attempt to carry out or act under any such arrangement, contract, agreement, trust, or combination, either on his own account or as agent of any corporation, or in any capacity whatever, shall be guilty of a misdemeanor."

The Constitution of the state of Kansas provides, art. 2, § 16: "No bill shall contain more than one subject, which shall be clearly expressed in its title."

The Supreme Court of Kansas has decided (*Re Pinkney*, 47 Kan. 89), that the said Act of 1889 was constitutional in that the subject of the Act was clearly expressed in the title. Therefore insurance is trade.

That decision finally settled the status of insurance companies in Kansas.

The Federal Law of July, 1890, concerning

trusts, when read parenthetically as regards the case at bar, is as follows (26 U. S. Stat. at L. 209):

Section 1. "Every contract or conspiracy in restraint of trade among the several states is hereby declared to be illegal." Every person, on conviction thereof, shall be punished by a fine not exceeding \$5,000.

Section 2. "Every person who shall combine to monopolize any part of the trade among the several states shall be guilty of a misdemeanor."

Section 4. "The several circuit courts of the United States are hereby vested with jurisdiction."

The Federal law is exclusive of the state law; the state law is inoperative, and the defendants must be discharged.

Walling v. Michigan, 116 U. S. 456, 29 L. ed. 694.

Commerce is intercourse, and the term "interstate commerce" means intercourse between people of different states.

If insurance is trade, then insurance policies and insurance agents are instruments of trade, and the power to regulate commerce embraces all the instruments by which trade may be carried on.

"It extends to the persons who conduct it as well as to the instruments used."

Cooley v. Philadelphia, 53 U. S. 12 How. 299, 18 L. ed. 996.

Communication by telegraph is a part of commerce.

Western U. Teleg. Co. v. Atlantic & Pacific States Teleg. Co. 5 Nev. 102; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 3 Woods, C. C. 643; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Western U. Teleg. Co. v. Texas*, 105 U. S. 480, 26 L. ed. 1067; *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 847, 30 L. ed. 1187; *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229.

If the recital over the wire of an unfortunate and uninteresting piece of ancient personal history is interstate commerce, then the only definition of interstate commerce is "intercourse."

Commerce among the several states means, "intercourse between the citizens of different states."

"Power to regulate commerce" including navigation and commercial intercourse was one of the primary objects for which the United States Constitution was adopted.

2 Story, Const. 3d ed. 4.

Commerce includes the fact of intercourse,

of combinations to prevent competition and creating monopolies, see *notes to Lealie v. Lorillard* (N. Y.) 1 L. R. A. 456; *People v. North River Sugar Ref. Co.* (N. Y.) 2 L. R. A. 83; *Carroll v. Giles* (S. C.) 4 L. R. A. 154; *Richardson v. Buhl* (Mich.) 8 L. R. A. 457; *Herreshoff v. Boutineau* (R. I.) 8 L. R. A. 469; *Union Ben. Co. v. Union Hospital Co.* (Minn.) 11 L. R. A. 437; *Lovejoy v. Michels* (Mich.) 13 L. R. A. 770.

See also, on the same subject, *Texas Standard Cotton Oil Co. v. Adoue*, 15 L. R. A. 598, 83 Tex. 650; *Leonard v. Poole*, 4 L. R. A. 723, 114 N. Y. 371; *People v. North River Sugar Ref. Co.* 9 L. R. A. 83, 121 N. Y. 582; *State v. Standard Oil Co.* (Ohio) 15 L. R. A. 145; *More v. Bennett*, 15 L. R. A. 361, 140 Ill. 69.

For a decision under the Act of Congress similar 18 L. R. A.

to the Kansas Act above involved, making combinations or conspiracies in restraint of trade criminally punishable, see *United States v. Jellico Mountain Coke & Coal Co.* 12 L. R. A. 733, 46 Fed. Rep. 432.

Another case just decided by the circuit court of the United States for the District of Massachusetts decides that an indictment under that Act must allege that there was a conspiracy in restraint of trade by engrossing or monopolizing or grasping the market, and that it is not sufficient to allege a purpose to drive certain competitors out of the field by violence, annoyance, intimidation or otherwise. *United States v. Patterson* (C. C. D. Mass.) March, 1893.

and of traffic, and the subject-matter of intercourse and of traffic. The fact of intercourse and traffic again embraces all the means, instruments, and places by and in which intercourse and traffic are carried on, and further still, comprehends the act of carrying them on at these places and by and with these means.

Pom. Const. Law, § 878.

It also means intercourse and navigation.

Fuller v. Chicago & N. W. R. Co. 81 Iowa, 207; *People v. Raymond*, 84 Cal. 492.

Free intercourse and trade between the states and with foreign countries can be safely regulated only by that jurisdiction that looks to the general interests of the nation as a whole rather than the special advantages of a particular locality.

State v. Pratt, 59 Vt. 590.

Congress has power to legislate over intercourse as well as traffic.

King v. American Transp. Co. 1 Flipp. 6; *United States v. The James Morrison*, Newb. Adm. Rep. 244; *People v. Brooks*, 4 Denio, 469; *Re Wong Yung Quay*, 6 Sawy. 447; *Seeatt v. Boston, H. & E. R. Co.* 5 Cliff. 848; *United States v. Cisna*, 1 McLean, 280; *Western U. Tele. Co. v. Atlantic & Pacific States Tele. Co.* 5 Nev. 109; *Norfolk & W. R. Co. v. Com.* 13 L. R. A. 107, 88 Va. 95; *State v. Delaware, L. & W. R. Co.* 80 N. J. L. 478; *Corfield v. Corryell*, 4 Wash. C. C. 371; *Moor v. Veazie*, 81 Me. 360; *Pennacola Tele. Co. v. Western U. Tele. Co.* 96 U. S. 1, 24 L. ed. 708; *Worcester v. Georgia*, 81 U. S. 6 Pet. 561, 8 L. ed. 501; *State Tonnage Tax Cases*, 79 U. S. 12 Wall. 214, 20 L. ed. 373; *Hall v. De Cuir*, 95 U. S. 491, 24 L. ed. 549; *Trade Mark Cases*, 100 U. S. 86, 25 L. ed. 550; *Welton v. Missouri*, 91 U. S. 280, 23 L. ed. 849; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23.

There are now, as shown by the report of the commissioner of insurance, thousands of insurance agents in the state, regularly licensed to issue policies.

The business is done in the name of the foreign company, and not in the name of the agent.

When a policy is written, a report thereof is sent out of the state to the home office of the company, and the company accepts or rejects the risk.

The money that is received for the premium is promptly remitted to the foreign company, and the company pays the agent, for the agent is not doing business for himself or in his own name.

If a building is burned and the company so elect, it can build another building in place of the one burned down, thereby trading one building for another; or the company from its treasury abroad can send into the state its money to pay the loss. If articles of property are damaged, the company reserves the right to buy them. This is intercourse.

The very genius of the business makes it interstate. It is the only known business that is naturally interstate.

During all this time the foreign corporation is not a citizen, or a resident, or an inhabitant of the state of Kansas. It is at all times foreign.

Purcell v. British Land & Mortg. Co. 42 Fed. Rep. 465; *Henning v. Western U. Tele.* 18 L. R. A.

Co. 43 Fed. Rep. 97; *Myers v. Murray & Co.* 11 L. R. A. 216, 43 Fed. Rep. 695; *Conn v. Chicago, B. & Q. R. Co.* 48 Fed. Rep. 177.

And the corporation is not only not domesticated, but it cannot be held to an agreement that it is domesticated, because the law says that such agreement is invalid.

Home Ins. Co. v. Morse, 87 U. S. 30 Wall. 415, 22 L. ed. 365.

The reasoning of the United States Supreme Court in *Paul v. Virginia*, 75 U. S. 8 Wall. 183, 19 L. ed. 361, is incomprehensible so far as it relates to the insurance part of the case.

If a New York insurance company sends an agent to Virginia to make a contract of indemnity to be paid by the New York party, it makes no difference whether the contract is delivered in Virginia or Quebec, so far as its interstate feature is concerned. It is still an interstate contract.

The first mistake to be noticed is that the supreme court fails to distinguish between an executed contract and an executory contract. A policy of insurance is not an executed contract.

The second mistake to be noticed is that insurance cannot be likened to a New York man who goes into Virginia and buys something. It should be likened to a New York man who goes into Virginia and sells something (indemnity) to be delivered in the future from the home office in New York. If, instead of "indemnity," we read "stoves," we find the case already decided in *Wrought Iron Range Co. v. Johnson*, 8 L. R. A. 273, 84 Ga. 754.

See also *McCall v. California*, 136 U. S. 104, 34 L. ed. 392.

It is easily possible for the insurance companies of the United States to send a committee of experts to Kansas, who would revise and prepare fire maps for the state showing every building. Then the business could be run from the home or department office. If, after the report of the committee upon maps and rates, the companies should see proper to combine, and adopt the maps and rates, then the local agent would know nothing of it, and the companies violating the laws of Kansas would have innocent local agents in Kansas carrying out the combine.

If the local agent be not guilty, and cannot be punished, and if all the other persons connected with the violation of law live outside of the state, then what is the status of the actors?

If a person outside of the state commits, by reason of an innocent agent, a crime within the state, he is guilty of committing a crime within the state.

Bishop, Crim. Proc. § 53.

Suppose a misdemeanor is committed in Kansas by a man who was never in the state, and that the man remains outside of Kansas, can he be extradited and tried in the state?

Only "fugitives from justice" can be extradited.

The most liberal opinion on that subject is *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, and that case requires the prisoner to be in the state when the crime was committed.

Tennessee v. Jackson, 36 Fed. Rep. 258.

Courts of equity do not generally enjoin the commission of crime. But if it should, the re-

sult of such action inside the state of Kansas by the state against foreign companies would be wholly fruitless.

Kansas cannot go into the foreign Federal courts and enjoin the insurance companies at their homes from violating the laws of Kansas.

A suit brought by a state outside of its own territory, in the courts of the United States, against the citizen of another state, must be an action in which a money judgment can be rendered, and it must be a "civil suit" as to its origin.

An injunction suit by Kansas in a Federal court, as suggested, would be a suit to enforce the penal laws of Kansas. No country or state will execute the penal laws of another.

Wisconsin v. Pelican Ins. Co. of New Orleans, 127 U. S. 265, 32 L. ed. 239; *Dey v. Chicago, M. & St. P. R. Co.* 45 Fed. Rep. 82.

Outside of the commerce clause of the Constitution, it would seem that there had been given inherent power to Congress to legislate concerning the relations of states with citizens (and insurance companies) of other states.

Kan. Const. art. 8, § 2, art. 1, § 8.

There is no common law as to insurance.

When the United States Constitution was formed fire insurance was not a science; it was hardly a business.

What, then, is to be the construction of the Constitution of the United States as to matters of which the framers could not have foreseen the importance?

What is to be the construction as to matters that are both new and important and which can be included or excluded in the interpretation of the Constitution?

Ought we to say: What would the framers of the Constitution have done if the matter had been presented to them in its then condition?

Or ought we to say: What do the American people want now?

Obviously the latter.

Dartmouth College Trustees v. Woodward, 17 U. S. 4 Wheat. 644, 4 L. ed. 661; *Tiedeman*, *The Unwritten Constitution*, p. 144.

When Kansas says that insurance is trade, the Federal courts are bound to accept and follow that ruling as part of the settled policy of the state.

McKeen v. DeLancy, 9 U. S. 5 Cranch, 22, 8 L. ed. 25; *Green v. Neal*, 81 U. S. 6 Pet. 291, 8 L. ed. 402.

The United States Supreme Court is therefore at liberty to overrule *Paul v. Virginia*, 75 U. S. 8 Wall. 183, 19 L. ed. 361, and follow *Re Pinkney*, 47 Kan. 89.

The Supreme Court of the United States will follow and carry to their ultimate logical conclusions the decisions that the state courts give to state statutes, if valid.

Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 794; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244.

If trusts are an evil, if the combinations of citizens of various states to violate the laws of other states are contrary to public policy and deserve restraint, has not Congress an implied power to recognize and control such a condition of things?

See *Council Bluffs v. Kansas City, St. J. & 18 L. R. A.*

O. B. R. Co. 45 Iowa, 351, 24 Am. Rep. 778; *Crandall v. Nevada*, 73 U. S. 6 Wall. 35, 18 L. ed. 745.

Whenever those subjects are of a national character over which the power of Congress to regulate commerce is asserted, or of a national concern, or whenever such subjects admit of a uniform interstate system of regulation, then their nature is such that Congress may by appropriate legislation regulate them exclusively.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700; *Hall v. DeCuir*, 95 U. S. 495, 24 L. ed. 550; *Crandall v. Nevada*, 73 U. S. 6 Wall. 42, 18 L. ed. 746; *Cooley v. Philadelphia Port Wardens*, 53 U. S. 12 How. 299, 13 L. ed. 996; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Munn v. Illinois*, 94 U. S. 113, 34 L. ed. 77.

Messrs. J. N. Ives, Atty. Gen., and J. R. Hill, with Mr. F. H. Atchinson, Co. Atty., for the State.

Simpson, O., filed the following opinion:

W. C. Phipps and Theo. Gardner, with four others, were complained against, by information, in the district court of Labette county, upon a charge of having violated chapter 257, Laws 1889, being "An Act to Declare Unlawful Trusts and Combinations in Restraint of Trade and Products, and to Provide Penalties therefor." It seems from the record that only Phipps, Gardner, Neely, and McClure were arrested. The other two defendants were not served with process. At the trial the defendants Phipps and Gardner were found guilty, while the defendants James L. McClure and George A. Neely were found not guilty. Each of the appellants was fined \$100 and costs. The specific charge was that the accused were agents of various insurance companies organized under the laws of the states of New York, Colorado, Minnesota, and Connecticut; that they were doing business in this state, and that said insurance companies had combined to control the price and rate of insurance in the city of Oswego, Labette county, Kan.; that by agreement they had established certain rates, larger than those existing before said combination; and that the accused, as agents and adjusters of said companies, were engaged in compelling local agents to observe such combination rates, so established by said companies. The defendants Phipps and Gardner appeal to this court.

The counsel for the appellants contends, to state his proposition in general terms, that chapter 257, Sess. Laws 1889, so far as it affects foreign insurance companies or their agents, is in conflict with the power of Congress to regulate commerce among the several states, and for that reason void; or, that the federal Anti-Trust Law of July 2, 1890, (26 U. S. Stat. at L. p. 209,) is exclusive of the state law, and that all prosecutions for such offenses as are charged in this information must be commenced in the Federal courts, and hence these appellants must be discharged. The counsel has filed an elaborate brief, and made a long oral argument, discussing the Anti-Trust Law of this state and of the United States; the commerce clause of the Federal Constitution and the power of

Congress to legislate on that subject; as well as other branches of inquiry that may be involved in the proper discussion of this appeal.

The major premise of the argument in favor of the discharge of the appellants is that this court has decided in a recent case that insurance is "trade," within the meaning of the provisions of the Anti-Trust Law of this state, under which these appellants were prosecuted and convicted. The exact question in the case of *Re Pinkney*, 47 Kan. 89, was whether the word "trade," in the title to the Anti-Trust Law, (being chapter 257, Laws 1889,) so far as it relates to the business of insurance contained in the first section of the Act, was broad enough to fairly indicate that such a provision with respect to insurance was a part of the Act; and the court held the Act valid so far as it related to the business of insurance, that being covered by the title of the Act. This is what the court did say: "The question presented is, Does the word 'trade,' used in the title, fairly indicate and include the provisions of the Act with reference to insurance? It is argued that the usual meaning of the word should govern, and in that sense it has reference to the business of selling or exchanging some tangible substance or commodity for money, or the business of dealing by way of sale or exchange in commodities; and it is said that the use of the word in connection with that of 'products,' in the title, qualifies the meaning of 'trade,' and makes it all the more apparent that the construction contended for is the correct one. This is the commercial sense of the word, and possibly may be the most common signification which is given to it, but it is not the only one, nor the most comprehensive meaning in which the word is properly used. In the broader sense, it is any occupation or business carried on for subsistence or profit. . . . The broader signification given to the word by most of the lexicographers would fairly embrace and cover the provision of the Act with reference to the business of insurance. The title prefixed to an Act may be broad and general, or it may be narrow and restricted, but in either event it must be a fair index of the provisions of the Act. . . . That the broader meaning of the word 'trade' was the one intended by the Legislature is manifest from the incorporation of the insurance provision in the body of the Act. . . . How can it be said that the business of insurance is foreign to the title of the Act, when the subject expressed in the title, taken in its broadest sense, and the one intended by the Legislature, would embrace such business?" So it may be fairly said, as it is in the printed brief of counsel for appellants, that a legislative and a judicial definition of insurance is that it is "trade," within the meaning of the Anti-Trust Law of this state.

The minor premise of counsel is that "trade," as defined by this court in the case of *Re Pinkney*, *supra*, means interstate commerce. This is an assumption, rather than a fair and logical deduction from the language used in the opinion. Trade between citizens of this state is not interstate com-

merce. Trade between a citizen of this state and a citizen of another state temporarily in this state is not interstate commerce. In fact, at the time the opinion in the case of *Re Pinkney* was written, there were no facts in the case that would suggest to the mind of the writer any question as to interstate commerce, because nowhere in the complaint, proceedings, or record of that case is it hinted that the unlawful combination intended and designed to control the cost of insurance was made or attempted by other persons than residents of the state of Kansas. So that it can be positively asserted that the word "trade," as used in that decision, meant then, and means now, trade between citizens of this state,—domestic trade, if you please,—and not trade or commerce between citizens of different states, or interstate commerce. It is a conclusive presumption of the law that this court knew that the Legislature of this state had no power to regulate interstate commerce, and the presumption is equally strong and conclusive that by the use of the word "trade" the intercourse between citizens of different states that constitutes interstate commerce was not in contemplation. It has been judicially determined, time and time again, by the highest judicial authority in the land, that issuing a policy of insurance is not a transaction of commerce. The Supreme Court of the United States, in the case of *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357, in an elaborate opinion by Mr. Justice Field, says: "The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce. In *Nathan v. Louisiana*, 49 U. S. 8 How. 73, 12 L. ed. 993, this court held that a law of that state imposing a tax on money and exchange brokers who dealt entirely in the purchase and sale of foreign bills of exchange was not in conflict with the constitutional power of Congress to regulate commerce. The individual thus using his money and credit, said the court, 'is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the shipbuilder, without whose labor foreign commerce could not

be carried on.' And the opinion shows that, although instruments of commerce, they are the subjects of state regulation and, inferentially, that they may be subjects of direct state taxation. 'In determining,' said the court, 'on the nature and effect of a contract, we look to the *lex loci* where it was made or where it was to be performed. And bills of exchange, foreign or domestic, constitute, it would seem, no exception to this rule. Some of the states have adopted the law-merchant, others have not. The time within which a demand must be made on a bill, a protest entered, and notice given, and the damages to be recovered, vary with the usages and legal enactments of the different states. These laws, in various forms and in numerous cases, have been sanctioned by this court.' And again: 'For the purposes of revenue the Federal government has taxed bills of exchange, foreign and domestic, and promissory notes, whether issued by individuals or banks. Now, the Federal government can no more regulate the commerce of a state than a state can regulate the commerce of the Federal government, and domestic bills or promissory notes are as necessary to the commerce of a state as foreign bills to the commerce of the Union. And if a tax on an exchange broker who deals in foreign bills be a regulation of foreign commerce, or commerce among the states, much more would a tax upon state paper, by Congress, be a tax on the commerce of a state.' If foreign bills of exchange may thus be the subject of state regulation, much more so may contracts of insurance against loss by fire." The doctrine of this case was distinctly affirmed by the supreme court in the case of *Liverpool & L. L. & F. Ins. Co. v. Massachusetts*, 77 U. S. 10 Wall. 566, 19 L. ed. 1029, in which Mr. Justice Miller says: "The case of *Paul v. Virginia* decided that the business of insurance, as ordinarily conducted, was not commerce, and that a corporation having an agency by which it conducted business in another state was not engaged in commerce between the states." The case of *Paul v. Virginia*, *supra*, was distinctly affirmed in the cases of *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. ed. 148, and *Philadelphia Fire Assn. v. New York*, 119 U. S. 110, 80 L. ed. 842, and has been cited approvingly in many other Federal and numerous state decisions. It must now be regarded as the law of the land, in spite of the facetious criticisms of counsel for appellants. In *Paul v. Virginia*, *supra*, a statute of that state required that every insurance company not incorporated by Virginia should, as a condition of carrying on business in Virginia, deposit securities with the state treasurer, and obtain a license; and another statute made it a penal offense for a person to act in Virginia as agent for an insurance company not incorporated by Virginia without such license. Paul, having acted as such agent without a license, was convicted and fined under the statute. So that case arose out of an attempt on the part of the state of Virginia to enforce its penal laws for the regulation of the business of insurance within its bor-

ders; and in this respect it is very similar to the case we are now discussing.

In the case of *Leavenworth v. Booth*, 15 Kan. 628, which was the prosecution of a local agent of a foreign insurance company for a violation of a city ordinance that required foreign insurance companies to pay certain license taxes for the privilege of doing business in said city, this court, by Mr. Justice Valentine, said: "It must be remembered that the insurance company involved in this controversy is a foreign insurance company, having no rights in this state except such as the state may see fit to confer upon it. It has no power to do business in Kansas by virtue of its organization in Wisconsin. It has no power to do business in Kansas by virtue of the laws of Wisconsin, or by virtue of the Constitution or laws of the United States, or by virtue of all combined. *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357; *Ducat v. Chicago*, 77 U. S. 10 Wall. 410, 19 L. ed. 972; *Liverpool & L. L. & F. Ins. Co. v. Massachusetts*, 77 U. S. 10 Wall. 566, 19 L. ed. 1029. It can do business in Kansas only under the laws of Kansas, and by permission from the state of Kansas. This state might absolutely exclude it, or might require that it do business only under a license, and might require that it not only get a license from the state, but also that it get a license from every city, county, or village in which it should attempt to do business. The state may permit such insurance company to come into the state under such just restraints and regulations as the state may choose. Hence the state is not bound to permit said insurance company to come to this state, as individual citizens of other states have a right to do, and then, for the purpose of raising revenue, resort only to the ordinary modes of taxation. On the contrary, the state, without resorting to taxation at all, may require that such insurance company shall pay for the privilege of coming into the state, and of doing business therein, and may require that it shall not only pay a sum to the state for the privilege of doing business therein, but that it shall also pay a sum to every municipal corporation in the state in which it shall attempt to do business. And all this the state may do without violating any provision of its own Constitution." This case asserts in the strongest possible language the right of this state to regulate the business of insurance within its borders, not only with reference to those insurance companies that may be organized under our laws, but especially with regard to insurance companies organized under the laws of sister states, doing or desiring to do business in this state.

At this writing it is probable that every state in the Union has passed laws upon this subject, until it may be said that the right of state regulation of the business of insurance is universally recognized and upheld. So it can be confidently said that this court, when it held in *Re Pinkney* that insurance was "trade," did not contemplate that the term used could be tortured into interstate commerce; and it can be said with equal

confidence that the settled law of this country is that the issuing of a policy of insurance is not a transaction of commerce. As we have seen, neither the major nor minor premise of the argument of counsel for the appellants is sound, and that the inevitable conclusion—that Congress alone has power to regulate interstate commerce, and to provide penalties against insurance trusts and combinations—does not follow. The court did not mean "trade," as synonymous with interstate commerce. The business of insurance is not interstate commerce. The state has power to regulate and control—and to provide penalties for the transgression of its regulating and controlling statutes—the business of a foreign insurance company within its boundaries. If the theory of the counsel for the appellants ever ripens into authoritative judicial decision, the power of the state to regulate and control the business of insurance within its limits is gone. The insurance department, and every act upon the statute books for the protection of the policy holders, and every line looking to the punishment of the violators of its public policy in this respect, goes with it, except, possibly, as to such companies as may be organized and operated under the laws of this state.

We recommend that the judgment of conviction be affirmed.

Per Curiam:
It is so ordered.

Johnston, J., concurs.

Horton, Ch. J.:

I dissent from the judgment ordered, not, however, upon the ground of the interstate character of insurance, as urged by the attorney for the appellants, but because of my reasons for my dissent in the case of *Re Pinkney*, 47 Kan. 89. The subject of an Act must be clearly expressed in its title. Chapter 257 is penal in its nature. The title thereof should not be extended by construction. Common or popular words are to be understood in a popular sense. In the construction of statutes, a word which has two significations should ordinarily receive that meaning which is generally given to it.

Considering the provisions of the Constitution concerning titles to bills or acts, and the foregoing cardinal rules of construction, I do not think the word "trade," used in the title of said chapter 257, Sess. Laws 1889, indicates or includes, in any public sense, or as generally understood, lawyers, doctors, insurance agents, or insurance companies. When I speak of the profession or business of a lawyer, a doctor, or an insurance agent, I do not say he is a trader or tradesman, or is in trade, nor that he is carrying on a trade, or doing well in his trade. I have never heard any person, in referring to the success of a lawyer, a doctor, or an insurance agent, say of either that he is prosperous in his trade, or that he is doing well in carrying on his trade, or that he is an energetic trader. Indeed, I never have heard insurance agents spoken of as "in trade." I think the decisions referred to in the foregoing opinion except the one of this court 47 Kan. 89, all tend to show that insurance is not "trade." The Supreme Court of the United States, in the case *Paul v. Virginia*, cited, say insurance policies "are not subjects of trade and barter, offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale." 75 U. S. 8 Wall. 168, 19 L. ed. 357.

Valentine, J.:

I concur in the decision of this case, and in affirming the judgment of the court below. It is evident from the body of the Act (chapter 257, Laws 1889) that the Legislature, in using the word "trade" in the title to the Act intended to include insurance, but did not intend to include interstate commerce; and it is the duty of the courts to carry out the will and intention of the Legislature, when enacted into law, and when the same can be fairly ascertained, and not to defeat the same, although the Legislature may not have used the most appropriate language in expressing its will and intention. There is nothing in this case with reference to lawyers or doctors, or their business or profession. Hence it is wholly unnecessary to say anything with reference thereto.

TENNESSEE SUPREME COURT.

JACKSON, MATTHEWS & HARRIS
v.
NATIONAL BANK OF McMINNVILLE.

(.....Tenn.....)

A drummer or commercial traveler has no implied authority to indorse checks

in the name of his principal because he has power to collect accounts and receive money and checks payable to his principal.

(January 5, 1893.)

A PPEAL by complainants from a decree of the Chancery Court for Warren county in

NOTE.—Extent of the authority conferred upon traveling salesmen.

Authority to collect payment.

It will be seen from the cases following that the courts have for the most part denied the implied authority of a traveling agent to receive payment for goods which he sells without having them in possession.

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A clerk employed to procure orders has no authority thereby to receive payment. A purchaser who pays such clerk for the goods sold without making any inquiry of the principals does so at his own risk. *Puttock v. Warr*, 3 Hurst. & N. 979, 81 L. T. 86.

A drummer employed to solicit orders for goods, but not having possession thereof, and not having

favor of defendant in a suit brought to compel defendant to pay to plaintiffs the amount of a check which had been drawn in their favor and cashed by defendant on the indorsement of one of their employes. *Reversed.*

The facts are stated in the opinion.

Messrs. T. C. Lind and Smith & Dickenson for appellants.

Messrs. Murray & Fairbanks for appellee.

Holman, J., delivered the opinion of the court:

The complainants were wholesale grocery merchants in the city of Nashville, and had in their employ as a traveling salesman or

drummer one Gibson. Gibson's duty, under his employment, was to travel through the country, take orders from retail merchants for goods, and collect the bills as they became due. For complainants Gibson sold a bill of goods amounting to \$228.90 to J. J. Meadows, of Warren county. On October 12, 1891, before Meadows' bill became due, and while Gibson was still in the service of complainants, he proposed to Meadows that, if he would then pay the bill, he would be allowed a discount of 2 per cent. To this Meadows agreed, and gave to Gibson his check on the defendant for \$224.89, payable to the order of Jackson, Matthews & Harris. On the face of the check was inserted the statement

authority in fact to receive payment therefor, has no implied authority to receive payment. And payment made to him at the time the order for the goods is given is not binding on his principal. *Clark v. Smith*, 83 Ill. 298.

One who pays a drummer for goods forwarded from his principals upon an order given to the drummer makes payment at his peril. In a suit by the principals to recover the price of the goods, the defendant must show that the drummer had authority to collect, and such authority is not presumed. *Greenhood v. Keator*, 9 Ill. App. 183.

Independently of controlling usage to the contrary, the sale of goods by an agent or the fact that he is authorized to solicit orders for goods, does not of itself authorize him to receive payment.

A drummer employed by one firm took an order which he forwarded to another firm, who shipped the goods to the buyer. The latter paid the drummer, who failed to account for the proceeds. The vendors sued the buyer for the price and it was held that evidence of the usage among drummers and their employers as to the former's authority to collect payment was not admissible in an action between others than their employers and a buyer of goods, there being no evidence that the usage in the two cases was the same. *Janney v. Boyd*, 30 Minn. 319.

A salesman employed to solicit orders by sample has no implied authority to collect the purchase money, if there is no evidence of express authority, or authority springing from custom or usage. But he may do so where such is the general custom recognized by the principal, even though the salesman is without possession of the goods. *Meyer v. Stone*, 46 Ark. 210, 55 Am. Rep. 577.

A drummer authorized to sell goods on credit may have authority implied from custom to receive payment. The words on the bill, "Payable at office," are not constructive notice to the buyer of the agent's want of authority. The buyer, not having noticed the words in fact, and having paid the drummer in good faith, is not liable for the price of the goods a second time to the principals, the drummer having failed to account for the money paid him. *Putnam v. French*, 53 Vt. 402, 38 Am. Rep. 682.

Where a drummer took an order for goods, which order he transmitted to his principals, who shipped the goods directly to the buyers together with a bill upon which were printed legibly the words "Agents not authorized to collect" and about thirty days afterwards he called upon the buyers and asked for and received payment, it was held, in the absence of evidence of other acts of the agent, or of any general habits or dealings between the parties, (1) that omitting from consideration the words quoted there was not shown any authority in the agent to collect; and (2) that the words quoted were sufficient notice of the agent's want of authority whether the buyer saw them or not. **18 L. R. A.**

not. *McKindly v. Dunham*, 55 Wis. 515, 42 Am. Rep. 740.

A salesman selling his principal's goods on commission has authority to sell goods on credit, but not to collect subsequently the price of the goods; and payment to the salesman will not discharge the purchaser, unless he shows some authority in the agent other than that necessarily implied in a mere power to make sales. And where with the goods a bill is sent, having upon its face a notice that salesmen are not authorized to collect, which bill is used by defendant in checking the goods, it is gross negligence not to see the notice; and payment thereafter to the salesman will not protect the purchaser. *Law v. Stokes*, 32 N. J. L. 249, 90 Am. Dec. 655.

Where an order for goods was taken by a drummer, and the goods were shipped by his principals to the buyer, together with a bill upon which was printed the following words: "Settlements must be made directly with us; in no case with an agent or salesman unless he presents our written authority. We shall hold purchasers responsible for the strict observance of this rule;" and the buyers afterwards paid the agent,—it was held that they were not thereby discharged. Authority to sell does not include authority to collect. *Kane v. Barstow*, 42 Kan. 465.

A drummer, not entrusted with possession of the goods, which were sold on four months' credit, and expressly forbidden by terms of his employment from receiving payment for them, six days after the sale drew a draft upon the buyer for a part of the price, and stated to the latter that he would either return to him within ten days the amount of the draft, or would credit the amount on the bill for the goods. It was held that payment of the draft did not discharge the buyer *pro tanto*. Authority to receive payment is not implied from authority to sell. *Butler v. Dorman*, 68 Mo. 298, 30 Am. Rep. 795.

An order for goods transmitted by plaintiff's agent was filed by them, the goods being sent directly to the purchasers together with a bill in plaintiff's name—the buyers afterwards paid the agent for the goods. It was held that there having been no prior dealings between the parties, and the goods having been sent directly to the purchasers, it was their duty to find out whether the agent had authority to receive payment; and, in the absence of competent evidence that he had such authority, payment to him was not binding on the plaintiff. *Kornemann v. Monaghan*, 24 Mich. 36.

An agent, having sold property of his principal, took in part payment the purchaser's note, which he forwarded to the principal. Subsequently the agent, having been discharged by the principal, and not having the note in his possession, told the buyer that he (the agent) was authorized to collect, and thereupon received payment. It was held that

that it was "in full of acct. to date." Upon the back of the check Gibson indorsed the names of complainants, "Jackson, Matthews & Harris, by Gibson," and presented it to the defendant bank, where it was paid to him by the cashier, and charged against the deposit account of Meadows. Gibson failed to pay over or account to complainants for this money. Complainants having learned that Gibson had collected other money due them, and failed to account for it, ordered him in, and discharged him. Gibson absconded. Subsequently complainants sent to J. J. Meadows a statement of his account, requesting payment. Meadows replied that he had paid the account to Gibson by giving him a check

on the defendant bank, and had settled with the bank and taken up the check. Complainants demanded of defendant payment to them of the check, which was refused. Complainants filed their bill to hold the bank liable, and to recover the amount of the check, alleging that Gibson had no right to indorse complainants' name, and that the payment of the check to him was unauthorized. The defendant answered, stating, in substance, that Gibson was authorized to indorse complainants' name to checks and receive the money thereon; that, if not expressly empowered, he was by implication authorized so to do; that Gibson, while in complainants' service, had frequently re-

authority to sell and take in payment a note payable to the principal did not of itself create authority to receive payment of such note.

It seems, that if the note had been entrusted to the possession of the alleged agent by the payee thereof, payment to the agent would be justified. *Draper v. Rice*, 56 Iowa, 114, 41 Am. Rep. 88.

A drummer authorized to sell by sample, but not to receive payment, sent to his principals an order for goods. The goods were shipped directly to defendant, the buyer, and a bill and draft sent at the same time. Defendant claimed that he had paid for the goods by crediting the price of them upon the account due him from the agent; but he had paid one who had no authority to collect payment, and who had no possession of the goods; and the plaintiff, having done nothing to mislead the defendant, was entitled to recover. *Dunn v. Wright*, 51 Barb. 244.

Plaintiff's salesman, having authority to sell goods on commission, sold defendants certain goods on six months' credit. Ten days after the sale defendants paid the salesman for the goods, less a discount of 5 per cent, and took his receipt. A finding that he had no authority to collect payment was affirmed.

It seems that an agent in possession of goods with authority to sell has also authority to receive payment in cash, and perhaps so, even if he sells on credit. But where he has no possession of the goods and sells on credit, that must be other evidence of his authority to justify a payment to him. *Seiple v. Irwin*, 30 Pa. 513.

In *Capel v. Thornton*, 8 Car. & P. 832, it was said of an agent: "If he as their agent had authority to sell goods so had he (in the absence of advice to the contrary) an implied authority to receive the proceeds of such sale." But the agent in this case had taken orders as principal and had been in the habit of collecting payment and giving receipts in his own name and the payment in question was made before notice of his agency.

An agent having express authority only to take orders for sales agreed to take in part payment for one sold an old safe belonging to the purchaser. The principal received the order, agreed to its terms, and afterwards shipped the new safe to the purchaser, who paid the agent the balance due on the transaction. It was held that the agent was held out by the plaintiffs as having authority to collect as well as to sell and that they could not recover. *Harris v. Zimmerman*, 81 Ill. 413.

In a Georgia case action was brought to recover the price of two parcels of goods sold to defendant. The first parcel was ordered by defendant directly of plaintiff. The second parcel was ordered through the plaintiff's traveling salesman, who had authority to sell but was specially instructed not to collect; he did not have possession of the goods which were shipped directly by plaintiff to defend-

ant. Upon the invoice were printed the words, "All bills must be paid at this [i. e. plaintiff's] office." Defendant testified that he did not see this notice. There was evidence that the agent had collected bills from other parties with plaintiff's knowledge; and that the accounts between the agent and plaintiff had been settled, the former giving his note in full of all sums alleged to be due from himself to his principal on account of collections made by the former prior to such settlement, the price of the goods in suit being one of said collections.

The trial court having refused to charge that there was evidence of authority in the agent to collect; or on the question of ratification as requested by defendant, and the verdict and judgment being for plaintiff, the judgment was reversed and new trial ordered. *Luckie v. Johnson*, (Ga.) May 18, 1892.

A traveling agent has no implied authority to draw a bill on a customer payable to his own order and obtain an acceptance and payment thereof. And such payment does not discharge the debtor's liability to the principal. *Hogarth v. Wherley*, L. R. 10 C. P. 690, 14 Moak, Eng. Rep. 474.

An agent who has sold goods and taken therefor a negotiable note payable to his principal has no implied authority thereafter to receive payment by discounting the note before it is due and when it is not in his possession. *Holland v. Van Bell* (Ga.) April 27, 1892.

The doctrine of most of the above cases is not accepted in some states. Thus in Maine it is held that a traveling salesman authorized to sell may collect the price in the absence of custom to the contrary, or actual knowledge by the buyer that the salesman's authority is limited. And the words printed in red ink at top of bill-head, "All bills must be paid by check to our order, or in current funds at our office,"—do not put the buyer on his guard, as matter of law. *Trainer v. Morison*, 79 Me. 160.

So in Tennessee a drummer took orders for goods, which were shipped by the principals to the buyers, without any contract or correspondence between them, or any directions given by the principals upon transmission of the goods. Upon receipt of them the buyers paid the drummer. The court held that the buyers could presume rightfully that the agent was authorized to receive payment as well as to sell, and in the absence of knowledge of any limitation upon his authority, the payment to him would be protected. *Hoskins v. Johnson*, 5 Sneed, 469.

The rule that an agent authorized to sell has power to receive payment was applied in *Collins v. Newton*, 7 Baxt. 299. In that case a sale by sample, was made by an agent and the goods ordered were shipped directly from the principal to the buyer, who afterwards paid that part of the price

ceived checks payable to complainants, indorsed complainants' name, and received the money thereon, and that these acts of Gibson were known to and had been ratified by the complainants; that they were estopped from denying his authority, and that it was inequitable for complainants to undertake to visit the consequences of their own negligence and misplaced confidence upon respondent. The chancellor being of opinion that it would be inequitable to visit the loss of the Meadows check upon the defendant, as to it he dismissed the bill. Complainants have appealed.

In the brief of counsel for the defendant it is insisted that there is no such privity between the complainants and the defendant as will authorize the bringing of this suit; that, where a check is made payable to the order

of one person, and upon the faith of a forged indorsement the bank pays to another, this is not such an acceptance by the bank as will make it liable to the payee, because the bank did not accept the check for the payee, nor promise to him to pay it, but on the contrary refused to do so. To sustain this proposition, the case of *First Nat. Bank of Washington v. Whitman*, 94 U. S. 848, 24 L. ed. 229, is referred to. It is true that the court in that case held that a payment to a stranger upon an unauthorized indorsement does not operate as an acceptance of the check so as to authorize an action by the real owner to recover its amount as upon an accepted check. But the case of *First Nat. Bank of Washington v. Whitman*, on this point, has been expressly dissented from by this court, and we do not now regard this as an open question in this

in controversy to the agent. The court held that payment might be safely made to him, unless the buyer was notified not to pay him.

An agent for the sale of sewing machines held out by his principal as a general agent has authority to accept as a payment on account a part of the amount of a note given in payment of a sewing machine. And such payment on account is binding on the principal. *Sumner v. Saunders*, 51 Mo. 89; *Brooks v. Jameson*, 55 Mo. 505.

Permitting an agent to make similar collections will prevent a principal from repudiating a payment made to the agent. *Estey v. Snyder*, 76 Wis. 624.

Effect of agent's possession of goods.

Possession of goods by a traveling agent who sells them is evidence of authority to collect payment therefor. *Bailey v. Pardridge*, 134 Ill. 188, affirming 20 Ill. App. 351; *John Hutchinson Mfg. Co. v. Henry*, 44 Mo. App. 268; *Keown v. Vogel*, 25 Mo. App. 35; *Cross v. Haskins*, 13 Vt. 536; *Rice v. Groffmann*, 56 Mo. 434.

Yet a drummer who never had authority to sell goods and collect payment cannot after revocation of his authority pass any title to goods of his former principal, although he has obtained a wrongful possession of them. And the buyer never having dealt previously with the principal through this drummer cannot claim that he was misled by an apparent authority. *Abrahams v. Weiler*, 87 Ill. 179.

An agent for the sale of sewing machines in certain counties, having a central office, sold a machine to defendant, who gave in payment his promissory note payable at said office. The agent had authority to receive payment on cash sales, or sales on the installment plan when made by him and on purchasers' notes guaranteed or indorsed by him; and for a year or more had collected money on notes given for machines, and forwarded sums so collected to the plaintiffs, his principals. It was held that there was evidence that from the course of dealing between the agent and his principals, defendant had good reason to believe that the agent had authority to collect the note given by defendant; and the jury having found for defendant the judgment on their verdict was affirmed. *Kasson v. Nollner*, 43 Wis. 646.

The authority of an agent to accept payment of a note due to his principal, which is incidentally touched upon in the case above is a matter not included in this note except so far as it relates to drummers or traveling agents.

Authority to accept payment in anything else than money.

An agent authorized to sell has no authority to

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receive in payment for the goods other goods and money. Authority to sell is not authority to barter. *Taylor & F. Organ Co. v. Starkey*, 59 N. H. 142.

An agent authorized to take orders for the sale of property has not authority to make a bargain to exchange the same. *Sioux City N. & S. Co. v. Magnus*, 1 Colo. App. 45.

A commission allowed to one who solicits orders upon sales affected through such orders does not constitute him or prove him to be an agent with authority to make absolute contracts of sale; much less to receive payments and make agreements to receive payments in other goods by way of barter. *Clough v. Whitcomb*, 105 Mass. 482.

Authority to a special agent to sell for cash will not justify an exchange for other property. *Drury v. Barnes*, 29 Ill. App. 166.

A drummer who is furnished with cash to pay his expenses and also given authority to make further drafts on his employer for the same purposes, if necessary, has no authority to give in exchange for his board the goods of his principal. Nor does the fact that the agent has authority to sell goods, collect the price therefor, and use the money to pay his own traveling expenses, render the principal liable. Having once paid in cash to the agent the amount of his expenses for which the goods were exchanged by him the principal can recover of the inn-keeper the full agreed price of the goods. *Nicholson v. Pease*, 61 Vt. 534.

A drummer authorized to take orders and not having the goods in his possession cannot bind his principal by a contract of exchange in which the drummer took an order for goods of his principal and forwarded the same, and received in exchange goods of the buyer. In the absence of evidence of the drummer's authority to receive payment such authority is not presumed, and even if it existed it would not authorize the agent to make an exchange or barter. *Hayes v. Colby*, 65 N. H. 192.

An unauthorized agreement by a traveling salesman to take other goods in part payment for those sold by him is binding on the principal if he ships the goods to the purchaser and the latter had no notice of the agent's want of authority. *Billings v. Mason*, 80 Me. 496.

"It is elementary law that an agent has not prima facie authority to receive anything but money in payment." Benjamin, Sales (Bennett's ed. 1892), pp. 723, 729.

Plaintiff's agent sold goods to defendant, the contract of sale containing the words, "Special Notice. All payments must be made directly to the Union School Furniture Company, and not to its agents." There was evidence that in fact the agent had collected money due on sales made by him and that

-state. In the case of *Pickle v. Muss*, 88 Tenn. 380, it was decided, in the opinion of a majority of the court, that acceptance of a bank check, and promise to pay it in accordance with its directions, will be inferred when the drawee bank receives and retains the check, and charges it to the account of the drawer, who had sufficient funds on deposit to meet it, and subsequently lifted the check on settlement with the bank, although the check may have been presented to the bank by, and the money paid on it to, an unauthorized person. All the members of complainants' firm testify that Gibson had not been empowered to indorse the firm's name on checks received in payment of goods. Several drummers were examined as witnesses for defendant to prove, and a majority of them say with some qualification, that it is

the usage and custom of traveling salesmen and drummers, who are empowered to collect and receipt bills and accounts, to indorse the names of their principals to checks received in payment for goods; and it is insisted that by implication Gibson was authorized to indorse complainants' name to the check, and receive the money. We do not think the usage or custom sufficiently proven, nor do we intimate an opinion that such a power can be inferred from usage or by implication. A person cannot by proof establish a usage or custom which, in his own interest, contravenes the established commercial law. *Vermilye v. Adams Exp. Co.* 88 U. S. 21 Wall. 139, 22 L. ed. 609. No authority will be implied from an express authority. Whatever powers are strictly necessary to the effectual exercise of the express powers will

plaintiff had received money so collected. In the case at bar the agent undertook to accept an account due from himself to the buyer in part payment of the amount due from the latter to the plaintiff on account of the goods sold. It was held that even if authority to receive payment in cash was shown by the evidence, it did not therefore show authority to settle the account in the manner stated. *Union School Furniture Co. v. Mason* (S. Dak.) June 18, 1892. See also *Gerard v. McCormick*, 130 N. Y. 261, holding that an agent cannot use money of his principal to pay his own debt; and that a creditor who receives such money with notice, although he receives it in good faith, must refund the same to the principal.

And see *note* to same case in 14 L. R. A. 234, on agent's power to use property of his principal for payment of his own debt.

Authority to pledge principal's credit for traveling expenses.

Where the use of a horse and carriage is necessary for a drummer in transacting the business of his principals, the drummer may hire upon the credit of his principals. And this power is not taken away by the fact that the principals have supplied him with cash and instructed him not to pledge their credit, where the other party is not aware of such instruction. *Bentley v. Doggett*, 61 Wis. 224, 37 Am. Rep. 837. See also *Huntley v. Mathias*, 90 N. C. 101, 47 N. C. Rep. 518, where it was held that where a drummer hired a horse and carriage to drive about through the country upon the business of his principals, the latter were liable for his tort in overdriving the horse. The nature of the agency justified the inference that the agent had authority to hire the conveyance.

Drummers while actively engaged on business of their principal usually pay hotel bills in cash and an hotel keeper cannot collect a bill for drummer's board charged to the employer without notice to him. *Covington v. Newberger*, 99 N. C. 523. And see *Nicholson v. Pease*, 61 Vt. 554.

Authority to sell samples.

It seems that a purchaser may be justified in assuming that a drummer has authority to sell his samples; and that in determining the agent's authority possession of the goods is a more important element than the fact that the goods are samples. And where such a sale is ratified by the principals, the payment to the agent is ratified also; and the principals cannot recover payment a second time of the buyer. *Bailey v. Pardridge*, 134 Ill. 183.

In *Kohn v. Washer*, 64 Tex. 131, 53 Am. Rep. 745, a drummer authorized to show samples and take orders, sold his samples and converted the pro-

ceeds. No evidence was offered of custom or usage as to the disposition of samples by drummers. In the absence of such evidence the principals were not bound by the sale.

The same principle was applied in *Savage v. Pelton*, 1 Colo. App. 143.

Other cases relating to powers of drummers.

The rule that an authority in a drummer to take orders was not an authority to make sales was applied and affirmed in *Bensberg v. Harris*, 46 Mo. App. 404.

The court cannot know judicially that an agent who travels to solicit orders for a commercial house also has authority to cancel his contracts and receive back goods shipped to a customer and not satisfactory to him. The nature of the employment does not indicate such an authority, which must be established by evidence if it exists. *Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154.

A drummer forwarded to his principals an order for goods which were shipped to the buyer. The drummer had agreed with the buyer that the goods were to be furnished at list prices less a discount of 10 per cent, which was to be paid by the drummer himself. He was afterwards discharged by his principals. In an action by them to recover the full list price of the goods it was held that they were entitled to do so. *Taylor Mfg. Co. v. Brown* (Tex. App.) Oct. 18, 1890.

The plaintiffs, part-owners of a vessel, having agreed to sell her, placed in the hands of another part-owner, as their agent, a bill of sale, the spaces for the consideration and buyer's name being left blank. The agent employed defendant to make the sale, which he did; and shortly afterwards cashed the agent's drafts for a part of the purchase money before receipt thereof from the buyer. The agent failed to account to his principals for this sum. The court held that an agent authorized to sell personal property which he has in his possession and can deliver must be deemed authorized to receive the price, in the absence of any known limitation upon his authority. And it seems that if defendant had paid the drafts after receiving the purchase money he would not have been liable to plaintiffs; but the agent had no actual or implied authority to collect from defendant the purchase money before it had been paid by the buyer. The payments upon the drafts were in effect loans to the agent, and defendant was obliged to account to plaintiffs for the amount thereof. *Whitton v. Spring*, 74 N. Y. 160.

An agent to sell goods and collect bills has no authority to bind his principals on a contract for advertising his business in a newspaper. *Tarpy v. Bernheimer*, 42 N. Y. S. R. 134. S. C. B.

be conceded to the agent by implication. In order, therefore, that the authority to make or draw, accept, and indorse commercial paper as the agent of another may be implied from some other express authority, it must be shown to be strictly necessary to the complete execution of the express power. The rule is strictly enforced that the authority to execute and indorse bills and notes as agent will not be implied from an express authority to transact some other business, unless it is absolutely necessary to the exercise of express authority. Tiedeman, Com. Paper, § 77. Possession of a check payable to order, by one claiming to be agent of the payee, is not prima facie proof of authority to demand payment in the name of the true owner. Id. § 812. A bank is obliged by custom to honor checks payable to order, and pays them at its peril to any other than the person to whose order they are made payable. Id. § 481. It must see that the check is paid to the payee therein named upon his genuine indorsement, or it will remain responsible. *Pickle v. Muse*, 88 Tenn. 380. An authority to receive checks in lieu of cash in payment of bills placed in the hands of an agent for collection does not

authorize the agent to indorse and collect the check. *Graham v. United States Sav. Inst.* 46 Mo. 186; 1 Wait, Act. & Def. p. 284; 1 Dan. Neg. Inst. § 294. The indorsement of the check was not a necessary incident to the collection of accounts. *Graham v. United States Sav. Inst.* 46 Mo. 186.

It follows that a drummer or commercial traveler, employed to sell and take orders for goods, to collect accounts, and receive money and checks payable to the order of his principal, is not by implication authorized to indorse such principal's name to such checks. No equitable considerations can be invoked to soften seeming hardships in the enforcement of the laws and rules fixing liability on persons handling commercial paper. These laws are the growth of ages, and the result of experience, having their origin in necessity. The inflexibility of these rules may occasionally make them seem severe, but in them is found general security.

The decree of the chancellor is reversed, and a decree in favor of complainants against the defendant will be entered here for the amount of the Meadows check with interest from date of filing the bill, and the costs.

CONNECTICUT SUPREME COURT OF ERRORS.

Arunah M. PRIOR, *Appt.*,

v.

Christian SWARTZ.

(.....Conn.....)

1. **Wharves or channels extending below low-water mark may be made by the proprietor of land adjoining navigable water to connect himself with such water so long as he does nothing to interfere with the free navigation of the waters.**
2. **The designation of land under navigable water for the planting of and cultivation of oysters**, under Gen. Stat., §§ 2342, 2349, does not destroy the right of an adjoining owner to build wharves or dig channels below low-water mark in front of his land for the purpose of connecting himself with navigable water.

(June 30, 1892.)

APPPEAL by plaintiff from a judgment of the Superior Court for Fairfield County in favor of defendant in an action brought to restrain defendant from interfering with and digging channels through plaintiff's oyster beds. *Affirmed*.

The facts are stated in the opinion.

Messrs. J. B. Curtis and H. W. R. Hoyt for appellant.

Mr. Samuel Fessenden, for appellee:

Riparian and littoral rights in the several states of the United States are settled by the respective states for themselves.

Wilson v. Black-Bird Creek Marsh Co. 27 U. S. 2 Pet. 245, 7 L. ed. 412; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *St. Louis v. Myers*, 118 U. S. 506, 28 L. ed. 1181.

In this state the owners of land bounded on a harbor or navigable water, while they own only to high-water mark, have a right of occupation of the intervening soil to the channel, with the right to construct wharves and other structures for the purposes of commerce, below that line to the channel, provided they do not obstruct the paramount rights of navigation, and conform to such regulations as the state imposes upon them.

1 Swift, Dig. 109; *East Haven v. Hemmingway*, 7 Conn. 186; *Chapman v. Kimball*, 9 Conn. 38, 21 Am. Dec. 707; *Nichols v. Lewis*, 15 Conn. 137; *Frink v. Lawrence*, 20 Conn. 117; *Groton v. Hurlburt*, 22 Conn. 178; *Simons v. French*, 25 Conn. 846; *Burrows v. Gallup*, 32 Conn. 498, 87 Am. Dec. 186; *Church v. Meeker*, 34 Conn. 421; *Seeley v. Brush*, 35 Conn. 419; *Lockwood v. New York & N. H. R. Co.* 37 Conn. 337; *Mather v. Chapman*, 40 Conn. 382; *Union Wharf Contractors v. The Starin*, 45 Conn. 585; *Hawley v. Beardsley*, 47 Conn. 571; *New Haven S. B. Co. v. Sargent*, 50 Conn. 199; *Morris v. Beardsley*, 54 Conn. 334; *Ladies Seamen's Friends Soc. v. Halstead*, 58 Conn. 144; *Farist Steel Co. v. Bridgeport*, 18 L. R. A. 590, 60 Conn. 278; Gould, Waters, § 170; *State v. Sargent*, 45 Conn. 858.

The defendant's injury then, if any, is *damnum absque injuria*. The decisions above

NOTE.—The above case with the cases reported immediately following furnish a very valuable review of much of the law of waters.

On the subject of wharves or piers made by a riparian owner, see *Miller v. Meridenhall*, 8 L. R. 18 L. R. A.

A. 89, and note, 43 Minn. 95, 19 Am. St. Rep. 219; *Hanford v. St. Paul & D. R. Co.* 7 L. R. A. 722, 43 Minn. 110; *Eisenbach v. Hatfield*, 13 L. R. A. 622, and note, 2 Wash. 236.

quoted, without legislative authority, entirely justified the defendant's acts.

Lewis, Em. Dom. §81; 1 Dillon, Mun. Corp. § 106; *Dutton v. Strong*, 66 U. S. 1 Black, 23, 17 L. ed. 29; *St. Paul & P. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 272, 19 L. ed. 74; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984; *Weber v. State Harbor Comrs.* 85 U. S. 18 Wall. 64, 21 L. ed. 801; *Tuck v. Olds*, 29 Fed. Rep. 788; *Case v. Loftus*, 89 Fed. Rep. 790; Gould, Waters, §§ 180, 181; *Morrill v. St. Anthony Falls W. P. Co.* 26 Minn. 232; *State v. Minneapolis Mill Co.* 26 Minn. 229; *Miller v. Mendenhall*, 8 L. R. A. 89, 43 Minn. 95, 19 Am. St. Rep. 219; *Hanford v. St. Paul & D. R. Co.* 7 L. R. A. 722, 43 Minn. 104; *Stevens Point Boom Co. v. Reilly*, 46 Wis. 237; *Atlee v. Northwestern U. Packet Co.* 88 U. S. 21 Wall. 389, 22 L. ed. 619.

Conn. Gen. Stat., Rev. 1888, § 2349, upon which plaintiff's rights are founded, provides that "nothing herein contained shall affect the rights of any owner of lands, in which there may be salt-water creeks or inlets, or which may be opposite to or contiguous to such navigable waters."

The rights of the defendant are carefully guarded by these provisions of the statute. The right of fishery of every kind in navigable waters has always been held and enjoyed in subordination to the right of navigation, and any erection or improvement which can be admitted by the latter will not be prevented by the former right.

Moulton v. Libbey, 87 Me. 472, 59 Am. Dec. 57; *Tinicum Fishing Co. v. Carier*, 61 Pa. 21, 100 Am. Dec. 597, 90 Pa. 88, 35 Am. Rep. 632; *Post v. Kreischer*, 32 Hun. 49; *Clark v. Providence*, 1 L. R. A. 725, 16 R. I. 337; Gould, Waters, § 180.

Seymour, J., delivered the opinion of the court:

It will not be necessary to state fully the finding in this case in order to understand the points involved. The defendant, owning land adjoining that part of Long Island sound known as "Stamford Harbor," and within the navigable waters of this state, built a wharf opposite and contiguous to his land from the upland, above high-water mark, to low-water mark, and thence, below low-water mark, out towards the channel of the harbor; and, for the purpose of connecting the end of his wharf with the harbor channel, he dug a channel between the two; also a channel in front of and alongside the end of his wharf. The wharf was built and the channels were dug to enable steamers and other vessels to receive and discharge passengers and freight to and from the defendant's adjoining upland, and in order that he might use the waters of Long Island sound opposite and contiguous to his land for the purposes of navigation. The plaintiff contends that, while it is the law of this state that the owner of the adjoining upland has the exclusive right of access to the water, over and upon the soil between high and low water mark, and the exclusive privilege of wharfing and erecting piers over the same, yet in no case has it been decided, and the law is not so, that he has a right to build

his wharf below low-water mark. It is stated in Swift's System (vol. 1, chap. 23, p. 341) that "all rivers that are navigable, all navigable arms of the sea, and the ocean itself on our coast, may in a certain sense be considered as common, for all the citizens have a common right to their navigation. But all adjoining proprietors on navigable rivers and the ocean have a right to the soil covered with water as far as they can occupy it, that is, to the channel, and have the exclusive privilege of wharfing and erecting piers on the front of their land. . . . Nor may adjoining proprietors erect wharves, bridges, or dams across navigable rivers so as to obstruct their navigation." This statement of the law is quoted in the opinion in *East Haven v. Hemingway*, 7 Conn. 186, with the suggestion that the court does not understand by it that the adjoining proprietors are seized of the soil covered by water, but that they have a right of occupation, properly termed a "franchise." The controversy between the parties regarded the title to the soil, with the wharf and store standing thereon, between high and low water mark on the east side of Dragon river, which is an arm of the sea where the tide ebbs and flows, and was navigable adjoining the premises for large vessels. That case decided that the proprietor of land adjoining a navigable river has an exclusive right to the soil between high and low water mark, for the purpose of erecting wharves and stores thereon. We do not recall any case in this state in which the precise point made in this case was in issue.

There are, however, expressions in the opinions in several cases which indicate the general views of at least the judges writing the respective opinions. Thus in *Simons v. French*, 25 Conn. 346, Judge Storrs says: "In Connecticut it is now settled . . . that the owner of the upland adjoining such [adjacent] flats becomes entitled, by virtue of his ownership of the upland, to the exclusive right of wharfage out over them in front of said upland to the channel of an arm of the sea adjoining such flats." In *Mather v. Chapman*, 40 Conn. 882, the court says: "It is conceded that by the settled law of Connecticut the title of a riparian proprietor terminates at ordinary high-water mark. It is also conceded that, though his title in fee thus terminate, yet he has certain privileges in the adjoining waters. Among the most important of these privileges are (1) that of access to the deep sea; (2) the right to extend his land into the water by means of wharves, subject to the qualification that he thereby does no injury to the free navigation of the water by the public." In *State v. Sargent*, 45 Conn. 358, the right of owners of land bounded on a harbor, to "embark therefrom and go upon the sea," is recognized. And in *New Haven S. B. Co. v. Sargent*, 50 Conn. 199, the right of a party, owner of the upland, to extend his wharf, if he desires, to the channel of the harbor, in that case some 900 feet below low-water mark, is expressly stated, and the words "deep water" and "channel" are used as synonymous. Aside from these references, the reason ordinarily stated for giving to

riparian proprietors the right of wharfage, to wit, to facilitate commerce and the loading and unloading of ships, together with the common sense of the matter, clearly indicates that the right should not be restricted as claimed by the plaintiff, unless there are positive decisions to that effect or imperative reasons for so doing. If, in view of the opinions already quoted, the question is to be regarded as an open one in this state, we see no good reason why it should not be decided in accordance with the convenience of riparian proprietors, and for the encouragement of commerce, so long as there is no counter-balancing injury involved to others. Except in cases where navigability begins at low-water mark, the right to wharf out to low-water mark only would be no privilege to adjoining proprietors nor benefit to commerce. It is significant that the word "wharf," as ordinarily defined, implies a structure in aid of navigation and to which vessels have access. This is well stated in *Langdon v. New York*, 98 N. Y. 151, thus: "A wharf is a structure on the margin of navigable waters, alongside of which vessels can be brought for the sake of being conveniently loaded or unloaded. . . . Hence water of sufficient depth to float vessels is an essential part of every wharf, a necessary incident thereof or appurtenance thereto, without which there can be no wharf and no wharfage. Indeed a wharf cannot be defined or conceived except in connection with adjacent navigable water." It seems to us therefore that a proprietor of land adjoining Stamford harbor, and waters of a like character in this state, has a right to connect himself with navigable water by means of wharves or channels extending from and adjacent to his upland, so long as he does nothing to interfere with the free navigation of the waters.

The defendant claimed that the Legislature had passed an Act, which was recited in the finding, which directly authorized the erec-

tion of the wharf in question. The grounds over part of which the wharf was built and the channels dug were designated for the planting and cultivation of oysters by a committee of the town of Stamford in accordance with the statutes. The plaintiff claimed that the defendant had no right to wharf out into said grounds or to dig said channels in the same, the same being situated below low-water mark and within the navigable waters of this state; that, the plaintiff having acquired his title to the grounds through original designations of a competent committee appointed for that purpose, his rights therein could not be affected by adjoining landowners, as the rights of such landowners, in contemplation of the statute, only extended to low-water mark; that the statute gave the defendant no right to build a wharf or dig a channel below low-water mark, and no right to build any wharf; and that, even if it did, it gave him such right only as subservient to the plaintiff's right to plant and cultivate oysters, and the right to build such wharf could be exercised only by obtaining the plaintiff's consent so to do. The court ruled adversely to the claims of the plaintiff, and rendered judgment for the defendant. The view we have taken of the law makes it unnecessary for us to examine the Act of the Legislature referred to. If, as we hold, the owner of the uplands in question had a right, as incident to such ownership, to connect the same by means of wharves or channels with the navigable water of the harbor, nothing has been done, so far as appears, to legally deprive him of that right, and the designation of the grounds for the planting and cultivation of oysters under the terms of the statute (Gen. Stat. §§ 2848, 2849,) is ineffectual for that purpose.

There is no error in the judgment appealed from.

The other Judges concurred.

MINNESOTA SUPREME COURT.

Uri L. LAMPREY and Wife, *Repts.*,

v.

STATE of Minnesota, Impleaded, etc., with Oscar M. Metcalf, *Appt.*

(.....Minn.....)

***1. When the United States has disposed of the lands bordering on a meandered lake, by patent, without reservation or restriction, it has nothing left to convey, and any patent thereafter issued for land forming the bed, or former bed, of the lake, is void and inoperative.**

2. Where the United States has made grants, without reservation or restriction, of public lands bounded on

*Headnotes by MITCHELL, J.

streams or other waters, the question whether the lands, forming the beds of the waters belong to the state, or to the owners of the riparian lands, is to be determined entirely by the law of the state in which lands lie.

3. The same rules govern the rights of riparian owners on lakes or other still waters as govern the rights of riparian owners on streams. Hence, if a meandered lake is "non-navigable," in fact, the patentee of the riparian land takes the fee to the center of the lake; but, if the lake is "navigable" in fact, its waters and bed belong to the state, in its sovereign capacity, and the riparian patentee takes the fee only to the water line, but with all the rights incident to riparian ownership on navigable waters, including the right to accretions or relictions formed in front of his land by the action or recession of the water.

NOTE.—On the subject of ponds and lakes, see *Concord Mfg. Co. v. Robertson* (N. H.) *post*, 679, and 18 L. R. A.

note, also *Gouverneur v. National Ice Co.* (N. Y.) *post*, 686, and *note*.

See also 18 L. R. A. 679; 26 L. R. A. 609.

4. The division of waters into navigable and nonnavigable is merely a method of dividing them into public and private, which is the more natural classification; and the definition or test of navigability to be applied to our inland lakes must be sufficiently broad and liberal to include all the public uses, including boating for pleasure, for which such waters are adapted. So long as they continue capable of being put to any beneficial public use, they are public waters.

(January 10, 1893.)

APPEAL by the State from a judgment of the District Court for Ramsey County in favor of plaintiffs in an action brought to determine adverse claims to certain vacant and unoccupied real estate which formerly constituted the bed of a meandered lake. *Affirmed.*

The facts are stated in the opinion.

Messrs. Moses E. Clapp, H. W. Childs and W. N. Jones, for appellant:

Whatever may be said as to the title of the state to the bed of the lake, by virtue of sovereignty, it is very apparent that the United States had no title to convey to Gilmore.

The conclusiveness of a patent goes only to the government, and parties claiming under junior patents.

Sedgwick & Wait, Title to Lands, § 887.

When issued without authority it may be impeached collaterally.

Doe v. Winn, 24 U. S. 11 Wheat. 880, 6 L. ed. 500; *St. Louis Smelt & Ref. Co. v. Kemp*, 104 U. S. 644, 26 L. ed. 878.

The issuance of the patent is a merely ministerial act.

Stoddard v. Chambers, 48 U. S. 2 How. 285, 11 L. ed. 269; *Davis v. Weibold*, 139 U. S. 507, 35 L. ed. 288; *Hardin v. Jordan*, 140 U. S. 400, 35 L. ed. 439.

A state court will relieve against a patentee when the issuance of a patent is unauthorized.

Groves v. Fulsome, 16 Mo. 544, 57 Am. Dec. 247; *Huntrecker v. Clark*, 12 Mo. 387; *Gaines v. Hale*, 16 Ark. 25; *Bagnell v. Broderick*, 88 U. S. 13 Pet. 451, 10 L. ed. 242.

The government never owned or acquired title to the beds of lakes within the thirteen original states.

The new states have, upon their admission into the Union, the same rights, sovereignty, and jurisdiction, as to the soil of their navigable waters, as the older states.

Gould, Waters, § 89; *Re Bevans*, 17 Copp's L. O. 18; *Re Burns*, 2 Copp's L. L. 1090; *Webber v. State Harbor Comrs.* 85 U. S. 18 Wall. 65, 21 L. ed. 801; *Barney v. Keokuk*, 94 U. S. 334, 24 L. ed. 228.

Within the history of the government, it never has been its policy to meander any lands to which it claimed title.

The only purpose of meander lines is to bound and about the lands granted upon the waters whose margins are thus meandered.

Hardin v. Jordan, 140 U. S. 880, 35 L. ed. 432.

Where waters are once meandered and the abutting lands surveyed and conveyed by the government with reference thereto, the government is not only thereby divested of all previously assumed jurisdiction but it would

not be in good conscience for the government to assume such jurisdiction or ownership.

Mitchell v. Smale, 140 U. S. 412, 35 L. ed. 444.

When the Revolution took place the people of each state became themselves sovereign, and, in that character, had the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution.

Martin v. Waddell, 41 U. S. 16 Pet. 410, 10 L. ed. 1012.

The new states have upon their admission into the Union the same rights, sovereignty and jurisdiction, as to the soil of navigable waters, as the older states.

Gould, Waters, § 89; *Webber v. State Harbor Comrs.* and *Barney v. Keokuk*, *supra*.

The question of ownership of the soil under the water is one which each state is entitled to determine for itself, in accordance with its views of local law and public policy.

Barney v. Keokuk, 94 U. S. 334, 24 L. ed. 227; *Hardin v. Jordan*, 140 U. S. 382-402, 35 L. ed. 433-440.

This country adopted the common law of England only so far as it was applicable to their situation.

Lorman v. Benson, 8 Mich. 18, *note*; *Perrin v. Lepper*, 84 Mich. 292; *Coburn v. Harvey*, 18 Wis. 148; *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570.

All the learning of the British tribunals before 1878 will be found devoted almost exclusively to tide waters. No instance can be found where the case involved the proprietorship of a lake bed substantially denuded of all its waters. They were cases, so far as soil was concerned, where the abutting land had been affected by the natural action of the waters. To whom shall the increase of the abutting land belong? To whose benefit were the waves, year after year, imperceptibly, adding to the shore either by accretion or reliction? Discovered from the land of the riparian owners, the deposit or the recession, save after the lapse of many years, it may be, was of slight, if any, value to the crown. To meet such cases the law of accretion, which is identical with that of reliction, had its origin and rests upon the maxim *de minimis non curat lex*.

1 Bl. Com. *261.

Will it not be a strained application of that principle to yield to plaintiff's contention in this case? When the reason ceases, the rule also ceases.

The most reasonable view to take of the subject, is to regard such lakes and ponds as a class *sui generis*, requiring the application of such salutary rules as will meet their peculiar requirements.

Walker, Introduction to American Laws, 7th ed. 54.

Courts elsewhere have not hesitated to repudiate commonly received notions as to what constitutes the common law.

Canal Comrs. v. People, 5 Wend. 463.

In *Wheeler v. Spinola*, 54 N. Y. 385, the court says: "Neither can the rule as to riparian ownership be applied to this pond which is applied to ordinary fresh-water streams. A boundary upon it does not carry title to its

center, but only to low-water mark. Such is the rule as to boundaries upon natural ponds and lakes."

Canal Comrs. v. People, supra; Champlain & St. I. R. Co. v. Valentine, 19 Barb. 484; *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393; *Ledyard v. Ten Eyck*, 88 Barb. 102; *Boorman v. Sunnuchs*, 42 Wis. 242.

Indiana repudiates the doctrine that the riparian owner owns to the thread or center of a non-navigable lake.

Stoner v. Rice, 6 L. R. A. 387, 121 Ind. 52; *Eduard v. Ogle*, 76 Ind. 808; *Trustees of Schools v. Schroll*, 120 Ill. 511; *Rockwell v. Baldwin*, 53 Ill. 19; *Indiana v. Milk*, 11 Biss. 197.

Messrs. Stryker & Moore, for parties interested, adversely to plaintiffs:

In the case of the lake here under consideration, no alluvion or reliction was possible.

Alluvion is an addition made to land by the washing of the sea, a navigable river, or other stream, where the increase is so gradual in its progress that it cannot be perceived how much is added in any moment of time.

2 Bl. Com. 262; 3 Rolle, Abr. 170.

Without a current, tide or waves, there can be no alluvion or reliction; none of these exist in a surface lake.

Evaporation, percolation, and the disappearance of water through drainage, and other artificial causes, are no more like to alluvion and reliction than is this shallow pool to the ocean and great rivers in which the doctrine contended for by respondent originated, and to which alone it belongs.

Smith v. St. Louis Public Schools, 30 Mo. 290; *Chapman v. Hoskins*, 2 Md. Ch. 485. See *Throop v. Coburg & P. R. Co.* 5 U. C. O. P. 509, and cases therein cited. Vattel, Law of Nations, 121; Callis, Sewers, 51; 2 Bl. Com. 262; 1 Stephen, Com. 419, note p. See also *St. Clair County v. Livingston*, 90 U. S. 23 Wall. 46, 68, 23 L. ed. 59, 63; *Lammers v. Nissen*, 4 Neb. 250; *Berry v. Snyder*, 8 Bush, 266, 96 Am. Dec. 219.

Respondent claims that it is the universal rule of all states and countries that the riparian proprietor owns in fee by virtue of his grant, bounded by a lake, to its center or thread. A careful perusal of the cases cited by him, as well as of the following, which enunciate a rule the reverse of that stated by him, convinces us that both the weight of reason and authority are against him.

See *Ladd v. Osborn*, 79 Iowa, 98; *Mariner v. Schulte*, 18 Wis. 692; *Boorman v. Sunnuchs*, 42 Wis. 233; *Delaplaine v. Chicago & N. W. R. Co.* Id. 214; 8 Kent, Com. 429, note a; *Bradley v. Rice*, 13 Me. 201, 29 Am. Dec. 501; *Nelson v. Butterfield*, 21 Me. 229; *Mansur v. Blake*, 62 Me. 88; *Wood v. Kelley*, 30 Me. 47; *Warren v. Chambers*, 25 Ark. 120; *Primm v. Walker*, 88 Mo. 94; *Indiana v. Milk*, 11 Fed. Rep. 889; *State v. Gilmanton*, 9 N. H. 461; *Paine v. Woods*, 108 Mass. 160; *Com. v. Vincent*, Id. 441; *Waterman v. Johnson*, 13 Pick. 261; *West Roxbury v. Stoddard*, 7 Allen, 158; *Canal Comrs. v. People*, 5 Wend. 423; *Wheeler v. Spinola*, 54 N. Y. 877; *Fletcher v. Phelps*, 28 Vt. 257; *Jakevay v. Barrett*, 38 Vt. 316; *Austin v. Rutland R. Co.* 45 Vt. 215; *Trustees of Schools v. Schroll*, 120 Ill. 511; *Seaman v. Smith*, 24 Ill. 521; *Niles v. Burke*, 1 Pugsley 18 L. R. A.

(N. B.) 237; *Burke v. Niles*, 2 Hannay (N. B.) 166; *Zeller v. Southern Yacht Club*, 34 La. Ann. 838; 12 Am. & Eng. Encyclop. Law, 506; 2 Cruise, Dig. 886; Gould, Waters, § 208; Angell, Watercourses, §§ 41, 42.

Though the Massachusetts and Maine rule is based upon the Colonial Ordinance of 1647, yet it is to be noted that the courts give as a reason for their decision, that it is in accord with the common-law rule.

Paine v. Woods, supra.

The Minnesota cases have covered the following ground, and we think that they have gone no further. The meander line is not a boundary. The riparian proprietor upon streams navigable in fact, and upon the great lakes, owns the land in fee to the low-water mark.

Schurmeier v. St. Paul & P. R. Co. 10 Minn. 82; *St. Paul & P. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 272, 19 L. ed. 74; *St. Paul, S. & T. F. R. Co. v. St. Paul & P. R. Co. First Div.* 26 Minn. 81; *Everson v. Waseca*, 44 Minn. 247; *Wait v. May* (Minn.) Feb. 28, 1892.

And though the riparian proprietor does not take title in fee below low water, he is entitled to enjoy riparian rights incident to the land, and he may disassociate such rights from the shore line and convey them to persons having no interest in the original riparian estate.

Brisbane v. St. Paul & S. C. R. Co. 23 Minn. 114; *Rippe v. Chicago, D. & M. R. Co.* Id. 18; *Carli v. Stillwater, St. R. & Transfer Co.* 28 Minn. 373; *Stillwater Union Depot St. R. & Transfer Co. v. Brunswick*, 31 Minn. 297; *Miller v. Mendenhall*, 8 L. R. A. 89, 43 Minn. 95; *Hanford v. St. Paul & D. R. Co.* 7 L. R. A. 723, 43 Minn. 104; *Minneapolis Trust Co. v. Eastman*, 47 Minn. 301; *Gilbert v. Eldridge*, 13 L. R. A. 411, 47 Minn. 210.

If the United States did not dispose of this land through the riparian patents, and we think it did not, title passed by the Gilmore patent. That patent can only be attacked in a direct proceeding to set it aside.

Davis v. Wieboldt, 139 U. S. 507, 35 L. ed. 238; *St. Louis Smelt. & Ref. Co. v. Kemp*, 104 U. S. 636, 26 L. ed. 875; *Johnson v. Towlesley*, 80 U. S. 13 Wall. 72, 20 L. ed. 485.

Mr. Uri L. Lamprey, for respondents:

In the patents conveying these riparian lands pursuant to the survey of 1853, the lake is the boundary whether the meander line coincide with the shore or not.

Schurmeier v. St. Paul & P. R. Co. 10 Minn. 82; *St. Paul, S. & T. F. R. Co. v. St. Paul & P. R. Co. First Div.* 26 Minn. 81; *Carli v. Stillwater St. R. & Transfer Co.* 28 Minn. 373; *Everson v. Waseca*, 44 Minn. 247; *St. Paul & P. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 272, 19 L. ed. 74; *Jefferis v. East Omaha Land Co.* 124 U. S. 178, 33 L. ed. 872; *Palmer v. Dodd*, 64 Mich. 474; *Fuller v. Dauphin*, 124 Ill. 542; *Menasha Wooden Ware Co. v. Lawson*, 70 Wis. 600; *Wright v. Day*, 33 Wis. 260; *Boorman v. Sunnuchs*, 42 Wis. 233; *Sphung v. Moore*, 120 Ind. 852; Gould, Waters, § 76; *Mitchell v. Smale*, 140 U. S. 406, 35 L. ed. 442.

All additions to land, when formed by gradual and imperceptible degrees, belong to the riparian proprietor. There is no distinction in this respect between soil gained by accretions and that uncovered by relictions. Nor does it

make any difference whether the waters are navigable or unnavigable.

Rome:

Gaius (by Poste), § 70, p. 165; Justinian (by Sandar), lib. 2, title 1, p. 167.

France:

Code Napoleon, lib. 2, *Property*, § 556; *Morgan v. Livingston*, 6 Mart. O. S. 11.

England:

2 Bracton, chap. 2; 2 Bl. Com. *262; Hale, *De Jure Maris*, chap. 1, § 2; *King v. Yarborough*, 8 Barn. & C. 91; *Re Hull & S. R. Co.* 5 Meea. & W. 830; *John Doe on Demise Seabkrists & East India Co.* 10 Moore, P. C. C. 140. This rule was also the Hindoo law.

Musummat Imam Bandi and Wajid Ali Kuhn v. Hurgovind Ghose, 4 Moore, Ind. App. 408.

The United States:

Gould, *Waters*, 2d ed. (1891) § 155.

Alabama:

Hagan v. Campbell, 8 Port. (Ala.) 9, 38 Am. Dec. 267.

Arkansas:

Warren v. Chambers, 25 Ark. 120.

California:

Tappendorf v. Downing, 76 Cal. 169. See also *Dana v. Jackson Street Wharf Co.* 81 Cal. 120, 89 Am. Dec. 164; *Taylor v. Underhill*, 40 Cal. 471; *Fillmore v. Jennings*, 78 Cal. 634.

Connecticut:

Welles v. Bailey, 55 Conn. 292. See also *Middleton v. Sage*, 8 Conn. 228; *Perry v. Pratt*, 81 Conn. 442; *Lockwood v. New York & N. H. R. Co.* 37 Conn. 391.

Illinois:

Livingston v. St. Clair County, 64 Ill. 56; *Chicago Dock & Canal Co. v. Kinzie*, 93 Ill. 416. See also *Bristol v. Carroll County*, 95 Ill. 84; *Kehr v. Snyder*, 114 Ill. 818; *Elgin v. Beckwith*, 119 Ill. 867.

Iowa:

Kraut v. Crawford, 18 Iowa, 554, 87 Am. Dec. 414. See also *Cook v. Burlington*, 30 Iowa, 99, 6 Am. Rep. 649.

Kentucky:

Berry v. Snyder, 8 Bush, 266, 96 Am. Dec. 219. See also *Miller v. Hepburn*, 8 Bush, 826.

Louisiana:

Morgan v. Livingston, 6 Mart. O. S. 19; *Livingston v. Heerman*, 9 Mart. O. S. 656; *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 123; *Kennedy v. Municipality No. 2*, 10 La. Ann. 54; *Cambre v. Kohn*, 8 Mart. N. S. 295; *Syndic. of Barrett v. New Orleans*, 18 La. Ann. 106. See also *Barre v. New Orleans*, 22 La. Ann. 612.

Maryland:

Linthicum v. Coan, 64 Md. 439; *Giraud v. Hughes*, 1 Gill & J. 249; *Baltimore & O. R. Co. v. Chase*, 43 Md. 28; *Chapman v. Hoskins*, 2 Md. Ch. 485; *Ridgely v. Johnson*, 1 Bland, Ch. 816, note; *Goodsell v. Lawson*, 42 Md. 345; *Patterson v. Gelston*, 23 Md. 432.

Massachusetts:

Ingraham v. Wilkinson, 4 Pick. 278, 16 Am. Dec. 342; *Adams v. Frothingham*, 8 Mass. 352, 8 Am. Dec. 151. See also *Deerfield v. Arms*, 17 Pick. 41, 28 Am. Dec. 276; *Hopkins Academy v. Dickinson*, 9 Cush. 544.

Michigan:

Webber v. Pere Marquette Boom Co. 62 Mich. 626.

Minnesota:

18 L. R. A.

Schurmeier v. St. Paul & P. R. Co. 10 Minn. 82; *Minneapolis Trust Co. v. Eastman*, 47 Minn. 801. See also *Stillwater Union Depot St. R. & Transfer Co. v. Brunswick*, 31 Minn. 297; *Brisbine v. St. Paul & S. C. R. Co.* 23 Minn. 114; *Carli v. Stillwater St. R. & Transfer Co.* 28 Minn. 373; *Morrill v. St. Anthony Falls W. P. Co.* 26 Minn. 223; *Wast v. May* (Minn.) Feb. 28, 1892.

Mississippi:

The Magnolia v. Marshall, 39 Miss. 110.

Missouri:

Smith v. St. Louis Pub. Schools, 30 Mo. 290; *Benson v. Morrow*, 61 Mo. 845; *St. Louis v. Lemp*, 98 Mo. 477; *Campbell v. Laclede Gas Light Co.* 84 Mo. 852; *St. Louis Pub. Schools v. Risley*, 40 Mo. 857; *Busse v. Russell*, 86 Mo. 209; *Lamme v. Busse*, 70 Mo. 463.

Nebraska:

Lammers v. Nissen, 4 Neb. 245; *Bissell v. Fletcher*, 19 Neb. 725.

New Hampshire:

Gerrish v. Clough, 48 N. H. 11, 97 Am. Dec. 561, 2 Am. Rep. 165.

New Jersey:

Camden & A. Land Co. v. Lippincott, 45 N. J. L. 405.

New York:

Cook v. McClure, 58 N. Y. 487, 17 Am. Rep. 270; *Dickinson v. Codwise*, 1 Sandf. Ch. 214, 7 L. ed. 804; *Halsey v. McCormick*, 18 N. Y. 147; *Mulry v. Norton*, 29 Hun, 660; *People v. Jones*, 112 N. Y. 597; *Emans v. Turnbull*, 3 Johns. 812.

North Carolina:

Murry v. Sermon, 8 N. C. 56; *Beaufort Comrs. v. Duncan*, 46 N. C. 234.

Ohio:

Lamb v. Rickets, 11 Ohio, 811; *Niehau v. Shepherd*, 26 Ohio St. 40.

Oregon:

Minto v. Delaney, 7 Or. 343; *Pearcy v. Bybee*, 20 Or. 385.

Pennsylvania:

Morgan v. Scott, 26 Pa. 51.

Rhode Island:

Prior v. Comstock, 17 R. I. —.

South Carolina:

Spigener v. Cooner, 8 Rich. L. 301, 64 Am. Dec. 755.

Tennessee:

McClure v. James, 7 Lea, 98.

Texas:

Fulton v. Frandolig, 63 Tex. 330.

Vermont:

Newton v. Eddy, 23 Vt. 519.

Wisconsin:

Boorman v. Sunnucks, 42 Wis. 283.

This rule relative to accretions has always been the law of the Supreme Court of the United States:

Jefferis v. East Omaha Land Co. 134 U. S. 178, 33 L. ed. 872; *New Orleans v. United States*, 35 U. S. 10 Pet. 662, 9 L. ed. 573; *Banks v. Ogden*, 69 U. S. 2 Wall. 57, 17 L. ed. 818; *St. Clair County v. Livingston*, 90 U. S. 23 Wall. 46, 23 L. ed. 59; *Jones v. Soular*, 65 U. S. 24 How. 41, 16 L. ed. 604; *Jones v. Johnston*, 59 U. S. 18 How. 156, 15 L. ed. 323; *Johnston v. Jones*, 66 U. S. 1 Black. 222, 17 L. ed. 120; *St. Louis Pub. Schools v. Risley*, 77 U. S. 10 Wall. 99, 19 L. ed. 850.

By law the bed of the lake, whether covered

by water or not, belongs to the riparian owner.

Hardin v. Jordan, 140 U. S. 882, 85 L. ed. 438; Justinian, lib. 2, title 1, §§ 22, note; Poste, Galus, lib. 2, § 72; Sir Matthew Hale, De Jure Maris, lib. 1, chap. 1; Woolrych, Waters, *46; Phear, Rights of Waters, *11; Gould, Waters, § 78; Coulson & Forbes, Law of Waters, p. 98; Co. Litt. 4 a & 5 a; *MacKenzie v. Bankes*, L. R. 8 App. Cas. 1324; *Ridgway v. Ludlow*, 58 Ind. 248; *Stoner v. Rice*, 6 L. R. A. 887, 121 Ind. 51; *Forayth v. Smale*, 7 Biss. 201; *Hodges v. Williams*, 95 N. C. 331; *Finley v. Hershey*, 41 Iowa, 889; *Webber v. Pere Marquette Boom Co.* 62 Mich. 623; *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435; *Ryan v. Brown*, 18 Mich. 196, 100 Am. Dec. 154; *Rice v. Ruddiman*, 10 Mich. 125; *Cobb v. Davenport*, 82 N. J. L. 369; *Boorman v. Sunnucks*, 42 Wis. 238.

The common law is the law of this state.

State v. Pule, 12 Minn. 164; *Blackman v. Wheaton*, 19 Minn. 326; *Locke v. St. Paul & P. R. Co. First Div.* 15 Minn. 350; *Dutcher v. Culver*, 24 Minn. 584.

Under the swamp-land grant to Minnesota, until the proper steps have been taken by the proper officers to determine that certain lands are swamp lands, and until the same have been duly certified to or confirmed to the state, the state has no title to them as against a purchaser thereof from the government. Such is the express provision of the Act itself.

Buena Vista County v. Iowa Falls & S. O. R. Co. 113 U. S. 165, 28 L. ed. 680; *Prior v. Lambeth*, 78 Mo. 588.

The land must be selected as swamp land within the two years' limitation contained in the Act, or the title lapses.

Pengra v. Munz, 29 Fed. Rep. 830; *Cañn v. Barnes*, 5 Fed. Rep. 326.

The determination of the question, what are and what are not swamp lands within the purview of the Act, rests entirely with the secretary of the interior, and his decision, unless impeached for fraud or mistake other than an error of judgment, is final.

French v. Fyan, 93 U. S. 170, 23 L. ed. 812.

When the government has once granted its lands it cannot by any subsequent act or patent defeat that grant.

Stoner v. Rice, 6 L. R. A. 887, 121 Ind. 51; *Fuller v. Dauphin*, 124 Ill. 542; *Taylor v. Underhill*, 40 Cal. 471; *Minto v. Delaney*, 7 Or. 837; *Kraut v. Crawford*, 18 Iowa, 549; *Hardin v. Jordan*, 140 U. S. 871, 85 L. ed. 438.

Sovereignty is divided into two classes—domain public and domain of the state. Whatever rights the state has here are based upon the principle of domain public, not domain of the state.

See *Gould v. Hudson River R. Co.* 6 N. Y. 545; *Smith v. Rochester*, 93 N. Y. 477, 44 Am. Rep. 398, and cases cited.

Each state, as sovereign, has succeeded to the rights which the king formerly possessed in such rivers and in the soil beneath.

Gould, Waters, § 42.

All prerogatives must be for the advantage and good of the people, otherwise they might not be allowed by law.

Bacon, Abr. title, *Prerogatives*, p. 1; *Com. v. Charlestown*, 1 Pick. 180, 11 Am. Dec. 161.

A stream is a public highway whenever it

is suitable in its natural condition for general use in travel or in the transportation of property.

Gould, Waters, § 107; Hale, De Jure Maris, chaps. 2, 3.

Streams which are not floatable, or cannot in their natural state be used for the carriage of boats, rafts or other property, are absolutely private.

Gould, Waters, § 108, and many cases cited.

The mere possibility of occasional use during brief or extraordinary freshets does not give it a public character.

Gould, Waters, § 109; *Munson v. Hungerford*, 6 Barb. 265; *Morgan v. King*, 35 N. Y. 454, 91 Am. Dec. 58; *Morgan v. King*, 18 Barb. 277; *Morgan v. King*, 30 Barb. 9; *Curtis v. Keesler*, 14 Barb. 511; *Olson v. Merrill*, 42 Wis. 203; *Thunder Bay River Boom Co. v. Speechley*, 31 Mich. 338, 18 Am. Rep. 184; *Middleton v. Flat River Boom Co.* 17 Mich. 538; *Hubbard v. Bell*, 54 Ill. 110, 5 Am. Rep. 98; *Cates v. Wadlington*, 1 McCord, L. 580, 10 Am. Dec. 699; *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641; *Treat v. Lord*, 42 Me. 552, 66 Am. Dec. 298; *Lewis v. Coffey County*, 77 Ala. 190, 54 Am. Rep. 55; Article on Streams Periodically Navigable, 5 Alb. L. J. 407.

The public right is limited to those streams and inlets which are capable of public use.

Rowe v. Granite Bridge Corp. 21 Pick. 344; *United States v. The Montello*, 87 U. S. 20 Wall. 480, 22 L. ed. 891; *United States v. New Bedford Bridge*, 1 Woodb. & M. 401; *Wethersfield v. Humphrey*, 20 Conn. 218; *Glover v. Powell*, 10 N. J. Eq. 211; *Flanagan v. Philadelphia*, 43 Pa. 219; *Sullivan v. Spottswood*, 82 Ala. 163; *Atty-Gen. v. Woods*, 103 Mass. 436, 11 Am. Rep. 890; *Colchester v. Brooks*, 7 Q. B. 839.

The public right may be extinguished by natural causes like recession of the water.

Res v. Montague, 4 Barn. & C. 598.

Fresh-water streams which are not a common passage are private property.

Gould, Waters, § 46, and many cases cited; *Hodges v. Williams*, 95 N. C. 331, 59 Am. Rep. 242; *Stapp v. The Clyde*, 43 Minn. 193.

Where riparian estates are conveyed the general presumption is that the purchaser's title extends as far as the grantor owns. And this rule applies to a grant from the crown, a state, or the United States. Even a marsh, bayou, or swamp may constitute a well-defined boundary of a tract of land, and the thread of the channel or stream flowing through it, if any, may be regarded as the boundary line.

Gould, Waters, 2d ed. §§ 195, 196; *Boston v. Richardson*, 18 Allen, 155; *Ingraham v. Wilkinson*, 4 Pick. 268, 16 Am. Dec. 342; *Pratt v. Lamon*, 2 Allen, 275-284; *Devonshire v. Pattinson*, L. R. 20 Q. B. Div. 263; *Micklethwait v. Newlay E. Co.* L. R. 33 Ch. Div. 133; *Wright v. Howard*, 1 Sim. & Sta. 190; *Wishart v. Wyllie*, 1 Macq. H. L. Cas. 389; *Tyler v. Wilkinson*, 4 Mason, 397; *Thomas v. Hatch*, 3 Sumn. 170; *Johnson v. Anderson*, 18 Me. 76; *Jackson v. Hathaway*, 15 Johns. 447; *Varick v. Smith*, 9 Paige, 547, 4 L. ed. 811; *Walton v. Tift*, 14 Barb. 216; *Demeyer v. Legg*, 18 Barb. 16; *Hammond v. McLachlan*, 1 Sandf. 328; *Herring v. Fisher*, 1 Sandf. 344; *Jackson v.*

Lewis, 12 Johns. 252; *People v. Law*, 34 Barb. 494; *Wetmore v. Law*, 34 Barb. 515; *Goce v. White*, 20 Wis. 426; *Arnold v. Elmore*, 16 Wis. 509; *Newhall v. Ireson*, 8 Cush. 595, 54 Am. Dec. 790; *Buck v. Squiers*, 22 Vt. 434; *Stanford v. Mangin*, 30 Ga. 355; *Williams v. Buchanan*, 23 N. C. 535, 85 Am. Dec. 760; *Riz v. Johnson*, 5 N. H. 520, 22 Am. Dec. 472; *Hammond v. Ridgely*, 5 Harr. & J. 245, 9 Am. Dec. 522; *Kingsland v. Chittenden*, 6 Lans. 15; *Muller v. Landa*, 31 Tex. 265, 98 Am. Dec. 529; *Norris v. Hall*, 1 Mich. 202; *Lord v. Sydney*, 12 Moore, P. C. C. 478; *Boston v. Richardson*, 105 Mass. 351-355; *Lunt v. Holland*, 14 Mass. 149; *Cold Spring Iron Works v. Toland*, 9 Cush. 492; *Claremont v. Carlton*, 2 N. H. 369, 9 Am. Dec. 88; *Ex parte Jennings*, 6 Cow. 518, 16 Am. Dec. 447; *Arthur v. Case*, 1 Paige, 447, 2 L. ed. 710; *Coibert v. O'Conner*, 8 Watts, 470; *Hayes v. Bowman*, 1 Rand. (Va.) 417-420; *Browne v. Kennedy*, 5 Harr. & J. 195; *Ridgely v. Johnson*, 1 Bland, Ch. 316, note; *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112; *Morgan v. Reading*, 8 Smedes & M. 366; *The Magnolia v. Marshall*, 39 Miss. 109; *Gavit v. Chambers*, 3 Ohio, 496; *Jones v. Souard*, 65 U. S. 24 How. 41, 16 L. ed. 604; *Lawson v. Mowry*, 53 Wis. 219; *Cansler v. Henderson*, 64 N. C. 469; *Huff v. Tobey*, 56 N. Y. 633; *Phinney v. Waits*, 9 Gray, 269, 69 Am. Dec. 288; *Waterman v. Johnson*, 13 Pick. 261; *Mansur v. Blake*, 62 Me. 38; *Holden v. Chandler*, 61 Vt. 291; *Mill River Woolen Mfg. Co. v. Smith*, 34 Conn. 462; *Primm v. Raboteau*, 56 Mo. 407; *Dunkles v. Wilton E. Co.* 24 N. H. 489; *Smith v. Ford*, 48 Wis. 115-163; *Carter v. Chesapeake & O. R. Co.* 26 W. Va. 644, 53 Am. Rep. 116; *Turner v. Holland*, 54 Mich. 300; *Brumagin v. Bradshaw*, 39 Cal. 24; *Felder v. Bonnet*, 2 McMull. L. 44. 37 Am. Dec. 545; *Brooks v. Britt*, 15 N. C. 481.

Mitchell, J., delivered the opinion of the court:

In 1853, at the time of making the United States survey of sections 4, 5, 8, and 9, township 28, range 22, there was in the center of these four sections a shallow, non-navigable lake, comprising about 300 acres, which the government surveyor meandered, in accordance with the rules and instructions of the department, "to meander all lakes and deep ponds of the area of twenty-five acres and upwards," (1 Lester, Land Laws, 714,) and in doing so ran the meander lines substantially along the margin of the lake. The lake and the meanders thereof appear on the official plat of the survey, and are referred in the field notes. By this survey the lands bordering on the lake were subdivided into fractional governmental subdivisions and lots, the lake forming the boundary thereof on one side. The survey and plat were approved by the secretary of the interior in 1854. Subsequently, and prior to 1856, the United States, by patents, conveyed, without reservation or restriction, to various parties, all of these lands, which were described in the patents by their governmental subdivision or lot, according to the plat and survey, which were referred to in, and made part of, the patents. By sundry mesne conveyances from the patentees, the plaintiffs and de-

fendant Metcalf have become the owners of all these riparian lands. Since the survey in 1853 the lake has been, through natural causes, gradually and imperceptibly drying up, until now its former bed is all dry land. In 1860, after the lake had partially dried up, the United States land department caused a survey to be made of the land constituting that part of the former bed of the lake situate between the original meander line and the then existing margin of the lake, and in 1873 assumed to issue a patent therefor to one Gilmore, who subsequently conveyed to plaintiffs and Metcalf, who assert title to the former bed of the lake both as grantees of the riparian lands according to the original survey of 1853, and also, in part, under the Gilmore patent. The state, on the other hand, claims that the Gilmore patent is void, and that the patents, according to the original United States survey, only conveyed the land to the margin of the lake, as it then existed, and that the former bed of the lake belongs to the state, in its sovereign capacity. In the pleadings the state also asserted title under the "swamp-land grant" from the United States; but this claim was abandoned on the trial, and very properly so, because, for manifest reasons, it was entirely untenable.

It will be thus seen that the question presented is, What rights in or to the soil under water does the patentee of land bounded by a meandered inland lake acquire by his patent? The same question was suggested in *Huntman v. Hendricks*, 44 Minn. 423, but not decided, in view of its great importance, and the fact that it was not fully argued by counsel. The importance of the question, both to the public and to riparian owners, is apparent, when we consider that there are many thousand of such lakes in this state, which, although most of them may not be adapted for navigation, in its ordinary, commercial sense, have been, from the earliest settlement of the state, resorted to and used by the people as places of public resort, for purposes of boating, fishing, fowling, cutting ice, etc., and the further fact that observation teaches that the waters of many of these lakes are, from natural causes, slowly but imperceptibly receding, so that a part of what was their bed when surveyed has, or in time will, become dry land. The right of the public to use these lakes for the purposes referred to, as well as the right of riparian owners to these relict lands, and consequently their right of access to the water after such reliction occurs, are therefore all involved in the question presented. The question ought to be approached and considered from a practical, as well as legal, standpoint; and as the common law is a body of principles, and not of mere arbitrary rules, the effort should be to apply the spirit and reason of these principles to the state of facts presented.

There are certain matters which are so well settled that they may be summarily disposed of at the outset. Without troubling ourselves to consider what were the rights of the United States in these waters before they conveyed the lands bordering on them, it is

well settled that, having disposed of lands bordering on a meandered lake by patent, without reservation or restriction, they have nothing left to convey, and consequently the land department was thereafter without jurisdiction, and the Gilmore patent, issued in 1873, was inoperative and void; also that a meander line is not a boundary, but that the water whose body is meandered is the true boundary, whether the meander line in fact coincides with the shore or not; also, that grants by the United States of its public lands bounded on streams or other waters, made without reservation or restriction, are to be construed according to the law of the state in which the lands lie; and, consequently, whether the land forming the beds of these lakes belongs to the state, or to the owners of the riparian lands, is a question to be determined entirely by the laws of Minnesota. In support of these propositions, we need only cite *Hardin v. Jordan*, 140 U. S. 871, 85 L. ed. 428; and *Mitchell v. Smale*, 140 U. S. 406, 85 L. ed. 442.

In *St. Paul, S. & T. F. R. Co. v. St. Paul & P. R. Co. First Div.*, 26 Minn. 81, this court was led, from certain *dicta* in *St. Paul & P. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 272, 19 L. ed. 74, to suppose that the supreme court of the United States meant to hold otherwise as to patents of public lands bordering on navigable streams; but that no such doctrine has been adopted by that court is evident from *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224, and subsequent cases. We therefore approach the question in this case untrammelled by the binding authority of any Federal decisions, or even by any direct decisions in this state, in which this is still an open question. What the relative rights of the state and of riparian owners in the waters and beds of these lakes are, largely depends upon the question whether the rules of law as to the rights of grantees of lands bordering on running streams are applicable to grants of land bordering on lakes. The early English decisions, dealing, as they did, mainly with arms of the sea and rivers in which the tide ebbed and flowed, furnish but little light on this subject. In many of the states of the Union, this branch of the law is still somewhat unsettled, and, as said in *Huntsman v. Hendricks*, *supra*, the decisions are somewhat conflicting. The subject was recently very ably and exhaustively considered by the eminent jurist, the late Justice Bradley, in *Hurdin v. Jordan*, *supra*, in which all the authorities—Roman, English, and American—are collected and reviewed; and we think we may fairly say of the decision in that case that the result and logic of it is that, at common law, the rules governing riparian rights on streams apply, *mutatis mutandis*, to grants of land bordering on lakes; consequently, if they are non-navigable the grantees, if their grants are without reservation or restriction, take to the center of the lake, but that if they are navigable the grantees take the fee only to high water, but with all the riparian rights incident to the ownership of riparian land, including the right to accretions and relictions. It is true

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that case was controlled by the law of Illinois, and the only question was what the law of that state was; but, having determined that the courts of Illinois had adopted the common law on the subject, it became necessary to ascertain what the common law was; and in that point of view the conclusion arrived at on that question is pertinent here.

As has been already suggested, there are but few authorities on the question in England; for in England proper there are but few lakes, and in Scotland the civil law prevails. The case of *Bristow v. Cormican*, L. R. 8 App. Cas. 641, goes far towards sustaining the conclusion reached in *Hardin v. Jordan*, although it must be admitted that it is left in some doubt as to whether the presumption of ownership to the thread of the stream, which exists with regard to owners of land on the banks of nontidal streams of running water, exists also on inland lakes, navigable in fact, but nonnavigable in the common-law sense.

Coulson & Forbes, in their work on the Law of Waters, (page 98,) say that it does not appear that by the English law there is any difference as to the ownership of the soil between land covered with still and running water, except, perhaps, in the case of large inland lakes or seas, where the rule that the adjoining riparian owner is owner *ad medium flum aquæ* might cause inconvenience.

The decisions in Massachusetts, (of which Maine was a part,) and which have been followed in most of the New England states, are not particularly in point, for the reason that they have their foundation in the colonial ordinance of 1641-47, prohibiting towns from granting away ponds containing more than 10 acres, called "great ponds," and providing that such ponds should be free to the public for fishing and fowling.

In New Jersey, which adhered strictly to the old common-law definition of "navigable waters," it was held that a lake (which, according to the English common law, was non-navigable) was the private property of the riparian owner; thus applying the same rule that would be applied in case of a non-navigable stream. *Cobb v. Davenport*, 82 N. J. L. 369.

Whatever doubt once existed as to the law in New York would seem to be fully set at rest by the recent decision of the court of appeals (second division) in *Gouverneur v. National Ice Co.*, 184 N. Y. 355, *post*, 695, in which, after reviewing all the decisions of the state on the subject, the court holds "that a deed of land bordering on a small, non-navigable lake or pond is *prima facie* presumed to convey title to the center," saying there would seem to be no substantial reason for the application of a different rule in the legal construction of grants of land bounded on them than is applied to conveyances bounding premises on fresh-water streams, and that the difficulty in locating lines, under this rule, of different proprietors, is not an objection to its general application, as the same difficulties would be met with in the bays or bends of rivers.

Substantially the same views are expressed in *Lenbeck v. Nye*, 47 Ohio St. 336, 8 L. R.

A. 578, the court saying that no solid ground is readily perceived for limiting a grant of land bordering on a non-navigable lake to the water's edge, when, in the case of a non-navigable stream, its operation extends to the center.

In *Ridgway v. Ludlow*, 58 Ind. 248, it was held that the owner of land bordering on a non-navigable lake, lying within the congressional survey, is the owner of the bed of the lake to the thread thereof, or a line along the middle of the lake; the court adding that they could see no difference between non-navigable lakes and non-navigable rivers, although later, as will be seen, the court somewhat limited this common-law right.

In *Rice v. Ruddiman*, 10 Mich. 125, the rule of riparian ownership previously applied to the Detroit river was applied to Lake Muskegon; the court saying that they were not able to discover any fact or circumstance sufficient to make a substantial difference in principle between the two cases, and that the general understanding and common usage of the country have as clearly recognized the principles of riparian ownership with reference to lakes as to rivers within the state, and repudiated any distinction as arbitrary, having no foundation in the nature of things. The same court, in *Clute v. Fisher*, 65 Mich. 48, (followed in *Stoner v. Rice*, 121 Ind. 51, 6 L. R. A. 887, limited this common-law right by holding that the riparian owner of a fractional lot bounded by a non-navigable lake could only take so much of the lake as is required to fill out the subdivision of the section which he owned. The court seemed to think that they were required to so hold, under the decision in *Brown v. Clements*, 44 U. S. 8 How 650, 11 L. ed. 767, but which, with due deference, does not seem to us to have the least application to the question of riparian rights under a grant of land bordering on water. But, having held that the bed of a non-navigable lake belonged neither to the state nor the United States, the court was compelled to the somewhat peculiar position of holding that if the lake was so large that the lines of the granted lots or fractional subdivisions would not, when extended, embrace the whole of it, then the riparian ownership would extend to the center. We are compelled to the conclusion that this attempted limitation upon riparian ownership is illogical, purely arbitrary, and impracticable.

The same question has been before the courts of Wisconsin in several cases. *Dela-plaine v. Chicago & N. W. R. Co.* 43 Wis. 214, 24 Am. Rep. 886; *Boorman v. Sunnucks*, 43 Wis. 288, and *Diedrich v. Northwestern U. R. Co.* 43 Wis. 248, 24 Am. Rep. 899. The general result of these decisions is that, while the courts of that state hold that, whether a stream is navigable or non-navigable in fact, the title of the bed to the center of the current is in the owner of the bank, but that as to lakes a different rule applies, and that the owner of the land bordering on any meandered lake, whether navigable in fact or not, takes the land only to the water's edge; but no special reason is given why a different rule should be applied. The courts

of that state do, however, hold that the riparian proprietor has, as such, the exclusive right of access to and from the lake in front of his land, and of building his piers and wharves in aid of navigation, not interfering with the public easement where the lake is navigable; also, that he has the accretions formed upon or against his land, and those portions of the bed of the lake adjoining his land which may be uncovered by the recession of the water; there being no distinction in respect to the rights of riparian owners, between accretions and relictions. With these rights conceded to the riparian owner, the question whether the fee of the bed of the lake, while it remains covered with water, is in him or in the state, is more speculative than practical. In most cases where a distinction has been made between riparian rights on streams and on lakes it seems to have been merely assumed, without much consideration, that the rules applicable to running water were not applicable to lakes or ponds. The only reasons we have ever seen suggested for a distinction are—*First*, the supposed difficulty of running the lines between adjoining riparian owners of lands bordering on lakes, and, *second*, the supposed injustice that might result, in some cases, in giving the owner of a very small estate on the shore of a lake a very large reliction in front of it. But it seems to us that neither of these are adequate reasons for departing from a well-settled principle. Both of them are more imaginary than real, and would occur only in exceptional or extreme cases, and are almost as likely to occur in the case of riparian ownership on a tortuous river, with an ill-defined or changeable channel, as in the case of such ownership on the borders of a lake. The owner of a mere "rim" on the bank of a river may sometimes acquire an accretion or reliction much larger than the parent estate, but that is an incident to all riparian ownership; and it was never suggested, in the case of a stream, that such a state of facts furnished any reason for making the case an exception to the general rule.

Courts and text-writers sometimes give very inadequate reasons, born of a fancy or conceit, for very wise and beneficent principles of the common law; and we cannot help thinking this is somewhat so as to the right of a riparian owner to accretions and relictions in front of his land. The reasons usually given for the rule are either that it falls within the maxim, *de minimis lex non curat*, or that, because the riparian owner is liable to lose soil by the action or encroachment of the water, he should also have the benefit of any land gained by the same action. But it seems to us that the rule rests upon a much broader principle, and has a much more important purpose in view, viz. to preserve the fundamental riparian right—on which all others depend, and which often constitutes the principal value of the land—of access to the water. The incalculable mischiefs that would follow if a riparian owner is liable to be cut off from access to the water, and another owner sandwiched in between him and it, whenever the water line

had been changed by accretions or relictions, are self-evident, and have been frequently animadverted on by the courts. These considerations certainly apply to riparian ownership on lakes as well as on streams. Take the case in hand, of our small inland lakes, the waters of many of which are slowly but gradually receding. The owners of lands bordering on them have often bought with reference to access to the water, which usually constitutes an important element in the value and desirability of the land. If the rule contended for by the appellants is to prevail, it would simply open the door for prowling speculators to step in and acquire title from the state to any relictions produced in the course of time by the recession of the water, and thus deprive the owner of the original shore estate of all riparian rights including that of access to the water. The endless litigation over the location of the original water lines, and the grievous practical injustice to the owner of the original riparian estate, that would follow, would, of themselves, be a sufficient reason for refusing to adopt any such doctrine. That the state would never derive any considerable pecuniary benefit,—certainly, none that would at all compensate for the attendant evils,—we may, in the light of experience, safely assume. Our conclusion, therefore, is that upon both principle and authority, as well as consideration of public policy, the common law is that the same rules as to riparian rights which apply to streams apply also to lakes, or other bodies of still water. In this state, we have adopted the common law on the subject of waters, with certain modifications, suited to the difference in conditions between this country and England, the principal of which are that navigability in fact, and not the ebb and flow of the tide, is the test of navigability, and that we have repudiated the doctrine that the state has any private or proprietary right (as had the king) in navigable waters, but that it holds them in its sovereign capacity, as trustee for the people, for public use. In accordance with the rules of the common law, we therefore hold that where a meandered lake is non-navigable in fact, the patentee of land bordering on it takes to the middle of the lake; that where the lake is navigable in fact, its waters and bed belong to the state, in its sovereign capacity, and that the riparian patentee takes the fee only to the water's edge, but with all the rights incident to riparian ownership on navigable waters, including the right to accretions or relictions formed or produced in front of his land by the action or recession of the water. Of course, it is a familiar principle that these riparian rights rest upon title to the bank or shore, and not upon title to the soil under the water. Comparing what was said in *Schurmeier v. St. Paul & P. R. Co.* 10 Minn. 82, (Gil. 59,) with what is perhaps implied in *St. Paul, S. & T. F. R. Co. v. St. Paul & P. R. Co. First Div.*, 26 Minn. 81, it may be not entirely clear whether the doctrine of this court is that a patentee of land on navigable water takes the fee to low water, or only to high water; but this is a matter of little practical im-

portance in any case, and of none in the present one.

What has been already said is sufficient for the purposes of the present case; but, to avoid misconception, it is proper to consider what is the definition or test of "navigability," as applied to our inland lakes. The division of waters into navigable and non-navigable is but a way of dividing them into public and private waters—a classification which, in some form, every civilized nation has recognized; the line of division being largely determined by its conditions and habits. In early times, about the only use—except, perhaps, fishing—to which the people of England had occasion to put public waters, and about the only use to which such waters were adapted, was navigation, and the only waters suited to that purpose were those in which the tide ebbed and flowed. Hence, the common law very naturally divided waters into navigable and non-navigable, and made the ebb and flow of the tide the test of navigability. In this country, while still retaining the common-law classification of navigable and non-navigable, we have, in view of our changed conditions, rejected its test of navigability, and adopted in its place that of navigability in fact; and, while still adhering to navigability as the criterion whether waters are public or private, yet we have extended the meaning of that term so as to declare all waters public highways which afford a channel for any useful commerce, including small streams, merely floatable for logs at certain seasons of the year. Most of the definitions of "navigability" in the decided cases, while perhaps conceding that the size of the boats or vessels is not important, and, indeed, that it is not necessary that navigation should be by boats at all, yet seem to convey the idea that the water must be capable of some commerce of pecuniary value, as distinguished from boating for mere pleasure. But if, under present conditions of society, bodies of water are used for public uses other than mere commercial navigation, in its ordinary sense, we fail to see why they ought not to be held to be public waters, or navigable waters, if the old nomenclature is preferred. Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit. Many, if not the most, of the meandered lakes of this state, are not adapted to, and probably will never be used to any great extent for, commercial navigation; but they are used—and as population increases, and towns and cities are built up in their vicinity, will be still more used—by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated. To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated. When the colony of Massachusetts 250 years ago, reserved to public use her "great ponds,"

probably only fishing and fowling were in mind, but, as is said in one case, "with the growth of the community, and its progress in the arts, these public reservations, at first set apart with reference to certain special uses only, became capable of many others, which are within the design and intent of the original appropriation. The devotion to public use is sufficiently broad to include them all, as they arise." *West Roxbury v. Stoddard*, 7 Allen, 158. If the term "navigable" is not capable of a sufficiently extended meaning to preserve and protect the rights of the people to all beneficial public uses of these inland lakes, to which they are capable of being put, we are not prepared

to say that it would not be justifiable, within the principles of the common law, to discard the old nomenclature, and adopt the classification of public waters and private waters. But however that may be, we are satisfied that, so long as these lakes are capable of use for boating, even for pleasure, they are navigable, within the reason and spirit of the common-law rule. When the waters of any of them have so far receded or dried up as to be no longer capable of any beneficial use by the public, they are no longer public waters, and their former beds, under the principles already announced, would become the private property of the riparian owners.

Judgment affirmed.

NEW HAMPSHIRE SUPREME COURT.

CONCORD MANUFACTURING CO.

v.

ROBERTSON, ROWELL & CO.

(.....N. H.)

1. **Explicit legislative authority is necessary** to the alienation to an individual of the public rights in the beds of large ponds.
2. **An abutter's use of the bed of a public water** is governed by the rule of reasonableness applied to the facts of his case.
3. **The manner in which, and the extent to which, the bed of a public body of water can be reasonably appropriated** to the exclusive use of a littoral proprietor is in New Hampshire determinable on a bill in equity.
4. **One erecting a structure below the edge of a public body of water** without having the question of its reasonableness judicially determined assumes the risk of its being found to be unreasonable and abated as a nuisance.
5. **There may be a severance of an abutter's private right of use and occupation in a public body of water from his adjoining upland.**
6. **No prescriptive rights can be acquired by an individual in public waters.**
7. **An abutter has a common-law right to improve and occupy tide land above and below low-water mark where it ought to be improved and occupied.**
8. **The waters of a great pond in New Hampshire cannot be lawfully diverted** to the damage of one owning land on a stream flowing from the pond.
9. **The right of a littoral proprietor to cut ice on a great pond belonging to the public is not exclusive** although he may have advantages over others in the right to erect stagings and platforms in front of his lot for

use in filling 'ice-houses, and the extent of his right as against persons owning land on a stream flowing from a pond may be limited by the exercise of the same right by the public.

10. **The total quantity of ice that may be taken by all persons from a great public pond is as to the owners of a mill on a stream flowing from the pond limited to what will constitute a reasonable use of the pond which is the extent of the water right attached to the soil and invested in the owner of the basin through which the water flows.**

(March, 15, 1890.)

CASE presented to the law term upon an agreed statement of facts in an action brought to recover damages for the alleged wrongful diversion of water from plaintiff's mills. *Discharged and held for trial.*

Plaintiff is the owner of a water power on a stream flowing from Long pond in Concord. Defendants leased a tract of land bordering on the pond and from it went upon the pond and cut and carried away ice to be stored and sold in the usual course of defendants' business as ice merchants. Plaintiff claimed that this act in a preceptible and substantial degree diminished the flow of water in the stream thereby diminishing the power which it had been accustomed to use, and thereby damaging the plaintiff. They claimed that the whole water capacity of the pond was used by the city of Concord and by the plaintiff; the city taking what it needed for furnishing itself with a water supply and the remainder being required by plaintiff to run its mills, and, being insufficient for that purpose, that whatever power was not furnished by the water must be obtained by the use of steam generated by coal, and that in so far as the water power was unlawfully diminished more coal must be used to the direct damage of plaintiff. The defendants denied that the city of Concord and plaintiff

NOTE.—For ownership of ice and right to take it from waters, see *Brown v. Cunningham*, 12 L. R. A. 583, and note, 82 Iowa, 512; also *Barrett v. Rockport Ice Co.*, 16 L. R. A. 774, 84 Me. 155.

On the subject of ponds and small lakes, see *Henry v. Newburyport*, 5 L. R. A. 179, and note, 149 Mass. 582; also *Watuppa Reservoir Co. v. Fall River*, 1 L. R. A. 466, 147 Mass. 548; *Monatiquoit River*, 18 L. R. A.

Mills Props. v. Braintree Water Supply Co., 4 L. R. A. 272, 149 Mass. 478; *Fernald v. Knox Woolen Co.*, 7 L. R. A. 459, 82 Me. 48; *Atty-Gen. v. Revere Copper Co.*, 9 L. R. A. 510, 152 Mass. 444; *Watuppa Reservoir Co. v. Fall River*, 13 L. R. A. 255, 154 Mass. 303; *Lamprey v. State (Minn.) ante*, 670; *Gouverneur v. National Ice Co. (N. Y.) post*, 623.

needed the entire water capacity of the pond and claimed that the taking of ice by the defendants had not in any perceptible or substantial degree diminished the flow of water from the pond; that the ice taken by the defendants was less than enough to produce one seventeenth of an inch of water over the whole pond and that therefore it will never be missed in the use of the pond as a reservoir.

Further facts appear in the opinion.

Messrs. Samuel C. Eastman and J. S. H. Frink, for plaintiff:

Riparian and littoral owners can use the water of a stream or pond in any way that does not practically and in a perceptible and substantial degree diminish and impair the equal and common right of the lower proprietor.

Elliot v. Fitchburg R. Co. 10 Cush. 191, 57 Am. Dec. 85.

There was no suggestion that the Massachusetts Ordinance of 1641 gave any greater rights to any one.

In 1852, in *Cummings v. Barrett*, 10 Cush. 186, Chief Justice Shaw says that the question of ice-cutting comes up as one of first impression, and that these rights have not been adjudicated.

In 1803, Judge Hoar, in *West Roxbury v. Stoddard*, 7 Allen, 158, does decide what Chief Justice Shaw hesitated to do, that great ponds are free for cutting ice. This is placed upon the ground that new public uses may be declared as they arise. If not judicial legislation, it comes very near it.

Paine v. Woods, 108 Mass. 160.

The plaintiff not only was the owner of the dam, and now has all the rights of flowage and in the pond not taken by the city of Concord but it is the owner of a privilege lower down, covering both sides of the stream.

In virtue of this ownership it has the right to use of the water flowing over it, in its natural current, without diminution or obstruction. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. No one has the right to diminish the quantity which will, according to the natural current, flow to the proprietor below, etc.

Coultes v. Kidder, 24 N. H. 864, 57 Am. Dec. 287.

One may be liable for unreasonably diverting the water from its natural course to the prejudice of another.

Bealy v. Shaw, 6 East, 208; *Runnels v. Bullen*, 2 N. H. 587; *Embrey v. Owen*, 6 Exch. 858.

It does not matter who is the owner of the fee in Long pond. The defendants have not and do not claim to have any rights from any one who is. They cannot take the rights of the plaintiff, whatever might be done by the state.

Watuppa Reservoir Co. v. Fall River, 134 Mass. 267; *Mill River Woolen Mfg. Co. v. Smith*, 84 Conn. 462.

Even in cases where the ice is treated as an accretion to the soil, the rights of millowners to have the stream flow without diminution are recognized.

State v. Pottmeyer, 88 Ind. 402, 5 Am. Rep. 18 L. R. A.

224; *Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 Am. Rep. 196.

Messrs. Chase & Streeter and W. L. Foster, for defendants:

In 1725 the Colony of Massachusetts, claiming to be the owner of the territory included within the limits of Concord, granted it to certain proprietors. The plaintiff's title to its land and water power came from this source.

At the time of said grant the Massachusetts Ordinance of 1641 was in full force, and it controlled the grant.

In effect, Long pond was reserved for public uses by the grant and the ordinance which governed it.

This case therefore differs from all other cases now or previously before the court. It has elements that other cases do not possess, namely, the ownership of the soil and political jurisdiction over its inhabitants by Massachusetts, at the time of the grant.

We do not rely alone upon the union that existed between New Hampshire and Massachusetts bay at the time of the adoption of the Ordinance of 1641, and the subsequent perpetuation by New Hampshire of the laws then in force, as the respondent in *State v. Welch* (now before the court) and parties in other cases have been compelled to do. (See *Nudd v. Hubbs*, 17 N. H. 524; *State v. Rollins*, 8 N. H. 561.) But in addition to that position we claim that the ordinance was a part of the grant itself.

The Massachusetts court, by numerous decisions, has held that the Ordinance of 1641 makes great ponds public—"to lie in common for public use."

West Roxbury v. Stoddard, 7 Allen, 158; *Paine v. Woods*, 108 Mass. 160; *Fay v. Salem & D. Aqueduct Co.* 111 Mass. 37; *Hittinger v. Eames*, 131 Mass. 539; *Gage v. Steinkraus*, 131 Mass. 222; *Roswell v. Doyle*, 131 Mass. 474.

Accordingly the court holds that "the right of cutting and taking ice, either for use or for sale, from a great pond which is one of the public waters of the Commonwealth, is a public right, which may be exercised by any citizen who can obtain access to the pond without trespassing upon the lands of other persons, and who does not, by his exercise of the right, unreasonably interfere with its similar exercise by others."

Paine v. Woods, *supra*.

The ordinance of 1641 is held to be in force in Maine, as a part of its common law, as well as by reason of its union with Massachusetts.

Barrows v. McDermott, 78 Me. 441.

In *Brastow v. Rockport Ice Co.*, 77 Me. 100, the court says: "In this state all ponds containing more than ten acres are public ponds and the right to cut ice upon them is a public right, free to all."

The plaintiff's and defendants' rights to water and ice in Long pond closely resemble the rights of riparian proprietors upon a running stream.

Every riparian proprietor may make a reasonable use of the stream running over his land.

Almost every imaginable use of a stream

will cause some diminution of its water, or obstruction of its current, or otherwise affect it, so that others will not get the same benefit in kind and degree from its use that they would get if it had not been previously used. When the courts say that one riparian proprietor shall not use the water of a stream so as to work actual or material injury to others, they mean actual or material injury to the rights of others. And, by "material injury" must be understood an injury resulting in damages of a substantial nature, not merely nominal.

Crawford v. Rambo, 44 Ohio St. 279.

Where the rights are correlative and equal, reasonableness in view of all rights is the boundary of each one's rights.

Hayes v. Waldron, 44 N. H. 580, 84 Am. Dec. 105; *Norway Plains Co. v. Bradley*, 52 N. H. 109; *Holden v. Lake Co.* 58 N. H. 553; *Green v. Gilbert*, 60 N. H. 144.

Doe, Ch. J., delivered the opinion of the court:

By the grant of the original township of Gilmanton, (including territory afterwards set off as Gilford and Belmont,) made in 1727, and amended in 1729 by the provincial executive in the name of the king, the premises were bounded by two lines,—one running from the westerly corner of Barnstead northwest "to Winnipisiogee pond, or the river that runs out of the said pond," the other running from the westerly corner of Barnstead northeast six miles on the Barnstead line, then northwest two miles, "then north to Winnipisiogee pond, then on the said pond and river to meet the first line." The river Winnipisiogee running out of Lake Winnipisiogee flows into and out of Sanbornton bay (now commonly called "Lake Winnesquam.") The title of the township of Gilmanton passed from the king to the grantees as private owners and tenants in common (*Lawrence v. Haynes*, 5 N. H. 83, 20 Am. Dec. 554; *Atty-Gen. v. Tarr*, 148 Mass. 809, 2 L. R. A. 87), and their water boundary was the lake, the river, and the bay. Besides being a conveyance of land to the persons named as grantees, the grant was a town charter, issued to "the said men and inhabitants, or those that shall inhabit said town;" and it contained no express allusion to a distinction between the boundary line of the private land title and the jurisdiction line of the municipal corporation. In *State v. Gilmanton*, 9 N. H. 461, the town was indicted for not repairing Mosquito bridge, which connected Gilmanton and Sanbornton at a place where the boundary was either a part of the river or a part of the bay. In the agreed statement of facts on which the case was first submitted, it is said (page 462) that the "bay is about ten miles long, and from two to three miles wide in the broadest part;" that the bridge is "about thirty-seven rods long;" and that "there is so much current where this bridge is that no ice forms about it." It was held that the agreed statement must be discharged for a trial of the question whether the water at the bridge was a river. If it was a river the center of it was the line to which the town was bound to repair. If it was not a river but a part of

the bay, which is a large pond, the boundary of private land title at that place was the water's edge. It was assumed that the line of private ownership was the limit of the defendants' territorial jurisdiction and public duty, and upon this assumption it was necessary to ascertain whether the water under the bridge was river or pond. The ground of the decision is stated (p. 468) by Parker, Ch. J.: "Where a grant is made extending to a river, and bounding upon it, the center of the stream is the line of the boundary. . . . But in relation to grants bounding on ponds, lakes, or other large bodies of standing fresh water, that principle does not apply, but the grant extends only to the water's edge. . . . If, therefore, the line of the township of Gilmanton . . . strikes a river, and the boundary is then upon a river, the grant extends to the thread of the river; but if it strikes any large body of standing water, by whatever name it is called, it will go only to the water's edge." At the subsequent trial, the court instructed the jury that "the point for them to settle was whether there was a current or not; and if they should find that there was a regular, steady, and perceptible current, however small, it mattered not what was the width of the water, or what it was called, it was a river, and the defendant was liable to maintain the bridge." *State v. Gilmanton*, 14 N. H. 467, 470. The defendants, being found guilty, moved for a new trial, and contended (page 472) that, if the instructions given to the jury were correct, "then are all our large lakes and bays . . . nothing in fact but rivers, for in all of them there must necessarily be a small current towards the outlet; and if the current be the only thing that decides the character of our inland waters, then must these lakes and bays be decided to be private property, and the towns adjoining . . . be liable to erect bridges over the same." It was held (pages 476, 477) that "the fact that there is a current from a higher to a lower level does not make that a river which would otherwise be a lake;" that the definition of "river" on which the verdict was found "would not be applicable to all bodies of water in which there might be a current;" that the instruction given to the jury "must, of course, be taken in connection with the subject-matter to which it related," and that "where it is admitted, or certainly not denied, as in the present case, that the water is not a lake nor a pond, the material difference between which is in size, the only criterion by which to determine whether it is a river is the existence of a current." An admission that the water was neither lake nor pond would have been an admission that it was a river, and would have left no question for the jury. Judicial notice was taken of the geography of the country, (page 477.) a knowledge of which might enable the court to decide whether the water at the bridge was a part of the river or a part of the bay. The question might be one of fact, on the trial of which the current might be one of the items of competent evidence, and for the decision of which a legal test might not be necessary. A view, taken by court or jury,

without a ruling or instruction on any question of law, might be enough. To ocular proof could be added other evidence of the current, the quantity of water, and the comparative size and form of the basin of the bay and the channel of the river. The judgment ordered on the verdict established the fact that (for the purposes of that suit) the water under the bridge was a part of the river. At some place the water ceases to be Winnipisogee lake, and begins to be Winnipisogee river. Further south, it expands into another large pond, from which it issues, still further south, as a river. At each of these places of expansion and contraction the boundary of private landowners runs from the water's edge to the middle of the river. The second decision in the *Gilmanton Case* seems to determine that a current is not the only competent evidence of the points at which these changes occur in the boundary line.

However unsatisfactory *State v. Gilmanton* may be on the mode of finding the line between large ponds and streams running into or out of them, on other subjects it is clear and decisive. A large pond is not private property. When land, granted by the government to individuals for private use, is bounded by such a pond, the boundary is the water's edge. Sanbornton bay is a large pond. It does not appear that there had been any doubt on these points in this state before the first decision of the *Gilmanton Case* in 1838. Since that time they have not been open questions. In respect to title, the law divides natural fresh-water ponds into two classes,—the small, which pass by an ordinary grant of land, like brooks and rivers, from which, as conveyable property, they are not distinguished; and the large, which are exempted from the operation of such a grant, for reasons that stop private ownership at the water's edge of the sea and its estuaries. Tide waters and large ponds are public waters. Whatever exceptions, if any, may be found, this is the rule. It is well known that the fee of Lake Winnipisogee and Sanbornton bay is not in the owners of the adjoining land, and that all natural pools of fresh water are not the property of the state. The standard of size, or other test, that establishes their public or private title, is a point left undecided by our reported cases. But the law, classing large ponds with tide waters, and small ponds with fresh rivers and brooks, necessarily provides a mode of determining to which class every pond belongs. By the decision in *State v. Gilmanton*, and by uniform usage and a general concurrence of opinion, it is settled that the distinction between public and private waters is not based on tidal motion, or on the presence of salt. The action of the tide furnishes a convenient means of locating the boundary of the largest reservoir of public water, (*The Genesee Chief v. Fitzhugh*, 53 U. S. 12 How. 443, 455, 13 L. ed. 1058, 1063.) but does not show what reservoirs of fresh water are the property of the state. For the purposes of admiralty jurisdiction and the Federal power of regulating commerce "the doctrine of the com-

mon law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or, at least, to any considerable extent, which are not subject to the tide; and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different.

A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact." *The Daniel Ball v. United States*, 77 U. S. 10 Wall. 557, 568, 19 L. ed. 999, 1001; *The Genesee Chief v. Fitzhugh*, 53 U. S. 12 How. 443, 454, 455, 13 L. ed. 1058, 1063; *Frets v. Bull*, 58 U. S. 12 How. 466, 13 L. ed. 1068; *Jackson v. The Magnolia*, 61 U. S. 20 How. 296, 299, 15 L. ed. 909, 911; *Commercial Transp. Co. v. Fitzhugh*, 66 U. S. 1 Black, 574, 17 L. ed. 107; *The Hine v. Trevor*, 71 U. S. 4 Wall. 555, 18 L. ed. 451; *The Jas. E. Eagle v. Fraser*, 75 U. S. 8 Wall. 15, 19 L. ed. 365; *United States v. The Montello*, 87 U. S. 20 Wall. 430, 23 L. ed. 891; *Müller v. New York & Brooklyn*, 109 U. S. 385, 395, 27 L. ed. 971, 975. The reason of the English rule "was that the limit of the tide in all the waters of England was . . . the limit of practicable navigation, and, . . . as there could be no use for an admiralty jurisdiction where there could be no navigation, this test of the navigability of those waters became substituted as the rule, instead of the navigability itself. Such a rule . . . could have no pertinency to the rivers and lakes of this country, for here no such test existed. . . . The true rule in both countries was the navigable capacity of the stream; and, as this was ascertained in England by a test which was wholly inapplicable here, we could not be governed by it." *The Hine v. Trevor*, 71 U. S. 4 Wall. 555, 565, 18 L. ed. 451, 454. For highway purposes, fresh water is navigable, in the American common-law sense, if it is in fact, in its natural condition, reasonably capable of valuable use as a public way. *Connecticut River Lumber Co. v. Olcott Falls Co.* 65 N. H. 290, 377, 13 L. R. A. 826; *Morgan v. King*, 85 N. Y. 454, 91 Am. Dec. 58; *United States v. The Montello*, 87 U. S. 20 Wall. 430, 441, 443, 23 L. ed. 891, 894; *Barney v. Keokuk*, 94 U. S. 324, 336, 24 L. ed. 224, 227; *Cooley*, Const. Lim. 726-728. The Merrimack river was formerly used in connection with the Middlesex canal as a highway for a line of boats between Concord and Boston. Many streams are highways for logs. But while the public right of way in a floatable or navigable fresh river or small pond is, in this state, an easement in the submerged land of the riparian proprietors, the public right of flotation or navigation in large ponds and arms of the sea is one of the objects accomplished by vesting the beds of such waters in the state, in trust for public use, as they were formerly vested in the crown. *State v. Gilmanton*, and *Connecticut River Lumber Co.*

v. *Olcott Falls Co. supra*; *Com v. Roxbury*, 9 Gray, 451, 479, 482, 484, 492. The purpose and nature of the trust in which the right of way in Connecticut river is held is the ground on which it was decided in the *Olcott Falls Case*,—that the right is not relinquished or discontinued by an ordinary grant of the land under and around the waterway. For the same reason the title of the soil under large ponds and tide waters does not pass by an ordinary governmental grant of land bounded by or on them, or by a mere grant of a township or lot in which they are situated, although they may come within a municipal jurisdiction established by the same grant, (*East Haven v. Hemingway*, 7 Conn. 186, 198-200;) and the purpose and nature of the trust in which the basins of these public waters are held are such that an alienation of the title of the soil is not an exercise of executive power, and cannot be effected without legislative authority.

The acquisition of water rights by prior appropriation for manufacturing and other purposes is a new doctrine, adopted and extended where the English riparian rule has been considered inapplicable, or applicable only to a limited extent to local conditions. *Cary v. Daniels*, 8 Met. 466-468; *Head v. Amoskeag Mfg. Co.* 118 U. S. 9, 24-26, 28 L. ed. 889, 895; *Pom. Riparian Rights*, § 11; *Atchison v. Peterson*, 87 U. S. 20 Wall. 507, 510, 511, 22 L. ed. 414, 415; *Bacey v. Gallagher*, 87 U. S. 20 Wall. 670, 681-683, 22 L. ed. 452, 454, 455; *Jennison v. Kirk*, 98 U. S. 453, 457-461, 25 L. ed. 240, 242, 243; *Broder v. Natoma Water & Min. Co.* 101 U. S. 274, 276, 25 L. ed. 790, 791. "The former decisions of this court, in cases involving the rights of parties to appropriate waters for mining and other purposes, have been based upon the wants of the community, and the peculiar condition of things in this state." *Hoffman v. Stone*, 7 Cal. 47, 48. Liberties of hunting and fishing, and other common rights, always exercised here in the wild and unoccupied districts of the public domain, and retained in large ponds and tide waters, after the adjoining dry land became private property, have been impaired in England by monarchical and feudal theories and usages, and a system of legal inequality in the enjoyment of public property, not consistent with the purposes for which this state was settled, and not adopted by its inhabitants. In every government of laws, a body of unwritten, common law is inevitable. No legislature can foresee the innumerable variety of complications in human affairs, or provide a statutory rule sufficiently precise and definite to meet each particular case. 1 Paterson, *Liberty of the Subject*, 141, 143, 145. "Common law, as well as statute law, grows out of the situation and circumstances of the people." *Brown v. Langdon*, Smith, (N. H.) 178, 182. Differences of condition produce differences of law. A great proportion of the English common law "grew into use by gradual adoption, and received from time to time the sanction of the courts of justice, without any legislative act for interference. It was the application of the dictates of natural justice and cultivated reason to par-

ticular cases." 1 Kent, *Com.* 471. The dictates of justice and reason, applied to the situation and circumstances of New Hampshire settlers, were in many respects materially different from the law of England. "To such a colony there is no doubt that the settlers from the mother country carried with them such portion of its common and statute law as was applicable to their new situation." Parke, B., in *Kielley v. Carson*, 4 Moore, P. C. 63, 84; *Phillips v. Eyre*, L. R. 6 Q. B. 1, 19. The immigrants brought, not the whole body of written and unwritten laws under which they had enjoyed rights and suffered wrongs, but only such as were suited to their condition and wants, consistent with their new state of society, and conformable to the institutions they intended to establish, and the general course of policy they intended to pursue. *State v. Rollins*, 8 N. H. 550, 561; *Pendergast v. Young*, 21 N. H. 234, 236, 237; *Cochecho R. Co. v. Farrington*, 26 N. H. 428, 488; *Hall v. Martin*, 46 N. H. 837, 846; *Lisbon v. Lyman*, 49 N. H. 553, 569; *Cole v. Lake Co.* 54 N. H. 242, 279, 283, 285, 286; *Going v. Emery*, 16 Pick. 107, 115, 26 Am. Dec. 645; *Canal Comrs. & Appraisers v. People*, 5 Wend. 423, 463; *Williams v. Williams*, 8 N. Y. 525, 541; *People v. Canal Appraisers*, 33 N. Y. 461, 468, 476, 477; *Roberts v. Baumgarten*, 110 N. Y. 380, 383; *Suth. Stat. Constr.* § 15; *Cooley, Const. Lim.* 34, 35.

By the English rule thus modified, the legal title of New Hampshire land was in the king, who held it as trustee in his official and representative capacity, with no private interest. The dry land, and the soil under fresh rivers, brooks, and small ponds, was convertible, by his grant, into private property, for settlement, and for the advancement of the common welfare. The seashore, arms of the sea, and large ponds, by reason of their special adaptation to public uses, were set apart and reserved as public waters. They could not be converted into private estate or subjected to a private easement, by the trustee's grant, or by any act of the executive branch of the government. The distinction is between what the trustee held for public use and what he held for the purpose of sale or other appropriation to private use for the public benefit. *Weber v. State Harbor Comrs.* 85 U. S. 18 Wall. 57, 68, 21 L. ed. 798, 802. "The use of navigable waters is inalienable." 3 Kent, *Com.* 427. "It is incompetent for the crown in modern times to abridge or destroy . . . the public rights either of navigation or fishery." Gould, *Waters*, §§ 21, 82, and authorities cited; *Connecticut River Lumber Co. v. Olcott Falls Co.* 65 N. H. 387, 388, 18 L. R. A. 826. Public and private rights have been enlarged by the gradual abolition of the king's despotic power. 4 Bl. *Com.* 409, 418-420. But in judicial decisions the change has not been methodical or consistent. Land covered by public water is capable of many uses. Rights of navigation and fishery are not in the whole estate. And sufficient reasons have not been given for regarding all but two of the rights and uses comprised in the title as the private property of a former trustee, or convertible into private property

by his grant. He "held the seashores as well as the land under the sea," and other property of the same public class, "for the use and benefit of all the subjects, for all useful purposes, the principal of which were navigation and the fisheries." *Com. v. Roxbury*, 9 Gray, 451, 488; *Arnold v. Mundy*, 6 N. J. L. 1, 71-73, 76, 77, 10 Am. Dec. 356. The true rule, applied to Sanbornton bay, made the water's edge the boundary of the proprietors of Gilmanton.

The law of public waters is presumably uniform, and on many questions it is not material whether an authority relates to tide water or to large ponds. *Blundell v. Catterall*, 5 Barn. & Ald. 268, was an action of trespass *qu. cl.* for driving bathing machines across a beach. "The plaintiff was the lord of the manor of Great Crosby, which is bounded on the west by the River Mersey, an arm of the sea. As lord of the manor, he was the owner of the shore, [the land between high and low water mark,] and had the exclusive right of fishing thereon with stake nets. The defendant was the servant at an hotel erected . . . upon land in Great Crosby fronting the shore, and bounded by the high-water mark. . . . The proprietors" of the hotel "kept bathing machines for the use of persons resorting thither, who were driven by the defendant in machines across the shore into the sea for the purpose of bathing." The shore being a part of the plaintiff's manor, and the hotel grounds being bounded by high-water mark, the defendant contended "that by the common law of England all the king's subjects had a right, not only to traverse the ocean itself in every direction, as well for commerce, trade and intercourse as for every other lawful purpose, but also that they had a general public right of way over the seashore to and from the sea, . . . as well during the recess as during the flux of the tide, for all lawful purposes, and the king could not grant the shore so as to supersede or to deprive the public of the exercise of that right; . . . that, even if the public right was not so extensive, yet, at all events, the king's subjects had a right of bathing on the seashore . . . in such a way as is conformable to decency; that they had also, as incident thereto, a right to pass over the seashore, not merely on foot, but with horses and carriages,—that is to say, with bathing machines for that purpose,—whether the seashore belonged to the king as public property, or to any individual as being now or even immemorially private property; and that such public right could not be superseded by the king's grant of the seashore as private property." It was held by a majority of the court—Holroyd, Bayley, and Abbott—that there was no public right of using the shore for bathing, and judgment was given for the plaintiff. "The question is," says Holroyd, J., "with regard to the shore,—that is to say, the land between the high and the low water mark. . . . A general public right in all the king's subjects to use the seashore for all such temporary purposes as they please would be, I think, inconsistent with the nature of permanent private property,

or with the seashore becoming such permanent private property. If, therefore, the right of bathing, and the right of passing over the seashore on foot and with carriages, claimed as incident thereto, be claimed under the supposed general right of the public to use the sea and the shore for all such temporary legal purposes as they may please, such a public right of general appropriation is inconsistent with the fact of the *locus in quo* being private property, and of the fishing therein being also a private exclusive right, as stated in the case. . . . Where the soil remains the king's and where no mischief or injury is likely to arise from the enjoyment or exercise of such a public right, [of bathing,] it is not to be supposed that an unnecessary and injurious restraint upon the subjects would, in that respect, be enforced by the king." "By the seashore," says Bayley, J., "I understand the space between the ordinary high and low water mark, and the property in this is, *prima facie*, in the king. It may, indeed, by grant or prescription, belong to a subject; but, until the contrary is shown, the presumption is that it belongs to the king. Many of the king's rights are, to a certain extent, for the benefit of his subjects, and that is the case as to the sea, in which all his subjects have the right of navigation, and of fishing, and it is so in highways, along which all his subjects have the right of passage; and the king can make no modern grants in derogation of those rights. . . . The right, [of bathing,] as claimed, is not confined to any particular place, if it exists at all, but it must exist upon every part of the seashore. Every private building, then, erected upon the seashore, and even wharves and quays, would be an obstruction to that right, and, of consequence, abatable or indictable. And yet, in how many instances are such buildings, wharves, and quays erected. Every embankment by which land is redeemed from the sea would obstruct the exercise of this right, and be a nuisance, and so would the erection of stakes for holding nets; and yet how frequently are such embankments made, and such stakes set up. . . . The inconveniences which would result from" the general common-law right claimed by the defendant, "afford to my mind a strong argument against its existence. . . . If an individual had the grant of the seashore from the crown, and were using it for recreation or bathing he or his family might be interrupted and deprived of all privacy by the exercise of this common-law right. . . . The king, for the public welfare, may suffer such a right to be exercised in those parts of the shore which remain in his hands. . . . In those places in which convenience has required the right, and it has continued from the time of legal memory, there will be a right by custom; and where that is not the case, the crown or its grantees are not likely to withhold it, upon proper terms," and under proper regulations." The opinion of Abbott, C. J., presents the same argument from the inconvenience of a right of bathing that would prevent the building of wharves and the reclamation of land from

the sea; and the same suggestion that, where the king is the owner of the shore, it is not probable that any obstruction to bathing will be interposed on his behalf.

The effect of these opinions, and of the judgment recovered by the lord of the manor, is that the English shore was not originally vested in the king as a mere official trustee, holding the legal title for the public use and benefit, but that he had such a private interest in it that he or his grantees could exclude the owners of the adjoining land from the privilege of bathing in the sea, and exact rent or tolls from all persons crossing or entering the shore for that purpose. A different view is taken in the dissenting opinion of Best, J., who says: "We have been told that lords of manors will find it to their interest to indulge the public with the privilege of going on or over the sands of the sea, and that judges and juries will check the vexatious exercise of the right to exclude them. But the free access to the sea is a privilege too important to Englishmen to be left dependent on the interest or caprice of any description of persons. . . . The owner of the soil of the shore may erect such buildings or other things as are necessary for the carrying on of commerce." Although a wharf on a tidal river, "in order to be useful, must be carried out beyond the high-water mark, and, whilst the tide is up, must somewhat narrow the passage of the river, yet such wharves are necessary for the loading and unloading of vessels, and the right of passage must be accommodated to the right of loading and unloading the craft that pass. The law in these as in all other cases limits and balances opposing rights, that they may be so enjoyed as that the exercise of one is not injurious to the other.

. . . . The universal practice in England shows the right of way over the seashore to be a common-law right. . . . So far from the law allowing lords of manors to restrain persons from bathing, it will give them every facility for this recreation. . . . Bathing machines were used before my time, . . . and I think the use of them is essential to the practice of bathing. Decency must prevent all females, and infirmity many men, from bathing except from a machine. Attempts have been made to make those who use machines pay some acknowledgment to the lord of the manor where they are used; but I cannot find that any of those attempts have yet succeeded. . . . Selden, who wrote his '*Mare Clausum*' to prove that an exclusive right might be acquired in parts of the sea, admits that the sea was originally common to all, and . . . he has collected from the works of the learned of all nations . . . that the sea and its shores were common to all men, as much so as the air that blows over them. This, I think, proves that the doctrine is reasonable, and ought to be adopted into our law, unless there is something in our particular situation to exclude it; and, so far from it being the case, there never was a country, the local situation of which, and the habits and interests of the inhabitants of which, so much required such a law. . . . The right of using the shore for

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the purpose of fishing does not depend on any particular law applicable to fishing only, but is part of the more general right of the subjects to the sea and its shores.

My opinion is founded on these grounds: The shore of the sea is admitted to have been at one time the property of the king. From the general nature of this property, it could never be used for exclusive occupation. It was holden by the king, like the sea and the highways for all his subjects. The soil could only be transferred subject to this public trust; and general usage shows that the public right has been excepted out of the grant of the soil. . . . Unless I felt myself bound by an authority as strong and clear as an Act of parliament I would hold on principles of public policy—I might say public necessity—that the interruption of free access to the sea is a public nuisance. In the first ages of all countries not only the sea and its shores but all perennial rivers were left open to the public use. In all countries it has been matter of just complaint that individuals have encroached on the rights of the people. In England our ancestors put the public rights in rivers under the safeguard of *Magna Charta*. The principle of exclusive appropriation must not be carried beyond things capable of improvement by the industry of man. If it be extended so far as to touch the right of walking over these barren sands it will take from the people what is essential to their welfare whilst it will give to individuals only the hateful privilege of vexing their neighbors. It has been said that lords of manors should have a right to prevent bathing, that they might hinder persons from doing it in places of public resort. Magistrates are armed with authority to bring to punishment such as bathe indecently. I would rather rely on disinterested and responsible magistrates than on an interested and irresponsible lord of a manor."

It is said that the strip of land between the lines of high and low water, called the "shore" or the "foreshore," may be, and commonly is, parcel of the manor adjacent. Hale, *De Jure Maris*, chap. 4; Gould, *Waters*, § 21; *Clement v. Burns*, 48 N. H. 609, 616. In *Blundell v. Catterall*, the plaintiff, being "the owner of the shore" "as lord of the manor," and having the constructive possession that accompanies title, maintained trespass *qu. cl.* against a driver of bathing machines. In *Mason's Will*, New Hampshire was described and devised as "my manor of Mason Hall." Belknap, *Hist. N. H. Farmer's* ed. 15, 94; 1 N. H. Prov. Papers, 42, 110. One of the mistakes he "fell into was the idea of lordship, and the granting of lands not as freeholds, but by leases subject to quitrents. To settle a colony of tenants" here "was indeed a chimerical project. . . . The settlements began by an equal division of property among independent freemen. Lordship and vassalage were held in abhorrence." Belknap, *Hist. N. H.* 17, 89, 90. Such authorities as *Blundell v. Catterall*, and *Calmady v. Rowe*, 6 C. B. 861, are irrelevant where there is no manorial lord. 2 Bl. Com. 90-98. No one claims to be the feudal successor of

Mason. The success of the people in the Masonian controversy (*Copp v. Henniker*, 55 N. H. 186, 187, 20 Am. Rep. 194,) did not leave the province in the condition in which it would have been if they had failed. And whatever titles and powers would have been gained by the Masonian claimant, and whatever public and private rights would have been lost by the rest of the community if he had prevailed, he would not have acquired, in public waters, a private right that was not vested in the Plymouth company, under whom he claimed, or in the crown.

The private interest of the king in tide land, and his power of conveying it to favorites, to be held as a private interest, were parts of a social system which the settlers of New Hampshire considered oppressive, and from which they endeavored to escape. They "could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers, if the land under the water at their very doors was liable to immediate appropriation by another as private property, and the settler upon the fast land thereby excluded from its enjoyment, and unable to take a shellfish from its bottom, or fasten there a stake or even bathe in its waters, without becoming a trespasser." *Martin v. Waddell*, 41 U. S. 16 Pet. 367, 414, 10 L. ed. 997, 1014. A private ownership of this wilderness, vested in the king, and a regal or executive power of conveying those reservoirs which the interests of these settlers required the government should hold for common use, would be in conflict with the general object of their migration. The mediæval rule cannot be accepted without material modification. It is not necessary to reject the theory that the legal title of public waters was in the king. The entire equitable title and beneficial interest being held and enjoyed by the public, and being capable of alienation only by an exercise of legislative power, it matters not who is trustee. But no fiduciary theory can be adopted that allows the trustee to defeat the public purpose of the trust.

Martin v. Waddell, 41 U. S. 16 Pet. 367, 409-413, 10 L. ed. 997, 1012, 1014, was an action of ejectment for 100 acres of the tidal bed of Raritan river and bay in New Jersey. It was held that the tidewater trust survived the grant of the province to the Duke of York. "The country mentioned in the letters patent was held by the king in his public and regal character as the representative of the nation, and in trust for them. . . . We do not propose to meddle with the point . . . as to the power of the king since *Magna Charta* to grant to a subject a portion of the soil covered by the navigable [meaning tidal] waters of the kingdom, so as to give him an immediate and exclusive right of fishery either for shellfish or floating fish within the limits of his grant. The question is not free from doubt. . . . But from the opinions expressed . . . in the case of *Blundell v. Catterall*, 5 Barn. & Ald. 287, 294, 304, 309, and in the case of *Somersett v. Fogwell*, 5 Barn. & C. 883, 884, the question must be regarded as settled in England 18 L. R. A.

against the right of the king, since *Magna Charta*, to make such a grant. . . .

When the revolution took place, the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use.

. . . . The dominion and property in navigable waters, and in the lands under them, being held by the king as a public trust, the grant to an individual of an exclusive fishery in any portion of it is so much taken from the common fund intrusted to his care for the common benefit. . . . The questions upon this charter are: . . . Whether the dominion and propriety in the navigable waters and in the soils under them passed as a part of the prerogative rights annexed to the political powers conferred on the duke; whether, in his hands, they were intended to be a trust for the common use of the new community about to be established, or private property, to be parceled out and sold to individuals, for his own benefit.

The estate and rights of the king passed to the duke in the same condition in which they had been held by the crown, and upon the same trusts. . . . If the word 'soil' be an appropriate word to pass lands covered with navigable water, . . . it is associated in the letters-patent with 'other royalties,' and conveyed as such. No words are used for the purpose of separating them from the *jura regalia*, and converting them into private property, to be held and enjoyed by the duke apart from and independent of the political character with which he was clothed by the same instrument. . . . It was expressly enjoined upon him, as a duty in the government he was about to establish, to make it as near as might be agreeable in their new circumstances to the laws . . .

of England; and how could this be done if, in the charter itself, this high prerogative trust was severed from the regal authority,—if the shores, and rivers, and bays, and arms of the sea, and the land under them, instead of being held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shellfish as floating fish, had been converted by the charter itself into private property, to be parceled out and sold by the duke for his own individual emolument?"

Martin v. Waddell "was not an action for disturbing the plaintiff in a right of fishery, but an action to recover possession of the soil itself; and in giving judgment for the defendant, the court necessarily decided upon the title to the soil." *Den v. Jersey Company Assn.* 56 U. S. 15 How. 426, 14 L. ed. 757. The reasoning which led to the conclusion that the public trust was not terminated by the legal construction of the king's grant tends to show that this trust could not be extinguished by him. As the conversion of tide land into private property would have been inconsistent with the duke's duty of establishing a government, as near as conveniently might be, in the new circumstances, agreeable to the laws of England, it does not appear how such a conversion could be an exercise of royal power. The grant was

of a large territory containing "all the land from the west side of Connecticut to the east side of Delaware bay, . . . together with all the lands, islands, soils, rivers, harbors, mines, minerals, quarries, woods, marshes, waters, lakes, fishings, hawking, hunting, and fowling, and all other royalties, profits, commodities, and hereditaments to the said several islands, lands, and premises belonging and appertaining, with their and every of their appurtenances, and all our estate, right, title, interest, benefit, advantage, claim, and demand, of, in, or to the said lands and premises, or any part or parcel thereof, and the reversion and reversions, remainder and remainders, together with the yearly and other the rents, revenues, and profits of all and singular the said premises, and of every part and parcel thereof." Poore, *Charters & Constitutions*, 783, 784. The American construction of this deed being that it did not make the grantee private owner of the tidal basin of Raritan river and bay, it would seem that the grantor's ownership of American tide land was not an interest of a private character. "All our estate, right, title, interest, benefit, advantage, claim, and demand of, in, or to the said lands and premises" is comprehensive language, and was intended to describe all the grantor's real estate in New Jersey and New York. The terms of the grant suggested no distinction between the titles of dry land and tide land. The water's edge was not mentioned as a boundary line of rights or powers. If all the right, title, and interest of the grantor on both sides of that line included the land on one side in a sense in which it did not include the land on the other side, the result is apparently due to the nature of his title, and a difference in his conveying powers, and not to a lack of conveying words. If the method of construction employed in *Martin v. Waddell* were adopted here, it would not tend to sustain private ownership upon the king's express conveyances of shores or arms of the sea, or of such fresh ponds as our law assigns to the same class of property. But the first law of public waters is the fiduciary character of the king's title; and under this law, as interpreted in this state, no construction of his grants is necessary, in cases like the present. Without explicit legislative authority, he could neither discontinue a public easement of navigation or flotation in a fresh river or small pond, (the bed of which could be made private property by his grant,) nor alienate the bed of large ponds or tide waters. "The soil of the seashore, to the extent of three miles from the beach, is vested in the crown; and I am not aware of any rule of law which prevents the crown from granting to a subject that which is vested in itself." Erle, *Ch. J.*, in *Free Fishers & Dredgers v. Gann*, 11 C. B. N. S. 387, 418. The common law of this state regards the legal title of public waters (including the soil under them) as having been vested in the king in his fiduciary capacity for the special fiduciary purpose of securing public rights; and, according to the general law of trusts, this capacity and purpose gave

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the trustee no private right. The barren, legal title was held by him, not as a natural person, but as a corporation, endowed with perpetuity, (1 Bl. Com. 469,) and in his public and regal character as representative of the nation who had the entire equitable and beneficial interest. This public interest, like the royal succession, would not be affected by his grant of the crown, and all rights, titles, and interests vested in him in all his capacities, public and private. The people inherited the equitable title of public waters as he inherited the throne,—by force of a common-law rule which he could not rightfully annul. At the Revolution, the state, as sovereign, succeeded the king in the office of trustee. In contemplation of law, the equitable title of the people was the same before and after the transfer of the legal title from one trustee to another. Anything less than the substance of this principle would fall short of the modification of English law required by the situation and policy of the province.

When a road was laid out under section 2 of the Act of 1719, the land damages and expense of construction and repair were a municipal burden. In a technical sense, the road was the king's highway. His ownership of the public easement was a matter of form. When the way was taken for public use by the legislative power of eminent domain, no private interest was conveyed to him. He became a mere titular proprietor. In the same ceremonial and fiduciary sense, tide lands and large ponds were his. Provincial usage shows that these reservoirs were understood to be devoted, by natural law, to public uses. A private interest of the king in this property was a relic of a regal supremacy that is now extinct in England. The emigrants had no occasion to bring it with them. Beginning their settlement in the forest, with many of the advantages of an original organization of society, exercising in town meeting and provincial assembly substantially all the powers of local self-government, and enjoying a large measure of practical independence, they had no motive to adopt the unsound and useless doctrine of the trustee's private interest that had led, in the old country, to great abuses, some of which it had been necessary to correct by sections 33, 47 and 48 of the great charter. "By the law of nature every man . . . has an equal right of pursuing and taking to his own use all such creatures as are *feræ naturæ*, and therefore the property of nobody. . . . The whole island was replenished with all sorts of game in the time of the Britons, who lived in a wild and pastoral manner, without inclosing or improving their grounds, and derived much of their subsistence from the chase, which they all enjoyed in common. But when husbandry took place under the Saxon government, and lands began to be cultivated, improved, and inclosed, the beasts naturally fled into the woody and desert tracts, which were called the forests; and, having never been disposed of in the first distribution of lands, were therefore held to belong to the crown. These were filled with great plenty of game, which

our royal sportsmen reserved for their own diversion, on pain of a pecuniary forfeiture for such as interfered with their sovereign. But every freeholder had the full liberty of sporting upon his own territories, provided he abstained from the king's forests." This liberty of freeholders was afterwards limited to lords of manors and other privileged classes. The right of the crown "was exerted with the utmost rigor at and after the time of the Norman establishment; not only in the ancient forests, but in the new ones which the conqueror made, by laying together vast tracts of country depopulated for that purpose, and reserved solely for the king's royal diversion, in which were exercised the most horrid tyrannies and oppressions, under color of forest law, for the sake of preserving the beasts of chase; to kill any of which, within the limits of the forest, was as penal as the death of a man. . . . King John laid a total interdict upon the winged as well as the four-footed creation. . . . The cruel and insupportable hardships which those forest laws created to the subject occasioned our ancestors to be as jealous for their reformation as for the relaxation of the feudal rigors and the other exactions introduced by the Norman family, and accordingly we find the immunities of *Charta de Foresta* as warmly contended for, and extorted from the king with as much difficulty, as those of *Magna Charta* itself." 2 Bl. Com. 411, 414-416, 418, 419, and notes by Christian, Kerr, and Coleridge. "Though the forest laws are now mitigated, and by degrees grown entirely obsolete, yet from this root has sprung a bastard slip, known by the name of the 'game law,' now arrived to and wantoning in its highest vigor, . . . both productive of the same tyranny to the commons, but with this difference: that the forest laws established only one mighty hunter throughout the land; the game laws have raised a little Nimrod in every manor." 4 Bl. Com. 415, 416. An "exclusive right of fishing in a public river is also a royal franchise, and is considered as such in all countries where the feudal polity has prevailed; though the making such grants . . . was prohibited for the future by King John's great charter, and the rivers that were fenced in his time were directed to be laid open, as well as the forests to be disafforested. This opening was extended by the second and third charters of Henry III. to those [rivers] also that were fenced under Richard I., so that a franchise of" exclusive "fishery ought now to be at least as old as the reign of Henry II." 2 Bl. Com. 39.

"In the old Teutonic Constitution, just as in the old Roman Constitution, large tracts of land were the property of the state, the *ager publicus* of Rome, the folkland of England. As the royal power grew, as the king came to be more and more looked on as the impersonation of the nation, the land of the people came to be more and more looked on as the land of the king, and the folkland of our Old English charters gradually changed into the *terra regis* of Domesday. Like other changes of the kind, that Norman conquest only strengthened and brought to its full ef-

fect a tendency which was already at work; but there can be no doubt that, down to the Norman conquest, the king at least went through the form of consulting his Witan, before he alienated the land of the people to become the possession of an individual,—an Old English phrase, before he turned folkland into bookland. After the Norman conquest, we hear no more of the land of the people; it has become the land of the king, to be dealt with according to the king's personal pleasure. From the days of the first William to those of the third, the land which had once been the land of the people was dealt with without any reference to the will of the people. . . . Now this wrong . . . is redressed. A custom as strong as law now requires that at the beginning of each fresh reign the sovereign shall, not by an act of bounty, but by an act of justice, give back to the nation the land which the nation lost so long ago. The royal demesnes are now handed over to be dealt with like the other revenues of the state, to be disposed of by parliament for the public service; that is to say, the people have won back their own; the usurpation of the days of foreign rule has been swept away. We have . . . gone back to the sound principles of our forefathers; the *terra regis* of the Norman has once more become the folkland of the days of our earliest freedom. . . . The land which, to put it in the mildest form, the king held in trust for the common service of the nation, was now again employed to its proper use." Freeman, Eng. Const. 2d ed. 189, 140, 142; May, Const. Hist. chap. 4; 1 Bl. Com. 286; Gould, Waters, §§ 19, 21, note 2. The trustees' private interests, gained by usurpation, and lost when the ancient limitations of executive power were restored, was a wrong which the New England colonists could not have intended to bring over and perpetuate. It was not adapted to their circumstances, but was at variance with the institutions they endeavored to establish, and the rights for which they were disposed to contend.

The argument that the private use of tide waters and large ponds by abutters disproves the public title, (*Blundell v. Catterall*, *supra*,) is not conclusive. Like other general rules, the public title, and the king's want of capacity to convert such waters into private property, are applied with a due observance of private rights, founded on necessity and convenience, and maintained by uniform usage. The dictates of justice and reason, which retain in the government, for common use, the fee of large ponds, and the shores and arms of the sea, (and in some states large fresh rivers,) have vested a reasonable private right of using this public property in the owners of the adjoining land. *Clement v. Burns*, 43 N. H. 609, 616-619; *Clark v. Peckham*, 10 R. I. 35, 38, 14 Am. Rep. 654; *Thornton v. Grant*, 10 R. I. 477, 14 Am. Rep. 701; *Potter, J.*, in *Providence Steam Engine Co. v. Providence & S. S. S. Co.* 12 R. I. 348, 356-370, 84 Am. Rep. 652; *East Haven v. Hemingway*, 7 Conn. 186, 202, 208; *Frink v. Lawrence*, 20 Conn. 117, 121, 50 Am. Dec. 274; *Mather v. Chapman*, 40 Conn. 332,

395, 16 Am. Rep. 46; *Sherlock v. Bainbridge*, 41 Ind. 35, 13 Am. Rep. 802; *Delaplains v. Chicago & N. W. R. Co.* 42 Wis. 214, 24 Am. Rep. 386; *Diedrich v. Northwestern U. R. Co.* 42 Wis. 248, 24 Am. Rep. 399; *Union Depot Street R. & Transfer Co. v. Brunswick*, 31 Minn. 297, 47 Am. Rep. 789; *Lincoln v. Davis*, 53 Mich. 375, 51 Am. Rep. 116; *Dutton v. Strong*, 66 U. S. 1 Black, 23, 31, 32, 17 L. ed. 29, 32; *St. Paul & P. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 272, 289, 19 L. ed. 74, 78; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 504, 19 L. ed. 984, 986; *Weber v. State Harbor Comrs.* 85 U. S. 18 Wall. 57, 65, 21 L. ed. 798, 801. This right is not bounded by low-water mark. For shipping purposes in Portsmouth, it is reasonably necessary that wharves should be built from the upland, not only across the land uncovered at low tide, but also beyond it. In Lake Winnipisiogee, a steamboat wharf must extend to a navigable depth in the dry season. *Atles v. Northwestern U. Packet Co.* 88 U. S. 21 Wall. 389, 393, 22 L. ed. 619, 620. An abutter's use of the bed of a public water like a riparian owner's use of a fresh river flowing over his land, is governed by the rule of reasonableness applied to the facts of his case.

"By the common law, the king was the proprietor of the soil under the navigable water, and this, being regarded as a private emolument of the crown, was susceptible of transfer to a subject. But such transfer did not divest or diminish, at least after *Magna Charta*, the public rights in the water, and, consequently, the grantees of the crown held the property in subjection to the common privilege of fishery and navigation. . . . The king could not deprive the subjects of the realm of these general rights. This was a power that resided in parliament." "By the rules of the ancient law, the owner of land along the shore was entitled to no right as an incident of such ownership, except the contingent ones . . . of alluvion and dereliction. . . . On the other hand, the title to the soil under tide water was in the sovereign, and such title was attended with the usual concomitants of the ownership of realty; and it consequently followed . . . that, in order to enable the owner of the upland to fill in or wharf out below the line of high water, it was absolutely necessary to adopt some principle different from those of the common law." *Stevens v. Paterson & N. R. Co.* 84 N. J. L. 532, 550, 554, 8 Am. Rep. 269. In that case it was held that, by a local custom of New Jersey, abutters have an inchoate right to wharf out to low-water mark; that this right is a license, revocable before execution; and that, under a statute making it lawful for them to build docks or wharves upon the shore in front of their lands, and in any other way to improve the same, and, when so built upon or improved, to appropriate the same to their own exclusive use, the license does not become irrevocable until the improvement is made. The doctrine that the soil under tide water is a private emolument of the sovereign, (subject to public rights of fishery and navigation,) and 18 L. R. A.

that, without express or implied license, abutters cannot build wharves, or bathe in the sea, in front of their own land, is not introduced here by applying the dictates of justice and reason to the situation of the American people. The public title of the beds of large ponds, (*State v. Gilmanton*, 9 N. H. 461,) including a public right of fishery that cannot be impaired by prescription, (*State v. Franklin Falls Co.* 49 N. H. 240, 250, 252-257, 6 Am. Rep. 518;) and the private right of wharfing out (*Clement v. Burns*, 48 N. H. 609, 617-619,) are not overthrown by such cases as *Marshall v. Ulleswater S. Nav. Co.* 3 Best & S. 732, L. R. 7 Q. B. 166; *Bristow v. Cormican*, L. R. 3 App. Cas. 641; *Johnston v. Bloomfield*, 8 Ir. C. L. Rep. 68; and other authorities cited in *Stevens v. Paterson & N. R. Co. supra*. If due weight is given to the axiom that common law grows out of the institutions and circumstances of the country, the conclusion is unavoidable that the rights of abutters and the public in American public waters are the whole property, and not merely what was left for the subjects of the realm by the ancient monopolies of the English executive and the manorial lords.

Hamlin v. Pairpoint Mfg. Co., 141 Mass. 51, 57, was an action of tort for building a wharf on the plaintiff's tide-land in Acushnet river. The defendants contended that the plaintiff had no rights in the soil below low-water mark. By a special Act, passed in 1806, (*Haskell v. New Bedford*, 108 Mass. 209,) the Legislature had authorized the owners of lots adjoining Acushnet river in New Bedford to erect and maintain wharves parallel with their several lots to the channel of the river. It was held that, whether this did or did not give the lot owners an unrestricted fee, it operated as a legislative grant to them of an interest in the soil between their lots and the channel, and gave them a possessory title for the purpose of building wharves, sufficient to maintain trespass. In this state such grants are not necessary. What form of action is appropriate when the abutter has not actual possession is a question of no practical importance. If the state has a right of action for the possession when a wharf is wrongfully built in front of his land, (*Coburn v. Ames*, 52 Cal. 385, 398, 28 Am. Rep. 634) this does not preclude his recovering a judgment that will enable him to exercise his right of wharfing out. The proceeding at English common law to obtain leave to build a wharf or other structure on the king's tide land was a writ of *ad quod damnum* to ascertain what injury would ensue. Upon the return of a favorable verdict, the proposed work was authorized by the king's license. *Comyns' Dig. Ad Quod Damnum*; Gould, *Waters*, §§ 21, 43, 609. In this state, the manner in which and the extent to which the bed of a public water can be reasonably appropriated to the exclusive use of a littoral proprietor is determinable on a bill in equity. The ascertainment, location, and measurement of his right before he attempts to exercise it may be more useful than any remedial course that can be taken after a controversy has arisen on his

alleged violation of the public right. *Connecticut River Lumber Co. v. Olcott Falls Co.* 65 N. H. 290, 390-392, 13 L. R. A. 826. If there were no statutes relating to chancery jurisdiction, the common law would furnish necessary and convenient procedure. *Walker v. Walker*, 63 N. H. 321, 56 Am. Rep. 514; *Boody v. Watson*, 64 N. H. 162, 171, 178, 179. If it is reasonable that flats should be filled or permanent works constructed by abutters, and that they should not be deprived of their improvements without compensation, or that limitations or conditions should be imposed for the protection of public or private interests, a decree, made upon a hearing of all interested parties maintains the equities of the case, and so adjusts the exercise of the public and the private right that there shall be no substantial infringement of either. Without a decree or judgment on the question of reasonable use, the abutter assumes the risk of his construction of a wharf, warehouse, weir, tide mill, or other thing, below the water's edge, being found to be unreasonable, and his structure being an abatable nuisance. This risk has been assumed, from the earliest settlement to the present time, without fear of loss; and, if any public or private wrong or inconvenience has resulted, it is not generally known. The experience of more than 250 years has shown no practical difficulty in the question of the abutters' reasonable private use, and no defect in the law calling for such amendments as have been made in Massachusetts in relation to tide waters.

An abutter's private right of use and occupation in a public water, though conveyable by his deed of his upland, (*Watson v. Peters*, 26 Mich. 508; *Turner v. Holland*, 65 Mich. 458; *Norcross v. Griffiths*, 65 Wis. 599, 619, 620, 56 Am. Rep. 642,) is a severable part of his estate. In value, it may be the chief part. The reason of the law does not forbid him to sever and sell or lease the right he may not wish to exercise. *Simons v. French*, 25 Conn. 848, 852, 853; *Ladies' Seamen's Friend Soc. v. Halstead*, 68 Conn. 144, 150, 152; *Hanford v. St. Paul & D. R. Co.* 43 Minn. 104, 7 L. R. A. 722; *Goodsell v. Lawson*, 42 Md. 848. Being a part of his estate, it cannot be taken from him for private use without his consent, or for public use without compensation. In some instances it may not be material whether the fee below the water's edge is in him, subject to reasonable public use, or in the state, subject to his reasonable private use. In some places the public right of use is more, in others it is less, important than the private right. Convenience requires a rule, and no serious inconvenience has arisen from the adoption of the water's edge as the boundary of public and private ownership. Whether the water's edge, which is the high-water line in tide waters, is the low-water line in large ponds, (*Gould, Waters*, § 203; *Tiedeman, Real Prop.* § 836; *Paine v. Woods*, 108 Mass. 160, 170,) may be a question to be considered in determining what common-law forms of action are appropriate when remedies are demanded for al-

leged infringements of the public or the private rights existing below the line of high water.

"Navigable water" "is here held to mean all such waters as are actually navigable, whether fresh or salt. When it is considered that the rights and interests of the public, such as fishing, ferrying, and transportation, are preserved in all navigable waters by the inherent and inalienable attributes of the sovereign, it would seem to follow that the controversies which have arisen over the nominal ownership of the soil under such waters have been magnified beyond the real interests involved. This becomes still more apparent when we consider the character and extent of the property which may, in the nature of things, be acquired and enjoyed in running water. *Aqua currit et debet currere*. Neither sovereign nor subject can have any greater than a usufructuary right therein." *Smith v. Rochester*, 92 N. Y. 463, 479, 480, 44 Am. Rep. 898. In that case it was held that all conveyable rights of property in the bed of Hemlock lake, in the southwestern part of New York, had been vested in the state of Massachusetts and its grantees. Salt marshes and thatch beds, specially needed by owners of cattle before sufficient mowing ground was obtained by removing the forest, have been conveyed and inherited as private property (subject to public rights) since they were divided into lots and apportioned among the early settlers. *Belknap, Hist. N. H. chap. 2*, (Farmer's ed. p. 20;) *Bell, Hist. Exeter*, 20, 80, 81, 85, 40, 42, 180, 181, 435, 487, 498, 441, 444; *Acts June 27, 1780, January 15, 1784, November 26, 1812, and July 1, 1819*, (ed. 1880, p. 191;) *Gen. Laws, chap. 281, § 9*; *Knowles v. Dow*, 20 N. H. 185-187; *Potter, J., in Providence Steam-Engine Co. v. Providence & S. S. S. Co.* 12 R. I. 348, 357, 34 Am. Rep. 652. Whether this private property is a mere exclusive, assignable, and inheritable right to the crop of thatch, or a fee vested in persons described in the Act of 1794 as "owners of salt marshes," is a question that need not now be considered. Legislation of the subject of seaweed, rockweed, and flatsweed shows that by usage and universal understanding other parts of the tide land are public property. *Acts June 12, 1789, June 18, 1793, June 14, 1800, December 13, 1808, and June 21, 1814*; *Laws 1840, chap. 564*; *Laws 1850, chaps. 994, 1001*; *Index N. H. Laws, p. 335, title Marshes*; *Id. p. 496, title Seaweed*; *Rev. Stat. chap. 123, §§ 2, 8*; *Gen. Stat. chap. 263, §§ 8, 9*; *Gen. Laws, chap. 281, §§ 10, 11*. Taking from thatch grounds the weed deemed "necessary to preserve and fertilize" them, "without leave first obtained from the owner or owners thereof," is prohibited as a "damage" to the private right of the persons designated as "owners." Taking weed from the seashore is regulated in a manner calculated to prevent "inconveniences and disputes" among persons exercising a public right. This distinction is a legislative recognition and confirmation of the understanding that has always prevailed in the tide-water region, where grass-pro-

ducing lots in salt-water rivers and arms of the sea have been claimed and mowed under private titles derived from the towns.

The English doctrine of the king's private interest in public waters, the need of his license to authorize a reasonable private use of them by abutters, and the necessities of commerce, raised an equitable demand for an exception to the rule that private rights cannot be acquired from the crown by prescription. Gould, Waters, §§ 22, 37. In this state, the law of public waters being what justice and reason require, there is no exceptional power of invading the public right by prescription. *State v. Franklin Falls Co.* 49 N. H. 240, 6 Am. Rep. 518; *Collins v. Howard*, 65 N. H. 190; *Weber v. State Harbor Comrs.* 85 U. S. 18 Wall. 57, 68, 21 L. ed. 798, 802. Private rights in thatch grounds, acquired from the public proprietor, not by prescription, but by express grants of lots laid out for private use below high-water mark, have no tendency to show that they would have been acquired by a grant of upland bounded by tide water, or by a grant of upland within the bounds of which such grounds were found. They seem to be an instance of the operation of the rule that private rights are not acquired in public waters unless an alienation of the public property is included in the terms of a grant by express words or necessary implication. *Com. v. Roxbury*, 9 Gray, 451, 491-497. If there are exceptional cases not governed by this rule, the existence of the rule is not a matter of doubt. When a lot of salt marsh (or the right of cropping it) has been converted into private property by an express public grant made by authority shown by usage to be competent to exercise this power over the marsh, its passing by deed or devise as parcel of a distant farm of which it is in fact a part would not be an infringement of the rule. In *Clement v. Burns*, 43 N. H. 609, the plaintiff, owning land adjoining the tide water of Cochecho river, had built a wharf above and below high-water mark, and the wharf had been taken for a highway by eminent domain. The defendant, exercising the right of navigation in public water, brought mud in boats up the river to the wharf. Exercising a highway right, he put the mud on the wharf, and removed it in a reasonable time to his farm; and, if these had been all the facts, he would have prevailed in the suit. On other facts, judgment was ordered for the plaintiff. Manure belonging to the plaintiff had been carried by rains and tides to the shore beyond the wharf, and mixed with the soil, and with some of the defendant's mud which had been casually dropped overboard in unloading his boats. This mixture the defendant carried away and converted to his own use, and for this act the plaintiff recovered damages. The state's ownership of the shore did not authorize the defendant to appropriate to his own use whatever property of other persons might be found there. If he had taken a boat belonging to the plaintiff, it would have been no defense that he found it on public land or public water. The mingling of the plaintiff's manure with

the state's soil and the defendant's mud by natural causes and accident raised a question of title by accretion of realty or confusion of personalty (3 Kent, Com. 428; Tiedeman, Real Prop. §§ 685, 686; 2 Kent, Com. 360-365) which the court did not consider. It was assumed that the plaintiff continued to be the owner of the manure, and that the defendant's appropriation of it was a tort. From this assumption it followed that the plaintiff was entitled to a remedy in some form of action. He was not the owner, and he had no possession, actual or constructive, of the ground on which the rains and tides had deposited the manure. The conclusion that he could maintain trespass *quare clavum* may have been reached by "overlooking nice technicalities," (page 620,) which there would have been no occasion to disregard if the land title and legal possession had been in him, and the defendant had been a trespasser when he brought his boats to the wharf. At the present time, when the plaintiff had a legal and just cause of action, and the sufficiency of the declaration is contested, the question of remedy is disposed of by amendment, and not by disregarding the distinctions between common-law forms of action. Cushing, *Oh. J.*, in *Carleton v. Cate*, 56 N. H. 180, 186; *Stebbins v. Lancashire Ins. Co.* 59 N. H. 148; *Peaslee v. Dudley*, 63 N. H. 220; *Winnipisogee Paper Co. v. Eaton*, 64 N. H. 284; *Tasker v. Lord*, 64 N. H. 279; *Morse v. Whitcher*, 64 N. H. 591; *Sleeper v. Kelley*, 65 N. H. 206.

In *Maloon v. White*, 57 N. H. 152, the defendants hauled sand from the seashore to repair highways. The plaintiff alleged, but failed to prove, that the hauling would expose his land to be overflowed and washed away. In *Clement v. Burns*, if any substantial injury to the plaintiff's upland, or to his private right of using the shore, had been directly or indirectly caused by the defendant's removal of the public soil, the plaintiff would have had an appropriate and adequate remedy. *Com. v. Tencksbury*, 11 Met. 55, 58, 59; *Doe v. Morrell, Smith*, (N. H.) 255; 3 Kent, Com. 437; Tiedeman, Real Prop. §§ 618-620; Washb. Easem. 429-438. As the wharf had been taken by eminent domain, it was not necessary to try the question whether his construction and use of it was an exercise of his private right, as owner of the upland, to a reasonable, exclusive use of the public land below high-water mark. This right of reasonable use was correctly described in the decision as "an interest in the shore, . . . which interest he may vindicate by suit." The expression "subject only to the paramount right of navigation," if it means that the fee and legal possession of the shore were in the plaintiff, or that the public had no right but that of navigation, cannot be sustained.

In some respects there has been a marked difference between Massachusetts and New Hampshire law, but in both jurisdictions large ponds are withheld from private ownership for reasons that are distinctively American. "Every inhabitant that is an householder shall have free fishing and fowling in any great ponds, and bays, coves, and

rivers so farre as the sea ebbes and flowes within the presincts of the towne where they dwell, unlesse the free men of the same towne or the generall court have otherwise appropriated them, provided that this shall not be extended to give leave to any man to come upon others proprieties without there leave." Mass. Body of Liberties, (enacted in 1641,) article 16, printed in 28 Mass. Hist. Coll. (8d Series,) 219, Mass. Colonial Laws 1660-1872, (ed. 1889, p. 87,) and *Com. v. Roxbury*, 9 Gray, 465. "The great purpose of the 16th Article of the Body of Liberties was to declare a great principle of public right, to abolish the forest laws, the game laws, and the laws designed to secure several and exclusive fisheries, and to make them all free." *Com. v. Alger*, 7 Cush. 58, 68; *West Roxbury v. Stoddard*, 7 Allen, 158, 165. In this state, free fishing and free fowling in great ponds and tide waters have not needed the aid of a statute for the abolition of written or the declaration of unwritten law. So far as the Ordinance of 1641 introduced or confirmed these liberties, it was an enactment of New Hampshire common law. The limitation to householders within the town where they dwell is not admissible in this jurisdiction, and is not in force in Massachusetts. *Lakeman v. Burnham*, 7 Gray, 487; *Com. v. Roxbury*, 9 Gray, 527. The recognition of the validity of appropriations of great ponds to private persons before 1641 (*West Roxbury v. Stoddard*, *supra*; *Berry v. Raddin*, 11 Allen, 577, 580; *Com. v. Roxbury*, 9 Gray, 516, 525, 526, 528; *Watuppa Reservoir Co. v. Fall River*, 154 Mass. 805, 808, 18 L. R. A. 255,) is an exception not required here for any purpose of justice or convenience. The proviso excluded the construction which might be claimed to give public access to public waters across private property.

In 1647 the want of a definition of "great ponds" was supplied, and the 16th article of the Body of Liberties was amended by changing the proviso and adding new clauses: "Provided, that no town shall appropriate to any particular person or persons any great pond containing more than ten acres of land, and that no man shall come upon another's property without their leave, otherwise than as hereafter expressed. The which clearly to determine, it is declared that, in all creeks, coves, and other places about and upon salt water where the sea ebbes and flowes, the proprietor of the land adjoining shall have propriety to the low-water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbes further. Provided that such proprietor shall not, by this liberty, have power to stop or hinder the passage of boats or other vessels in or through any sea, creeks, or coves to other men's houses or lands. And for great ponds, lying in common though within the bounds of some town, it shall be free for any man to fish and fowl there, and may pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow. [1641-47.]" Mass. Colonial Laws 1660-72, (ed. 1889,) p. 170; Mass. Ancient 18 L. R. A.

Charter, chap. 63, p. 148; *Com. v. Alger*, 7 Cush. 58, 67, 68. Under this Law of 1641 and 1647 (printed since 1660, with the date "1641, 1647," and called in some decisions the "Ordinance of 1641," in others the "Ordinance of 1647,") "the state owns the great ponds as public property held in trust for public uses." *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 557, 1 L. R. A. 466. "Great ponds, not appropriated before the Colony Ordinance of 1647 to private persons, are public property, the right of reasonably using and enjoying which, for taking ice for use or sale, as well as for fishing and fowling, boating, skating, and other lawful purposes, is common to all." *Hittinger v. Eames*, 121 Mass. 539, 546; *Gage v. Steinkrauss*, 181 Mass. 222; *Rowell v. Doyle*, Id. 474; *Potter v. Howe*, 141 Mass. 357, *People's Ice Co. v. Davenport*, 149 Mass. 323. "By this ordinance it was intended to devote the great ponds to public use. . . . They were not thenceforth to be appropriated to the use of any particular person or persons, but were declared to be 'lying in common.'" *West Roxbury v. Stoddard*, 7 Allen, 158, 166. The retention of title in the government, in trust for public uses, placed great ponds and tide waters in the same common-law class of property. *Drury v. Natick*, 10 Allen, 169, 179; *Paine v. Woods*, 108 Mass. 160, 169; *Watuppa Reservoir Co. v. Fall River*, *supra*.

It was formerly held that the Ordinance of 1647 "was annulled with the charter by the authority of which it was made," and that the rule established by it had derived from usage the force of common law in that colony, (*Storer v. Freeman*, 6 Mass. 485, 493, 4 Am. Dec. 155;) but the correctness of this view is doubted, (*Com. v. Alger*, 7 Cush. 58, 76; *Com. v. Roxbury*, 9 Gray, 517.) "Whether the ordinance is a part of the statutory or of the common law in the territory of the Massachusetts Colony it is perhaps unnecessary to determine. It was never extended over Plymouth by an Act of the general court. It is, however, the law throughout the whole commonwealth." It "has been extended to Plymouth, to Nantucket, to the county of Dukes, and to Maine, and this has been done by usage and by judicial decision." *Litchfield v. Scituate*, 186 Mass. 39, 46. "It is in force throughout the whole territory of this state, including those parts which were formerly the colony of Plymouth, Nantucket, and Dukes county, and also in Maine, although none of these were under the jurisdiction of the colony of Massachusetts bay." *Watuppa Reservoir Co. v. Fall River*, *supra*; *Com. v. Alger*, 7 Cush. 58, 75, 76, 79; *Weston v. Sampson*, 8 Cush. 847, 854, 54 Am. Dec. 764; *Com. v. Roxbury*, 9 Gray, 523. "When the Ordinance of 1647 is said to be part of the common law of Plymouth colony, all that is meant is that . . . it has been extended to that territory by usage and by judicial decision." *Watuppa Reservoir Co. v. Fall River*, 154 Mass. 805, 808, 18 L. R. A. 255.

In view of the early extension of Massachusetts jurisdiction to the Piscataqua, the settlement of a large portion of our territory

under Massachusetts grants, the number of settlers who came from Massachusetts to all parts of this province, and the extent of Massachusetts influence upon New Hampshire law, the Ordinance of 1647 could well be considered as common law by adoption here (as it is in other parts of New England) if it were in harmony with the usages and interests of the state. Belknap, Hist. N. H. chaps. 2, 17, 18; Smith, (N. H.) 448, 503; *Brown v. Langdon*, Smith, (N. H.) 178, 182, 183; Story, Const. § 81; and authorities before cited. It describes a "great pond" as one "containing more than ten acres of land." There may be no objection to this definition; and, if the provision relating to tide waters had become a part of our law, its acceptance would have tended to show that the definition of great ponds had not been rejected. While the ordinance maintains the public title of large ponds, it converts into private property, and gives away, a great amount of tide land. The main object of the gratuity "has always been understood to be to induce the erection of wharves for the benefit of commerce." *Com. v. Roxbury*, 9 Gray, 515. "The object . . . has often been declared to be the erection of wharves and similar structures, and the reclaiming of the flats." *Henry v. Newburyport*, 149 Mass. 582, 585, 5 L. R. A. 179. In this state, the transfer of the fee to the abutters has not been necessary to encourage improvements below high-water mark. Their common-law right of reasonable use has been sufficient for all the purposes for which the ordinance changed the common-law title. If a change of title had been needed, the premises conveyed by the ordinance would have been excessive in length and insufficient in width. Its operation was not limited to the short and comparatively few sections of the shore on which improvements had been or were likely to be made. Abutters would not be induced to build wharves at a few points in front of their land by giving other persons the rest of the shore of the sea and the Piscataqua. The gift of a wharf lot to the abutter who build a wharf upon it would have been enough for the benefit of commerce. If such a bounty had been necessary, the ordinance would have been defective in giving no title or right to use below low-water mark. Private ownership of so much of the tide land (not exceeding 100 rods in width) as is bare twice a day, and public ownership where vessels can come to a wharf at low tide, is not an adequate or useful adjustment of rights for commercial purposes. Where tide land ought to be improved and occupied by the abutter above and below low-water mark, he has a common-law right to improve and occupy it. When it is doubtful whether his proposed use and occupation of it would be reasonable, a decision of the question of reasonableness can be obtained in an appropriate action brought by him or the attorney-general.

In *Lamprey v. Nudd*, 20 N. H. 209, (decided in the county of Rockingham at the December term, 1847,) it was held that the provision of the Massachusetts ordinance re-

lating to the shore of tide waters has not been adopted and is not in force in this state; and there is no ground on which that case can be overruled. The introduction of any other line than high-water mark as the marine boundary would overturn common-law rights that had been established here by a usage and traditional understanding of 200 years' duration before they were questioned in *Lamprey v. Nudd*; and the rejection of the whole ordinance, except the clause defining a "great pond" as one "containing more than ten acres of land," may leave little ground for the claim that this definition has become a part of our law. There would be a distinction between public and private ponds if the ordinance had not been passed, and the common-law classification can be determined and applied by common-law means and methods. Parties are entitled to judgments in which their legal rights are ascertained and established. How far the marine territory of a nation extends from high-water mark is a question which courts may be compelled to decide on other evidence than written law. *Reg. v. Keyn*, L. R. 2 Exch. Div. 68. The decision in *State v. Gilmanton*, 14 N. H. 467, that Sanbornton bay is a large pond and a public water was not based on the Massachusetts ordinance. However slight the argument in favor of any particular dimensions in determining whether a pond is public or private property, the law requiring a decision of the question authorizes the adoption of a necessary rule. A standard of size seems to be indispensable, and, if a more satisfactory measure is not found, ponds of more than 10 acres may properly be classed with Sanbornton bay.

The division of lakes and ponds into public and private classes of property is not a Federal question. So far as state courts have considered the subject, they seem to agree that such a division must be made, and that lakes Superior, Michigan, Huron, Erie, Ontario, and Champlain are public waters. This modification of what has been supposed to be the English rule seems to be put on the ground that the six largest lakes flowing into the St. Lawrence are inland seas, navigable in fact, and used for an extensive commerce. Before determining whether a lake or pond is public or private property, the law does not wait to see how much it will be used for commerce. Its commercial use may depend on the future unknown population and business of the surrounding country. A great amount of transportation would probably be introduced on Sanbornton bay by the rise of a large city at each end of it. If natural capacity for navigation were the test, some degree of capacity would have to be selected. A pond is not a public water merely because small logs can be floated through it in May or June. But a sufficient reason has not been given for selecting Champlain as the measure, rather than Sanbornton bay, or some smaller basin. All bodies of fresh water can be connected with the sea by canals; and, if a natural channel for shipping to and from the sea were required in the class of public waters, the

largest Amercian lakes would be private property. The abandonment of the arbitrary tidal test makes it necessary to choose another, and it may be impossible to find one that is not arbitrary. Nothing can be more arbitrary than six exceptions to the English rule. The authorities in other states tend strongly to limit the exceptions to a small number. *Ledyard v. Ten Eyck*, 36 Barb. 102; *Cobb v. Davenport*, 32 N. J. L. 869, 377, 38 N. J. L. 223, 97 Am. Dec. 718; *Lembeck v. Nye*, 47 Ohio St. 336, 8 L. R. A. 578; *Ridgway v. Ludlow*, 58 Ind. 248; *Stoner v. Rice*, 121 Ind. 51, 6 L. R. A. 387; *Beckman v. Kreamer*, 43 Ill. 447, 92 Am. Dec. 146; *Lincoln v. Davis*, 58 Mich. 375, 390, 51 Am. Rep. 116; *Clute v. Fisher*, 65 Mich. 48; *contra*, *Trustees of Schools v. Schroll*, 120 Ill. 509, 60 Am. Rep. 575. In this jurisdiction, there is a different classification. "For the purposes of this Act, all natural ponds and lakes containing more than twenty acres shall be deemed public waters." Laws 1887, chap. 86, § 3. The purposes of the Act are stated in section 1, which provides that "no actions shall be maintained against any person for crossing uncultivated land to reach any public water for the purpose of taking fish unless actual damage has been sustained;" and in section 2, which provides that "in all actions brought to recover damage for crossing land to reach any public water for the purpose of taking fish, the cost shall be limited to an amount not exceeding the damages recovered, if such damages do not exceed \$13.38." Although section 1 is apparently invalid, and section 2 may be contested as a discrimination inconsistent with equal rights, the act is evidence of an understanding that a pond of twenty acres is public water. But it does not show that all smaller ponds are private property. It was not intended to be a conveyance of public title, or an abandonment of public rights. The Massachusetts Act of 1869, chap. 384, (Pub. Stat. Mass. chap. 91, §§ 10, 11,) "changes the law in regard to the size of great ponds, in which the public may have the right of fishing," and "gives to the riparian proprietors of any pond not more than twenty acres in extent, the exclusive control of the fisheries therein existing." As the law now stands, the public have no right of fishing in any pond not more than twenty acres in extent." *Com. v. Tiffany*, 119 Mass. 300, 303; *Com. v. Vincent*, 108 Mass. 441, 448; *Com. v. Perley*, 180 Mass. 469. The statutory size seems to be expressly changed only so far as a single public use is concerned. The New Hampshire Act of 1887 is much more limited. It relates merely to actions for crossing private land to reach public water for the purpose of taking fish. The bed of Long pond, containing in its natural condition about 160 acres, is the property of the state. The water's edge is the boundary of the lot which the defendants hired, and from which they went upon the pond to get ice. Before the township was granted, the public held not only the basin of the pond, but also the bed, banks, and valley of the brook that flows from the pond to the river. In that position of the title the public owner could divert the entire pond

from its outlet without infringing private rights between the pond and the river. If the original title of the valley had remained unchanged, this suit could not be maintained. But the public owner elected to convert into private property the mill site which the plaintiffs now own, (situated on the brook, about 100 rods below the outlet of the pond,) and to grant it to individuals from whom the plaintiffs derive their title. The Massachusetts grant of the township, recognized and established as a valid conveyance, is as effective as if made by the government of this province. The grant of the bed of the brook to private proprietors, whose title has come to the plaintiffs, conveyed rights of air, light, heat, and water. No express mention of these rights was necessary. They passed as parcel of the estate. If the original owner had desired to retain an unlimited right to divert the pond and destroy the mill privilege, there should have been an express reservation. A right to the natural flow of the brook, not unreasonably diminished or polluted, was inherent in the land, and one of the rights of use and occupation of which the title was composed. It may have been more valuable than all the others. By an elementary rule of conveyancing, it passed from grantor to grantee, in the absence of a stipulation to the contrary. The operation of the rule did not depend upon the question whether the water was a natural pond, large or small, before it entered the plaintiff's lot. The water right, having passed to them from the original public owner, is a part of their mill lot in the legal and essential sense in which a right to rains, winds, electricity, and the use of them on that lot, is a part of their realty. If the Legislature should authorize the governor to sell Long pond, his deed of it to the defendants would convey nothing to the plaintiffs, and would not convey to the defendants the right of unlimited use, which ceased to exist when the mill privilege was converted into private property by governmental grant. If the plaintiffs have been injured by an unreasonable use of the pond, or of any other lot of land or water, there is a legal remedy. *Cary v. Daniels*, 8 Met. 466, 476, 480, 41 Am. Dec. 532; *Com. v. Tewksbury*, 11 Met. 55, 57; *Com. v. Alger*, 7 Cush. 53, 84-87; 8 Kent, Com. 439, 440; *Bassett v. Salisbury Mfg. Co.* 43 N. H. 569, 578, 82 Am. Dec. 179; *Holden v. Lake Co.* 53 N. H. 552; *Thompson v. Androscoggin River Imp. Co.* 54 N. H. 545, 549-554; *Connecticut River Lumber Co. v. Olcott Falls Co.* 65 N. H. 290, 391, 392, 13 L. R. A. 826. In *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 557, 558, 1 L. R. A. 466, it was held by a majority of the court that the Ordinance of 1641-47 introduced a peculiar rule, under which, by an implied reservation in grants of land on streams flowing from great ponds, the public owner retained a right to divert the ponds. This change of the common law has not been adopted in this state.

In exercising the public right of cutting and gathering ice the defendants may have advantages as tenants of a littoral proprietor. Stages and platforms, erected by them in

the pond in front of their hired lot, and used in filling their ice houses, may be claimed to be within their lessors' right of reasonable use, of which wharfing out is an example. Such appliances may not harm the plaintiffs' mill privilege, but the abutters' right to take ice is not exclusive. The public may have access to the pond over a highway laid out under the general highway law, or under chapter 97, Laws 1887, entitled "An Act Providing for Highways to Public Waters." The quantity of water the defendants can rightfully divert from the brook in a solid or liquid form may be restricted by other persons exercising the public right at the same time, or earlier in the same season. The public character of the right does not multiply indefinitely what could be legally taken if only one person exercised the right. The quantity that can be

taken by all is limited by the reasonable use which is the extent of the water right attached to the soil and vested in the owner of the basin through which the water flows. But for reasons suggested in *Cummings v. Barrett*, 10 Cush. 186, 189, 190, the removal of large quantities of ice from ponds may not always be injurious to mills on outflowing streams. The agreed facts do not show that the defendants' removal of ice was an unreasonable use of the pond, or that the plaintiffs suffered damage. As the parties do not agree on these points, the case must stand for trial. The competency of evidence on the question of reasonable use is to be considered when evidence is offered.

Case discharged.

Carpenter and Bingham, JJ., did not sit. The others concurred.

NEW YORK COURT OF APPEALS (3d Div.).

Mary M. GOUVERNEUR *et al.*, *Repts.*,
v.
NATIONAL ICE CO. of New York, *Appt.*

(.....N. Y.....)

1. The title to land under the waters of small inland lakes and ponds is presumed to belong to the proprietors of the adjoining up-lands.

2. The common-law rule governing the construction and extent of grants of land bordering and bounded on non-navigable waters is applicable alike to conveyances bounding lands on fresh-water rivers and small non-navigable lakes or ponds.

3. Describing one boundary of a conveyance of land as along a certain pond will carry title to the center of the pond unless a contrary intention appears.

NOTE.—Ownership of the bed of lakes and ponds.

The recognized doctrine in this country is that the bed of the great navigable lakes belongs to the public, and, so far as it is included within the boundary of any state, is owned by that state.

Thus it is said in *Smith v. Rochester*, 32 N. Y. 463, 44 Am. Rep. 363, to be generally conceded that the doctrine of riparian ownership of the bed of waters does not apply "to the vast fresh-water lakes or inland seas of this country."

And in *Sloan v. Biemiller*, 34 Ohio St. 492, it is decided that riparian owners do not own the soil or control the fisheries to the center of Lake Erie or Sandusky bay.

So in *Lincoln v. Davis*, 58 Mich. 375, 51 Am. Rep. 116, it is decided that Thunder bay, which is a portion of Lake Huron, is public water; although the question in that case was as to fisheries and not directly as to the ownership of the bed of the lake.

In *Seaman v. Smith*, 24 Ill. 531, the line of land bounded on Lake Michigan is held to be that at which the water usually stands when undisturbed.

So Lake Pontchartrain is declared, in *Zeller v. Southern Yacht Club*, 34 La. Ann. 838, to be an arm of the sea, and the alluvion or batture that is upon its shores not to be susceptible of private ownership.

Lake Champlain, which covers nearly 1,000 square miles and is navigable for nearly 150 miles, is held both by New York and Vermont courts to be public and not subject to riparian ownership. *Champlain & St. L. R. Co. v. Valentine*, 19 Barb. 424; *Austin v. Rutland R. Co.* 45 Vt. 215; *Jakeway v. Barrett*, 33 Vt. 516; *Fletcher v. Phelps*, 28 Vt. 257.

And therefore a riparian owner cannot maintain ejectment for land made by a stranger by filling out from the shore. *Austin v. Rutland R. Co.* *supra*.

In *State v. Gilmanton*, 9 N. H. 461, Lake Winni-

pissee is held to be public although the decision is made to turn in that case upon the question whether a certain portion of the outlet was a stream or lake, and no distinction as to the size or navigability of the lake seems to be made important.

Small lakes and ponds.

The whole subject of the ownership of the bed of small lakes is a very difficult one. Early decisions tended to support the doctrine that the bed of any lake, however small, did not belong to the riparian owners, and the courts are at present somewhat divided on this question, while the whole number of decisions directly upon the subject is small.

The Massachusetts Ordinance of 1647 made every lake of more than 10 acres' extent public. *West Roxbury v. Stoddard*, 7 Allen, 158. And the Massachusetts and Maine decisions therefore necessarily denied that riparian ownership of such lakes extended to the center.

Thus in *Waterman v. Johnson*, 13 Pick. 261, although the question was as to the flowing of land and not as to title below low-water mark, it was assumed that such title was in the public and the question was whether parol evidence was admissible to show the intention as to the boundary of a large natural pond several miles in circumference, where its surface had been raised by a dam above the conveyance in question.

So in *Wood v. Kelley*, 30 Me. 47, the question was as to the boundary of land on a pond which had been raised by a dam, and low-water mark of the pond as raised was held to be the boundary.

In *Bradley v. Rice*, 13 Me. 198, 29 Am. Dec. 501, it is decided that the boundary of land on a natural pond goes only to the margin.

The Maine decisions are like those of Massachusetts governed by the Ordinance of 1647 which was operative in Maine, as that state was originally a part of Massachusetts.

4. The designation of the courses and distances of the shore line in a deed describing one boundary of the land conveyed as "along" a certain pond, will not prevent the passing by the grant of title to the center of the pond.

(October 1, 1892.)

APPEAL by defendant from an order of the General Term of the Supreme Court, Second Department, reversing a judgment of a Special Term for Putnam County in favor of defendant in an action brought to recover possession of certain land covered by water. *Reversed.*

Statement by **Bradley, J.:**

The action is ejectment, and was brought in January, 1888, to recover the possession of certain premises consisting of water and land under water of a natural pond or lake known as "Hinckley pond" or "Croton lake," situated in the town of Patterson, county of Putnam, and is about 2,500 feet in length, and 800 feet in width, in the broadest place, and covers 45 acres. Two streams, constituting its surface inlets, enter in at the southerly end. The outlet at the north end is known as "Muddy brook." The pond is within a tract of land granted June 17, 1697, to Adolph Phillipse by William III., king of England, by letters-patent, which embraced the present Putnam county. The plaintiffs, by descent and as successors in interest of the patentee, who died intestate,

seised of the premises, in 1749, have title to them, unless it has in the mean time been alienated or otherwise defeated. The plaintiffs' ancestors, by five deeds, of dates January 18, 1796, February 6, 1818, March 9, 1818, May 1, 1828, and September 30, 1845, conveyed all the lands surrounding and adjacent to the pond to grantees therein mentioned. The several deeds, respectively, described parcels of lands, and mentioned the quantities embraced within the boundaries; and the following are the only portions of the descriptions given by the said conveyances, in the order of their dates, essential to the questions here for consideration. In the first: "Thence north, sixteen degrees west, forty-three chains and seventy-nine links, to Muddy brook, and down the same as it runs until it bears due west," etc. This first-mentioned course intersected the pond some distance southerly from what now appears to be the outlet. In the second: "Thence south, eighty-one degrees east, five chains, . . . to Hinckley pond, near a large rock; thence northerly, along said pond, to the outlet thereof; that is, to Muddy brook." In the third: "Thence running north, nineteen degrees west, fourteen chains forty links, . . . to a birch sapling marked, on the east side of Hinckley pond; thence south, thirteen degrees west, three chains twenty-six links, along said pond; thence south, seven degrees fifteen minutes west, seven chains sixty links, along do.; thence south, thirty minutes west, two chains, along do.; thence south, five degrees

For the doctrine of the New Hampshire court, see *State v. Gilmanton*, 9 N. H. 461.

The decisions in other states which deny private ownership of the bed of small lakes have usually cited the Massachusetts and Maine decisions and have not always recognized the fact that these were based on the ordinance.

In Wisconsin the court lays down the doctrine generally that land bounded on a natural lake or pond goes only to the shore. *Diedrich v. Northwestern U. R. Co.* 48 Wis. 248; *Boorman v. Sunnucks*, 48 Wis. 253; *Delaplaine v. Chicago & N. W. R. Co.* 48 Wis. 214, 24 Am. Rep. 386.

This doctrine is applied to Lake Monona which is 9 miles in circumference and navigable. *Delaplaine v. Chicago & N. W. R. Co. supra.*

Also to a pond 4 or 5 feet deep covering about 160 acres which is meandered by the government survey. As to this it is held that no fee to the soil passes with the adjoining land. *Boorman v. Sunnucks, supra.*

In Illinois it was decided in *Trustees of Schools v. Schroll*, 120 Ill. 509, that a natural body of water five or six miles long, and in some places one mile wide, which was fed by springs, was a lake and not a stream, and that riparian ownership did not extend to the center of it. This case nevertheless is said in *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 423, not to establish in Illinois the doctrine that the bed of small lakes does not belong to riparian owners as there was another ground on which the decision was also based. Therefore the United States Supreme Court refused to adopt the doctrine laid down in that Illinois case in a case arising in that state although the question is one on which Federal courts must follow the state decisions as part of the local law.

In *Indiana v. Milk*, 11 Biss. 199, it is held that the proprietorship of surrounding lands will not in all 18 L. R. A.

cases give ownership to the bed of non-navigable lakes and ponds although this might be so in the case of a small lake; but that each case depends largely on its own facts. In that case it was held that riparian owners had no title of a shallow freshwater pond covering about 14,000 acres, and having no outlet.

But in *Ridgway v. Ludlow*, 58 Ind. 248, it was held that the owner of land on a non-navigable lake owns the bed to the middle of the lake. This was a case of ownership under a grant of a fractional subdivision of a section bounded on a small lake and the ownership was held to extend to the middle of the lake which was in the same quarter section.

The subsequent case of *Edwards v. Ogle*, 76 Ind. 302, explained this case and denied that the decision would apply to extend a government grant of a fractional section into another section or subdivision in order to reach the middle of the lake; but that the bed of the lake would be included in the grant only within the lines of the section or subdivision within which the land lay.

In *Stoner v. Rice*, 6 L. R. A. 337, 121 Ind. 51, the same doctrine is applied so as to give the purchaser from the government of lands bordering on a non-navigable inland lake all the land within the full subdivision of which his lot forms a portion, including that part which is beyond the meander line of the lake and covered by water. The Indiana cases then clearly establish for that state the doctrine that as to a meandered lake a purchaser from the government will not take to the centre of the lake unless that is within the subdivision of which his land forms a part, but that the bed of such lakes is the subject of private ownership.

This seems to leave undetermined the question which might arise in case of lakes of considerable size as to the ownership of subdivisions of land

east, two chains, along said pond; thence south, fourteen degrees fifteen minutes east, two chains ninety-five links, along do., to a bunch of basswood sprouts marked, at Abiol Crosby's corner." Another description in the same deed: "Thence nine degrees thirty minutes east, ten chains eighty-eight links, along Abiol Crosby, to a bunch of basswood sprouts marked; then due west one chain, along Hinckley pond; thence south, sixty-five degrees west, four chains, along do.; thence south, thirty-seven degrees west, five chains eighty-five links, along do.; thence north, seventy-one degrees thirty minutes west, six chains eighty-eight links, along do., to the brook leading in said pond." In the fourth: "Beginning near the south side of a large rock, on the west side of Hinckley pond; . . . thence running south, sixteen degrees west, five chains sixteen links, along said pond." In the fifth: Beginning at a stake in a swamp south of Hinckley pond; thence several courses and distances; then "north, sixteen degrees east, six chains forty-eight links, to a maple marked, by said pond; then north, sixty degrees west, four chains ninety links, along said pond, to the beginning." About twelve hundred feet in length of the northerly portion of the premises in question lies along the two courses of the lines so given in the first two deeds, and the balance, about thirteen hundred feet in length, of the southerly portion of them is between the lines so described as along it, in the last three deeds. Through those five deeds, and sundry mesne conveyances, the defendant took

title to upland adjacent to and surrounding the whole of the pond, except a portion at the northeasterly corner, formerly owned by one William Merritt, and such rights as the New York & Harlem Railroad Company acquired to a strip along its west shore. In 1850 and 1851 William Merritt, who then had title to a portion of the upland, conveyed to the predecessors of the defendant all his interest in the premises in question. And in 1850 or 1851 the defendant's predecessors filled in a portion of the pond, built an ice house thereon, and provided some other appliances for gathering ice. After the construction of the New York & Harlem Railroad, and in the winter of 1850 and 1851, the defendant's predecessors commenced gathering ice there, and shipping it to market on the railroad. This was done every year thereafter, unless the winter of 1853-54 may be excepted. And the defendant acquired its interest there in 1867, then made preparations for the business of gathering ice from the pond, and storing it for shipment and market, and erected buildings and provided means and facilities for such business, which it has since then carried on quite extensively there. The trial court found that the plaintiffs had no title to and were not entitled to the possession of the premises, and refused to find that by the lines, as defined in the deeds of the parcels of land around and adjacent to the lake, excluded the premises in question from the conveyances, and directed judgment for the defendant.

entirely covered by the water of the lake where the border is included in grants to individuals.

In Michigan the doctrine is thoroughly established that the title of riparian owners extends to the middle line of a non-navigable lake. (Webber v. Pere Marquette Boom Co. 62 Mich. 623; Clute v. Fisher, 65 Mich. 48), and that the ownership of a fractional subdivision bounded on an inland lake will extend to the soil covered by water within that subdivision.

So in Rice v. Ruddiman, 10 Mich. 124, it was held that the bed of Muskegon lake belongs to riparian owners, at least as far out as it is susceptible of beneficial private use. It was not necessary in that case to decide whether or not private ownership extended to the center of the lake although the court inclined to the doctrine which would thus extend it.

In New Jersey it was held that a lake the private ownership of which had been expressly recognized by the state and which was 8 miles long by 1 mile in width and deep enough for large vessels but had no navigable outlet did not belong to the state but to private owners. Cobb v. Davenport, 32 N. J. L. 369.

But in a recent decision by a vice-chancellor it was held that a devise of land which in plain language made the edge or margin of a small lake the boundary did not include any part of the bed of the lake. The court said this would be true by construction of law as well as by the terms of the devise. But this is not the doctrine of most recent cases.

The recent decision by the United States Supreme Court in Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 423, powerfully re-enforces most of the other modern decisions which affirm the private ownership of the bed of small lakes and ponds. The court declares that by common law fresh-water lakes, and

ponds, except the great navigable lakes, belong to the owners of the soil adjacent, who own *usque ad flum aqua*. The court then holds that the common law is the law of Illinois in this respect and denies that the case of Trustees of Schools v. Schroll, 120 Ill. 509, which is noticed above, establishes a different doctrine in that state. The lake in question here was two or three miles in extent but not navigable and had two outlets into Lake Michigan which was about two miles distant.

The main case above establishes this doctrine also in New York, and the opinion of the court very fully reviews prior New York decisions on the subject. It substantially overrules the case of Wheeler v. Spinola, 54 N. Y. 377, which decides that a boundary of land upon a fresh-water pond did not go below low-water mark.

Wheeler v. Spinola was regarded as authority in Sweet v. Syracuse, 60 Hun. 23, but this latter case was reversed on other grounds in 129 N. Y. 316, without touching upon this question.

Hemlock lake, which was in Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393, regarded as a subject of private ownership, is about 7 miles long by 1/4 mile in width.

In Crooked Lake Nav. Co. v. Keuka Nav. Co., 4 N. Y. S. R. 390, the bed of the outlet of a small fresh-water lake at a point where the navigability terminated, was held to be the property of riparian owners.

Cazenovia lake, the bed of which was held in Ledyard v. Ten Eyck, 38 Barb. 102, to belong to private owners, was about five miles long by 1/4 of a mile wide.

In Ohio, also, a recent decision establishes the doctrine that a non-navigable inland lake is the subject of private ownership. Lembeck v. Nye, 8 L. R. A. 573, 47 Ohio St. 323.

That meander lines do not cut off land between

Messrs. Calvin Frost and N. A. McBride, for appellant:

Courses running as in the five deeds from plaintiff's ancestors carry title to the center of watercourse.

Angell, Watercourses, § 9.

If the owner of land bordering on an inland unnavigable watercourse owns the soil of the bed of the watercourse and conveys the upland giving the watercourse as a boundary, the grant carries to the middle of the watercourse, unless the grantor expressly excludes the land under water by other expressions in the deed.

Where lines run to monuments on the bank of a watercourse, and then by, with, along, down or up the same, the deed carries to center.

Child v. Starr, 4 Hill, 369; *Ex parte Jennings*, 6 Cow. 518, 16 Am. Dec. 447; *Seneca Nation of Indians v. Knight*, 23 N. Y. 498; *Luce v. Carley*, 24 Wend. 451, 85 Am. Dec. 687.

Running the lines to monuments on the shore, and then by courses and distances along "the pond," did not restrict the title to the shore.

Childs v. Starr, *supra*; *Kings County F. Ins. Co. v. Stevens*, 87 N. Y. 291, 41 Am. Rep. 361; *Rice v. Johnson*, 5 N. H. 520, 22 Am. Dec. 472; *Seneca Nation of Indians v. Knight*, *supra*.

When lands are bounded in deeds of conveyance by a lake the title of grantees extends *usque ad medium flum.*

Ledyard v. Ten Eyck, 86 Barb. 112; *Hooker v. Cummings*, 20 Johns. 99, 11 Am. Dec. 249; *Morgan v. King*, 35 N. Y. 457, 91 Am. Dec. 58; *Okenango Bridge v. Paige*, 83 N. Y. 178, 38 Am. Rep. 407; *Smith v. Rochester*, 99 N. Y. 463, 44 Am. Rep. 398; *Silsby Mfg. Co. v. State*, 104 N. Y. 562; *Crooked Lake Nav. Co. v. Keuka Nav. Co.* 4 N. Y. S. R. 890.

The plaintiff's ancestors by their said five

deeds conveyed the bed of the pond by the conveyance of the upland.

Ridgway v. Ludlow, 58 Ind. 248; *Rice v. Ruddiman*, 10 Mich. 125; *Lorman v. Benson*, 8 Mich. 18; *Cobb v. Davenport*, 82 N. J. L. 869; *Brazon v. Bressler*, 64 Ill. 492; *Lembeck v. Nye*, 8 L. R. A. 578, 47 Ohio St. 336; *Hardin v. Jordan*, 140 U. S. 871, 35 L. ed. 423.

Messrs. Eugene Frayer and E. A. Brewster, for respondent:

Defendant has no title by grant of the premises in question.

The premises here in question are a pond or lake, as distinguished from a stream or river.

The deeds of plaintiff's predecessors did not pass title to the premises in question—the water and lands under water of the pond.

The common law and civil law alike agree in making a radical distinction in this particular between lakes or ponds and rivers or streams.

Les Cinqquante Livres du Digeste, lib. 41, title I, 1, 12; Angell, Watercourses, 7th ed. 37, § 41; *Wheeler v. Spinola*, 54 N. Y. 377; *Waterman v. Johnson*, 13 Pick. 261; *Bradley v. Rice*, 13 Me. 198, 29 Am. Dec. 501; *Indiana v. Milk*, 11 Fed. Rep. 889; *Trustees of Schools v. Schroll*, 120 Ill. 511.

An entirely different rule from that applicable to streams applies when land is conveyed, bounded along or upon a natural lake or pond. In such case the grant extends only to the water's edge.

Trustees of Schools v. Schroll, *Wheeler v. Spinola*, *Waterman v. Johnson*, and *Bradley v. Rice*, *supra*; *State v. Gilmanton*, 9 N. H. 461; *Wood v. Kelley*, 30 Me. 47; *Fletcher v. Phelps*, 28 Vt. 257; *Mariner v. Schulte*, 13 Wis. 692; *West Roxbury v. Stoddard*, 7 Allen, 158; *Mill River Woolen Mfg. Co. v. Smith*, 84 Conn. 462; *Bloomfield v. Johnston*, 8 Ir. C. L. Rep. 68; *Burke v. Niles*, 2 Hannay (N. B.) 166;

such lines and the water of a meandered lake is established by decisions beyond controversy. *Hardin v. Jordan*, 140 U. S. 871, 35 L. ed. 423; *Forsyth v. Smale*, 7 Biss. 201; *Clute v. Fisher*, 65 Miss. 46; *Pere Marquette Boom Co. v. Adams*, 44 Mich. 408; *Rice v. Ruddiman*, 10 Mich. 125; *Boorman v. Sunnuchs*, 43 Wis. 238; *Stoner v. Rice*, 6 L. R. A. 397, 121 Ind. 51.

In England it seems to be established by *Bristow v. Cormican*, L. R. 3 App. Cas. 641, that a nontidal lake is the subject of private ownership. The lake here in question was about 15 miles in length by 10 in width.

The law of Scotland also following the civil law gives the ownership of small lakes to riparian owners. *Mackenzie v. Bankes*, L. R. 3 App. Cas. 1324.

Derelict and accretions.

In *Warren v. Chambers*, 25 Ark. 120, 4 Am. Rep. 23, it is held that derelict land left by the ebbing waters of a meandered lake belonged to the riparian owners.

So in *Boorman v. Sunnuchs*, 43 Wis. 233, accretions on a meandered lake are held to be property of the riparian owners, although, as will be seen above, the decisions in that state hold that riparian ownership extends only to the waters.

In *Hodges v. Williams*, 95 N. C. 331, 59 Am. Rep. 242, it was held that no rights by reliction could be acquired by a riparian owner; but the ground of decision was that the bed of the waters was owned by another person under a prior grant. 18 L. R. A.

The doctrine of private ownership is thus clearly recognized in this case.

Artificial ponds.

In a multitude of cases, which there is no attempt to collect here, the private ownership of artificial ponds has been assumed.

In *Mansur v. Blake*, 62 Me. 38, the boundary of an artificial pond made by a dam is held to be the same as that on a stream, i. e. at the center of the pond.

So in *Mill River Woolen Mfg. Co. v. Smith*, 84 Conn. 462, land bounded by an artificial mill-pond is held to extend to the center unless clearly limited to the margin, and this doctrine was applied to a pond 200 years old.

Likewise in *Finley v. Hershey*, 41 Iowa, 389, a dam across a stream making an artificial pond was held not to defeat the riparian owner's right to the use and improvement of the water.

A careful review of all the decisions shows that the tendency of leading modern cases is very emphatically toward the doctrine of private ownership in the bed of small lakes. What lakes are to be considered large enough to be public is a question somewhat unsettled and one which it seems must be decided according to the facts of each particular case, and without any very definite rule yet established for its determination.

For rivers and lakes as state boundaries, see *Buck v. Ellenbolt* (Iowa) 15 L. R. A. 187. B. A. R.

Boorman v. Sunnuchs, 42 Wis. 233; *Diedrich v. Northwestern U. R. Co.* 42 Wis. 248; *Kanouse v. Stockhouser*, 43 N. J. Eq. 42; *Sweet v. Syracuse*, 60 Hun, 28.

The contrary rule would be in clear violation of the English and American rule that land cannot pass as appurtenant to land.

Jackson v. Hathaway, 15 Johns. 447; *Harris v. Elliott*, 35 U. S. 10 Pet. 25, 9 L. ed. 383.

Courses and distances between known monuments exclude all lands not included in the description.

Jackson v. Hathaway, *supra*. See also *Olap v. McNeil*, 4 Mass. 689; *Sibley v. Holden*, 10 Pick. 249, 20 Am. Dec. 521; *Taylor v. Hammond*, 11 Pick. 193; *Harris v. Elliot*, *supra*; *Thomas v. Hatch*, 38 Sumn. 170; *Starr v. Child*, 20 Wend. 149; *Phillips v. Bowers*, 7 Gray, 21; *Smith v. Slocomb*, 9 Gray, 36, 69 Am. Dec. 274; *Halsey v. McCormick*, 13 N. Y. 296; *Mott v. Mott*, 68 N. Y. 246; *Higginbotham v. Stoddard*, 73 N. Y. 94; *Storey v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Dec. 146; *Tag v. Keteltas*, 16 Jones & S. 241; *Lee v. Lee*, 27 Hun, 1; *King's County F. Ins. Co. v. Stevens*, 87 N. Y. 287, 41 Am. Rep. 861; *Carter v. White*, 101 N. C. 80; *Falker v. West Shore & B. R. Co.* 17 Abb. N. C. 279; *People v. Colgate*, 67 N. Y. 512; *Lembeck v. Nye*, 8 L. R. A. 578, 47 Ohio St. 336; *Kanouse v. Stockhouser*, *supra*; *Lankin v. Terwilliger* (Or.) March 4, 1892.

If plaintiffs had sold simultaneously all their lands about the lake, without reservation of right of way the law would, nevertheless, have still reserved to them such a right.

Washb. Easem. 4th ed. pp. 164, 260; *Clark v. Cogge*, Cro. Jac. 170; *Brigham v. Smith*, 4 Gray, 297, 64 Am. Dec. 76; *Seymour v. Lewis*, 13 N. J. Eq. 439, 78 Am. Dec. 108; *Dales v. Ceas*, 5 N. Y. Week. Dig. 400; *Shoemaker v. Shoemaker*, 11 Abb. N. C. 80.

Bradley, J., delivered the opinion of the court:

The defendant alleges several defenses, and the one founded upon the denial of the plaintiffs' title is that their ancestors conveyed the premises in question by deeds to certain grantees many years before this action was commenced. If this proposition of fact is sustained, the other alleged defenses will require no consideration.

The premises which are the subject of controversy consist of a body of water formerly known as "Hinckley pond," and later as "Croton lake," and land under the water, situated in the town of Patterson, county of Putnam. This is a natural pond or lake, about 151 rods in length, and in the broadest place about 48 rods in width, and covers about 45 acres. It has two inlets at the southerly end, and an outlet known as "Muddy brook" at the north end; and the court found that there was a slight and very sluggish current running through the pond from south to north. The plaintiffs do not claim title to any of the land adjacent to the lake, as that was all conveyed by their ancestors by five deeds made in the years 1796, 1813, 1828, and 1845. Natural ponds and small lakes are private property. They pass by grant of land in which they are included. They are also presumed, if nothing appears

to the contrary, to belong to the riparian owners. And there would seem to be no substantial reason for the application of a different rule in the legal construction of grants of land bounded on them than is applied to conveyances bounding premises on fresh-water streams. Our attention has been called to no case in this state where the question has arisen, and essentially, been the subject of determination. In *Canal Comrs. v. People*, 5 Wend. 447, and in *Canal Appraisers v. People*, 17 Wend. 597, the chancellor said: "The principle itself does not appear sufficiently broad to embrace our large fresh-water lakes or inland seas, which are wholly unprovided for by the common law of England;" and that a different rule must probably prevail as to them, "and also as to those lakes and streams which form the natural boundaries between us and a foreign nation." A like remark was made in *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393, by Judge Ruger, who added: "We have arrived at the conclusion that all rights of property to the soil under the waters of Hemlock lake were acquired by and belong to its riparian owners." Hemlock lake is about seven miles long, and a half mile in width. And the fact that the title to the land in western New York, within which is Hemlock lake, was not derived from this state, was not deemed and is not important upon the question of its proprietorship, because it came within the class of small lakes the bed of which is the subject of private ownership. In *Ledyard v. Ten Eyck*, 36 Barb. 102, it was held that land conveyed by deed bounding it on Cazenovia lake, which was five miles long and three fourths of a mile in width, extended to its center. But the conclusion reached in that case may have been supported upon another ground, which was there considered. In *Wheeler v. Spinola*, 54 N. Y. 877, the question was considered in its application to a pond the size of which does not appear; and it was there said that "a boundary upon it does not carry title to its center, but only to low-water mark. Such is the rule as to boundaries upon natural ponds and lakes;" and, in support of the proposition, are there cited *Canal Comrs. v. People*, 5 Wend. 423; *Champlain & St. L. R. Co. v. Valentine*, 19 Barb. 484; *Waterman v. Johnson*, 13 Pick. 261; *Bradley v. Rice*, 13 Me. 198, 29 Am. Dec. 501.

In the *Commissioners' Case* the relator claimed certain rights in the Mohawk river, which he alleged were impaired by the plaintiffs in error; and the *Railroad Company Case* had relation to alleged rights in Lake Champlain, which is a large navigable lake, about 180 miles in length, and varying from about fifteen miles to less in width. This is a large navigable lake, and the Mohawk has been held to be a public river. Those two cases seem to have no necessary application to the present one. Reference further on is made to the other two cited cases.

The controversy in *Wheeler v. Spinola* had relation only to a strip of land between high and low water mark on the south side of Flax pond, upon which strip the defendant

was charged with committing trespass in cutting thatch; and as the title under which the defendant claimed was by deed bounding the land upon the pond, it was held to extend to low-water mark. This covered the *locus in quo*, and was as far as the court was called upon to go for the purposes of the defense. While the views of the learned judge upon whose opinion that case was decided are entitled to much weight, the question now under consideration was not there necessarily considered or determined; and, so far as we are advised, it remains in this state an open one for consideration. There is a conflict of authority upon the subject by adjudication in some of the other states; and, in holding that by conveyances bounding lands on natural ponds the grantees take title only to low-water mark, Massachusetts seems to have taken the lead. *Waterman v. Johnson*, 18 Pick. 261. That case was decided in 1833. There was a reason for such rule in that state, in the fact that by a Colonial Law or Ordinance adopted in 1641, and amended in 1647, great ponds, which were defined as those containing more than ten acres, were declared public property, and, after this ordinance was so amended in 1647, such ponds have not been subject to private ownership. *West Roxbury v. Stoddard*, 7 Allen, 158; *Hittinger v. Eames*, 121 Mass. 539. And after referring to *Ledyard v. Ten Eyck*, 86 Barb. 102, and to what was there held in relation to the proprietorship of Cazenovia lake, *Mr. Justice Hoar* in the *West Roxbury Case* added that the state of New York had no statute similar in its provisions to the Massachusetts ordinance before mentioned. In *Bradley v. Rice*, 13 Me. 198, 29 Am. Dec. 501, (decided in 1836,) the question was not discussed, but the court said that no case had been cited or found where the rule of construction applicable to boundaries on streams had been extended to a pond or lake, and cited *Waterman v. Johnson* to the contrary. It is unnecessary to refer to the relation to the colony and state of Massachusetts of the territory constituting the state of Maine, up to the time of its admission as a state into the Union, as such previous relation may be entitled to no consideration from the time it became a state. In *State v. Gilmanton*, 9 N. H. 461, the question was whether the town of Gilmanton was chargeable with repairs of a bridge over what may be termed the outlet of Winnipisioegus lake, and that was said to be dependent on the fact whether the place crossed by the bridge was a river or bay. It was the boundary of the town; and it was accordingly held that, if a river, the line of the town would go to the center, and only to the water's edge, if a bay. This question of fact was reserved for trial. The cases cited in support of the proposition were *Ex parte Jennings*, 6 Cow. 518, 18 Am. Dec. 447, and *Canal Comrs. v. People*, 5 Wend. 423. And the court there added that such seems to have been the legislative construction in that state of grants bounding land on lakes and ponds, as appears from the annexation of islands to the towns adjacent, etc.

In *Kanouse v. Stockbower*, 48 N. J. Eq. 42, it was held that the line bounding the land

on the pond or lake was in terms confined to the edge of it, and for that reason, as well as in construction of law, the land devised embraced none under the water, nor any beyond low-water mark. The proposition that the rule applicable to boundaries on fresh-water streams does not apply to lakes or ponds was held in *Boorman v. Sunnucks*, 42 Wis. 233, and *Diedrich v. North Western U. R. Co.*, 42 Wis. 248, 24 Am. Rep. 899. And the same in *Trustees of Schools v. Schroll*, 120 Ill. 509. In *Fletcher v. Phelps*, 28 Vt. 257, there was really no question that the boundary of the land on Lake Champlain was other than at low-water mark. And the court, referring to the rule relating to boundaries of land on a fresh-water stream, added that a different rule prevails where land conveyed is bounded on large natural ponds or lakes, and cites the *Waterman and Canal Commissioners Cases*. The determination of some of the cases above cited is founded upon the proposition that the riparian owners do not have title to lakes and ponds. And in *Paine v. Woods*, 108 Mass. 169, *Mr. Justice Gray* said that "the question whether the title in the land under a great fresh-water pond or lake is in the proprietors of the lands adjoining, or in the crown, does not seem to have been ever judicially determined in England;" and cites *Marshall v. Ulswater S. Nav. Co.*, 3 Best & S. 732, where the question whether the soil of lakes *prima facie* belongs to the riparian owners on either side *ad filum aquæ*, or whether it belongs *prima facie* to the king, was raised and undetermined. But later it was held that the right to the soil of nontidal lakes was not necessarily in the crown. *Bristol v. Cormican*, L. R. 3 App. Cas. 641, 24 Moak, Eng. Rep. 431. Whatever may be the doctrine applicable to small inland lakes and ponds elsewhere, the presumption in this state is that the land under their waters belongs to the proprietors of the adjoining lands. *Smith v. Rochester*, 93 N. Y. 463, 44 Am. Rep. 398. Such is the common-law rule in the states where the grantees of land so situated and described by boundary, in grants on or along such waters, take to the center. *Rice v. Buddiman*, 10 Mich. 125; *Clute v. Fisher*, 65 Mich. 48; *Railway v. Ludlow*, 58 Ind. 248; *Lembeck v. Nye*, 47 Ohio St. 326, 8 L. R. A. 578. And in *Ridgway v. Ludlow* it was held that a prescriptive right acquired by adverse possession to land adjacent to such a lake extended to the middle of it. In *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, the subject had very thorough consideration, was elaborately discussed, and the conclusion there reached and adopted by a majority of the court was that, by the common law, the grantee of lands bounded upon an inland non-navigable lake or pond takes title to its center. The lake there in question is in the state of Illinois, and is two or three miles in length. And the court reviewed the case of *Trustees of Schools v. Schroll*, *supra*, which was criticised, held not to have correctly declared the common law applicable to that state, and was disregarded as authority on the subject. This is in harmony with the rule in our state

that the title to the soil under such waters is in the riparian owners and, analogously to that relating to the conveyance and proprietorship of lands bounded on fresh-water streams, it would seem, for the same reason, to be alike applicable to such lakes and ponds. The reason for the distinction in the cases where it has been recognized has not been the subject of much discussion by the courts. But a reason given by Judge Gresham in *Indiana v. Milk*, 11 Fed. Rep. 889, had relation to the inconvenience or difficulty in locating in the lakes the lines of the several proprietors of the uplands. He was dealing with a lake covering 14,000 acres. But he added that "a person might by purchasing the lands surrounding a lake, in view of the size and other circumstances, be held to own the bed. Each case depends largely on its own facts."

While a lake may be of such form as to render the designation in it of the lines of the several riparian owners in certain cases somewhat difficult, that fact, in its relation to the practical effect of the rule, is not an objection to its general application. No case will probably arise in which their respective rights in that respect may not be ascertained and defined in reference to the location and extent of the boundaries of their lands on or along the lake. Bends or bays in rivers may to some extent present like difficulties. The value, such as they have, of small non-navigable lakes and ponds, as a general rule, is mainly in their relation to the adjacent lands. There may, however, be exceptional cases. The pond in question has, since the conveyance of the surrounding lands, become useful in its production of ice, by reason of railroad facilities for transportation of it to market. But this fact, and the extent of the business and of the preparations made there by the defendant to carry it on, have no bearing upon the question we are now considering. The inquiry has relation to the title in the soil under the water of the pond or lake. The views already given lead to the conclusion that the common law, relating to the construction and extent of grants of land bordering and bounded on such waters, is applicable alike to conveyances bounding lands on fresh-water rivers and small non-navigable lakes or ponds. Such is the character of the one in question, and whether its bed was embraced in or excluded from the grants made by the deeds before mentioned is dependent upon their construction. The boundaries are described as along the pond, and, unless in some manner qualified or restricted, they, by legal construction, had the effect to embrace its bed within their grants. This, in such case, is the presumed intent, unless the contrary appears. *Luce v. Carley*, 24 Wend. 451, 85 Am. Dec. 637; *Ex parte Jennings*, 6 Cow. 518, 16 Am. Dec. 447; *Mott v. Mott*, 68 N. Y. 247.

It is, however, urged that, as in the last three of those deeds the lines along the pond are described by courses and distances, the intent thus appears to restrict the grants to those lines, and that such is the legal effect. It may be observed that the outer boundary

of the waters of the pond are represented by courses and distances, as appears by the deeds; and, since they are described as along the pond, was the boundary in legal effect necessarily so restricted by that method of description as to exclude the bed from the grants? A boundary line, described as "along the shore" of a fresh-water stream, does not extend the grant to its center, (*Child v. Starr*, 4 Hill, 369;) and a like construction is applicable to a boundary by the bank of such a stream, (*Starr v. Child*, 5 Denio, 599; *Halsey v. McCormick*, 18 N. Y. 296.) In those cases the prescribed limitation of the boundary lines to the shore and bank did not permit the extension of the grant by construction to the thread of the streams. And the same may be said of *Peoples v. Jones*, 112 N. Y. 597. Our attention has been called to cases relating to conveyances of lands adjacent to highways, where it was held that a line described as running along a highway from and to monuments located on one side of it did not vest in the grantee title to its center, but by the terms of the description the roadbed was excluded. *Jackson v. Hathaway*, 15 Johns. 447; *Kings County F. Ins. Co. v. Stevens*, 87 N. Y. 287, 41 Am. Rep. 861; *Smith v. Slocumb*, 9 Gray, 86. While there is, in legal effect, analogy between the boundary of grants on highways and streams, there is this distinction: that it is not practicable to locate monuments in the channels of the latter; and it is usual to refer, in the description of boundary, to their location adjacent to the water, to mark the place of intersection with the stream. In *Luce v. Carley*, 24 Wend. 451, 85 Am. Dec. 637, among the courses in the description of the premises, were those to a hemlock stake "standing on the east bank of the river, from thence down the river, as it winds and turns, 24 chains and 94 links, to a hard maple tree," etc. This maple tree, as appears by the opinion of the court, was described as standing on or near to the east bank; and, in holding that the grantee took title to the center of the river, the court said: "It is never thought that monuments mentioned in such a deed, as occupying the bank of the river, are meant by the parties to stand on the precise water line, they are used to fix the termini of the line which is described as following the sinuosities of the stream. . . . Where the grant is so framed as to touch the water of the river, and the parties do not expressly except the river if it be above tide, one half of the bed of the stream is included by construction of law. If the parties mean to exclude it, they should do so by express exception."

In *Child v. Starr*, 4 Hill, 375, the chancellor remarked that "running to a monument standing on the bank, and from thence by the river or along the river, etc., does not restrict the grant to the bank of the stream; for the monuments in such cases are only referred to as giving the direction of the lines to the river, and not as restricting the boundary on the river." In *Seneca Nation of Indians v. Knight*, 28 N. Y. 498, the boundary of the land was described as beginning at a post standing on the bank of

Lake Erie, at the mouth and on the north side of Cattaraugus creek, and, after describing other lines, proceeded: "Thence . . . to a post standing on the north bank of Cattaraugus creek; thence down the same, and along the several meanders thereof, to the place of beginning." It was held that the grant was to the center of the creek. The court there referred to and approved the remark before mentioned of the chancellor in the *Childs Case*, and added: "Parties may restrict their grants, but the restriction ought to be found in very plain and express words." And in *Kings County F. Ins. Co. v. Stevens* the court cited with approval the *Seneca Nation Case*, and in like manner noticed such remark of the chancellor in the *Childs Case*. Inasmuch as a boundary by or along a watercourse is effectual to take the grant, by legal construction, to its thread, it would seem that the application of the courses and distances of the boundary along the water of the stream may not be treated as qualifying the effect which would be given to the grant if they were omitted. If the boundary were not expressed as along the pond, it might and would be assumed that there was an intent to so restrict; and it may be observed that the courses and distances between the outer lines intersecting it are not controlled by any monuments given in the deeds other than along the pond. A question somewhat similar to this arose in *Riz v. Johnson*, 5 N. H. 520, 23 Am. Dec. 472. There the boundary on a river was described by courses and distances between the two points of intersection of the outer lines with the stream by reference to monuments located near it, and it was held that the boundary was in the river. The present case is distinguishable from those where the line is described as along the shore or on the bank. Here there is nothing in the terms of

the deeds which places the boundary along there outside the water of the pond. The boundary is described as along the pond. The courses and distances given represent the sinuosity of the line of connection of the water with the shore; and the boundary, as described along the pond, as generally understood, means on its water. And the fact that the length of the lines running to and from the monuments at the pond is the distance to and from them on the bank does not, of itself, affect the question. Such is usually the case of the description of land bounded on streams in which the grants are treated as *ad filum aquae*. And as said by Mr. Justice Cowen in *Lucas v. Carley*, where the grant is so framed as to touch the water of the river, one half the bed of the stream is included by construction of law. This, of course, means to the extent of the boundary in contact with the water. It is a matter of common knowledge in respect to lands bordering on streams and other bodies of water that it is usual in surveys, when made, to so describe the uplands as to compute the number of acres they contain, as generally in them, exclusive of the soil beneath the water, is mainly the value, and the quantity of the uplands embraced in a conveyance constitutes, in view of the situation, the basis for the measure of the consideration. The conveyances embracing the land surrounding this lake or pond were made many years ago. No circumstances appear bearing upon the purpose, construction, or effect of those conveyances inconsistent with the intent of the grantors to include its bed within them. If these views are correct, the conclusion of the trial court that the plaintiffs had no title to the *locus in quo* was justified by the evidence; and the order should be reversed and the judgment affirmed.

All concur.

PENNSYLVANIA SUPREME COURT.

OHARTIERS BLOCK COAL CO., *Appt.*,
v.

W. L. MELLON *et al.*

(.....Pa.....)

1. The right to drill oil or gas wells through a stratum of coal belonging to another person to reach oil or gas in a lower stratum belonging to the owner of the surface is a right which exists at all times although it must be exercised so as to do no violence to the rights of the owners of the coal.
2. An injunction will be refused in the exercise of the discretion of the court when it would work an injury greater than the wrong to be redressed.

(January 9, 1883.)

A PPEAL by plaintiff from a decree of the Court of Common Pleas, No. 2, for Al-

legheeny County denying an injunction to restrain defendants from drilling oil and gas wells through a bed of coal which plaintiff had purchased for the purpose of removal and sale. *Affirmed.*

Complainant is the owner of 187 acres 49 perches of coal underlying a tract of land in South Fayette Township, Allegheny County, Pennsylvania. The deed conveying to it the coal conveyed also ample mining rights and privileges. The owner of the surface subsequently made leases for oil and gas purposes and the lessees began to drill for the purpose of reaching oil or gas. The plaintiff thereupon filed a bill to restrain the defendants from drilling the wells. The case was heard upon affidavits, some twenty-three being filed in behalf of defendant, and from thirty-five to forty in behalf of plaintiff. The defendants'

NOTE.—The most remarkable thing about the above decision is that it is one of first impression. It is strange that the question involved has not before arisen considering the multitude of oil and 18 L. R. A.

gas wells that have been drilled in coal-bearing regions. The practical importance of the case is as great as its novelty.

affidavits tended to show that in sinking the wells all precautionary measures for protecting the plaintiff's property and the lives of the miners would be taken. That the surface hole would be 16 inches in diameter, and that from the surface to a point 18 inches into the limestone the rock would be reamed out and a ten-inch tubing inserted, thread jointed, and made of wrought iron. Around this outside tubing cement would be used completely filling the space between the rock and the tubing from its base to a point 12 feet above the coal seam. That a second tubing would be inserted inside of the first 8½ inches in diameter extending from the surface to about 500 feet below the coal, and the space between the two tubes filled with cement. Inside of this second tube the casing of the well itself would be inserted which would extend from the surface down about 1500 feet below the coal so that the escape of gas or oil from the well could only be effected through this central casing. Numerous affidavits stated that actual experience had fully demonstrated that wells could be safely drilled through coal without danger to persons engaged in working the same; that outside of the larger casing the sand, sediment, and pieces of rock taken from the well were placed, and in a short time became as hard as the rock itself, and would effectually protect the outer casing from the action of water and prevent any corrosion or leaking. That casings so protected had been used in wells for periods of three years or more and then removed and found practically in as good condition as when put down. That sulphur water would not injure iron unless the iron was exposed to the action of the air as well as that of the water. That when the space outside of the casing had been once filled from the bottom to the top and permitted to harden there was no way known to remove the casing without drilling out the rock again. That no casings well put down had ever been known to leak either oil or gas. That whenever a hole was worn in the casing, or any vent by which the water could get into the well, the well must be recased or cemented, and that in the experience of men well versed in the business no injury had ever been known or heard of because of drilling wells through coal beds.

On the other hand, plaintiff's affidavits tended to show that gas is so subtle, and will pass through such minute openings that it is almost if not wholly impossible to construct a pipe line on the surface that will not let more or less gas escape and the danger is greatly increased when the pipe is put into the well where it cannot be examined and tested after it is put together to ascertain whether it is entirely tight and does not leak. That there could be no system devised that would surely prevent all liability to danger due to the leaking of the gas from the well into the *strata* below the coal thence up into the excavations, into the coal *strata*, or into the seams and perhaps porous *strata* around the coal which would be liable to be tapped at any moment into the mine during its working; that the seams have openings as many as a thousand feet away from the chambers where the gas was collected under pressure and that it would

be impossible to leave a bed of coal large enough around the well to prevent gas from working into the mine. That it was impossible to pack the cement into the openings perfectly tight because on account of the uneven spaces it was liable to clog at different points and pack down only to such point leaving open spaces below it. That iron and steel were peculiarly affected by the corroding action of sulphur water found in all coal mines and that sixteen pound mine rails would be rendered completely useless in less than a year by the corroding action of such water, and that it was impossible to use iron for the piping and pumps within the mines because it would not withstand such action and that if the water came in contact with the casing it would eat through it in a very short time thereby permitting the escape of gas into the mine; that the cement used contained more or less lime which was subject to the action of sulphur water and would be eaten out leaving spaces even through the cement which would admit of the escape of the gas. That new iron pipes had been known to be eaten through in less than sixty days. That the surface over mines was peculiarly subject to slide or shift, and when it took place the force was such that the casings even when supported by the cement could not withstand it but would be bent, cracked, and broken thereby permitting the escape of the gas into the mine; and that the cement was further subject to breakage from the heavy tools used inside the casing, and the shooting of the wells as well as from the blasting within the mines. That if it was necessary to leave large blocks of coal around the wells the necessary spaces for approach to the place of operation in the mine and for ventilation would be so zigzag that the cost of mining would be increased to such an extent that the mining itself would be rendered unprofitable and the coal interests destroyed; that the suction required to ventilate the mine is so strong that it would facilitate the escape of the gas into the mine.

Several mining inspectors testified that they would not permit a mine to be worked, if they could help it, where the coal was being taken out near a gas well, or an oil well producing gas; and testified that several mine disasters had been traced to explosions caused by leaking and escape of gas. One miner testified that soon after the putting down of a well through the mine in which he worked oil was found on the water that drained from the pit mouth and there was a strong smell of oil in the entries so that it was considered unsafe for him to work in the mine and it further appeared that many miners had stopped work because of fear of explosions. One affidavit set out that a 36 inch pipe line was laid in a ditch 12 feet below the surface for the purpose of carrying natural gas over the top of a mine which was at least 40 feet below the pipe; that a break took place in one of the joints of the line and shortly afterwards an explosion occurred in the mine which set it on fire and it was fully six months before the fire was extinguished.

The further facts sufficiently appear in the opinion.

Messrs. D. T. Watson, J. S. Ferguson and J. G. MacConnell, for appellants:

Defendants do not dispute the title of the plaintiffs to the coal, but claim the right to drill through this coal to reach oil they suppose to exist below, and having drilled through the coal to use the aperture for the removal of oil or other substances.

If the defendants have no such right it is a proper case for injunction, because it will prevent repeated trespasses, and will also prevent irreparable mischief from escaping gas, for neither of which there is an adequate remedy at law.

Scheele's App. 85 Pa. 88; *Stewart's App.* 56 Pa. 418; *Pennsylvania Lead Co's App.* 96 Pa. 124, 42 Am. Rep. 584; *Butting's App.* 105 Pa. 521.

The decree cannot be justified on the grounds that the appellee had the right of way by necessity through the coal and property of the appellants, and this:

(1) Because such ways are only over the surface of the land where from the facts surrounding the case the court implies that the parties agreed to make a grant of it or to reserve a right of way.

The case at bar is readily distinguishable from these apparent surface cases where the surrounding circumstances are such as to impress upon the transaction the implication of a grant.

Washburn, Easements, *82, 83; *Goddard, Easements*, 266, 268.

(2) A way of necessity is a way of approach to and egress from a certain tract of land for all purposes or for the purposes for which it was used when the implication of the right of way arises. There cannot be a right of way, for example, to use a lot as a stone quarry which is the use to which the lot is subject at the time, and afterwards because some other article might be discovered on the lot, or it would be advantageous to erect a rolling mill and hotel on the lot, that such right of way can be enlarged to embrace these new purposes. The use is restricted to the purpose apparent at the time.

(3) There cannot be a way of necessity for a thing granted which is destruction of the grant itself or seriously interferes with it.

Washburn, Easements, p. 82; *Pierce v. Selleck*, 18 Conn. 822.

(4) A way of necessity is *strictissimi juris*. It only arises in cases of strict necessity. But in the case at bar whether or not any one or all of the wells will strike oil is uncertain and cannot be determined until each well is bored through. Therefore when the well is being drilled there is no necessity for it, but it is a mere experiment to see if there be oil at the point where it is being drilled.

McDonald v. Lindall, 8 Rawle, 492; *Wissler v. Hershey*, 23 Pa. 838; *Washburn, Easements*, p. 164; *Goddard, Easements*, 268, 298; *Brigham v. Smith*, 4 Gray, 297, 64 Am. Dec. 76; 8 Kent, Com. *428; *Cooper v. Maupin*, 6 Mo. 624, 35 Am. Dec. 456; *McTavish v. Carroll*, 7 Md. 352, 61 Am. Dec. 353; *Gale & Wheatly, Easements*, 71-85; *Pennington v. Galland*, 20 Eng. L. & Eq. 561; *Collins v. Prentice*, 15 Conn. 89, 88 Am. Dec. 61; *Pierce v. Selleck*, 18 Conn. 828; *Nichols v. Luce*, 24 Pick. 102, 35 Am. Dec. 802; *Ogden v. Grove*, 88 Pa. 487; 18 L. R. A.

Oliver v. Pitman, 98 Mass. 50; *Lawton v. Rivers*, 2 McCord, L. 445, 18 Am. Dec. 746, and *note*.

(5) If in any emergency this court should hold that there was a way of necessity through the coal grant to the appellants this way is limited strictly to one way only and not six or more ways as convenience might dictate.

McDonald v. Lindall, 8 Rawle, 496.

As in the case where the land is conveyed and the surface only described, the party takes to an indefinite extent both above and below, why if the coal is granted and the space that is occupied by the coal is also granted does not the party take to an indefinite extent below the coal. Not but that a party might provide differently, but if he does not, there can be no implication of a reservation.

Lillibridge v. Lackawanna Coal Co. 13 L. R. A. 627, 148 Pa. 293.

Mr. J. McF. Carpenter, for appellees:

We are now "confronted by a condition, not a theory." A condition unknown and unthought of when the doctrine relating to ways of necessity was established. In *Sanderson v. Pennsylvania Coal Co.*, 86 Pa. 405, 27 Am. Rep. 711, *Mr. Justice Woodward* said: "To render a particular case an exception to the general principles controlling the exercise of dominion over property by its proprietor, it must be ascertained to be exceptional in its surroundings or its facts. From necessity the principles are sometimes relaxed."

Mr. Neely, our lessor, owned all above and all below the coal. As said by counsel in *Pennsylvania Coal Co. v. Sanderson*, 118 Pa. 189, 57 Am. Rep. 445, "This is really a case for the application of the great maxim relating to lands and to property, *cujus est solum ejus est usque ad cælum*, which in the revised version reads, so far as our case is concerned, *cujus est solum ejus est usque ad achælum*."

Mining rights are peculiar and exist from necessity, and the necessity must be recognized and the relative rights of land and mine owners adjusted and protected accordingly.

Pennsylvania Coal Co. v. Sanderson, supra.

We have the right to make a lawful use of our own property, and if in so doing we necessarily do some injury to our neighbor which can in any event be compensated in damage, the court ought not to restrain us.

The law must keep up with the times in which we live. In our western states the importance of the great mining interests is such that by the mining laws, one who "strikes a lead" may follow the "vein," even through the property of his neighbor; and in Nevada a mine owner may take neighboring land for the purpose of sinking a shaft for the benefit of his mine. *Dayton G. & S. Min. Co. v. Seawell*, 11 Nev. 894.

It would be an extraordinary condition of affairs that would justify the interference of the court, and an extraordinary exercise of power on the part of the court to say that this great industry must cease in a vast territory, the value of which for oil purposes can scarcely be approximated.

Marvin v. Brewster Iron Min. Co. 55 N. Y. 538, 14 Am. Rep. 322; *Ewing v. Sandotal C. & Min. Co.* 110 Ill. 290.

Paxson, Ch. J., delivered the opinion of the court:

This is a case of first impressions, and of very grave importance, and in view of these facts we have been asked to express our opinion of the law bearing upon it, notwithstanding it is an appeal from a decree awarding a preliminary injunction. The facts are probably as fully before us now as they will ever be. The contest arises between the owner of the surface or his lessees and the Charters Block Coal Company, the plaintiff below and appellant, which is the owner in fee of the coal beneath the surface. The company purchased the coal on December 22, 1881, and the deed conveying it granted not only all the coal, but also the mining rights and privileges, including the right to enter mines and carry away all the coal: the right to make openings or entries, air courses, watercourses, drainage, and shafts, with right of ingress and egress for the purpose of making such openings, with right of way for taking such coal or any other coal and minerals through the entries; and also the right to enter upon the surface of the land for the purpose of taking into and placing on the same any material that it may desire and need in its coal operations; and, when making entries or shafts, the right to deposit the *débris* and slack near the openings. The grantor, in conveying the coal with these privileges, reserved to himself no right, privilege, or easement in said coal, or any part thereof, and no right of way through said coal from the surface, to obtain gas or oil, or any other substance. It is not likely, at the time the grant was made, that it occurred either to the grantor or the grantee of the coal that underneath the latter there might lie another substance of perhaps greater value than the subject of the grant itself. It now appears that the coal is underlain with the oil and gas bearing sand, which can only be reached by sinking wells from the surface through the *strata* of coal. Shortly before the filing of this bill it began to be known that oil or gas existed in large quantities in that part of Allegheny county where the appellant's works are situated, and active operations had begun in the early summer of 1891 by oil operators, to obtain this oil and gas. About this time the surface owner made leases for oil and gas purposes, and the lessees began at once to drill. This bill was then filed by the appellant company for the purpose of obtaining an injunction against the defendants, to restrain them from further drilling wells then commenced, and from drilling any other well or wells which would pass through the coal. The bill was filed upon the allegation and belief that the defendants had no right whatever to drill the wells. The plaintiff company also claimed that it was impossible for such wells to be drilled in such a manner as to allow the removal of all the coal without exposing the mine to leakage from gas from said wells, and rendering the mine operations so hazardous to plaintiff's property and plaintiff's employes as to very greatly injure and depreciate the value of said coal property, if not wholly to destroy

the value thereof. The case was heard below upon bill, answer, and affidavits. The court, as we understand the decree, refused to grant a preliminary injunction as against any well or wells on said tract of land which at the date of the decree had been drilled by the defendants through the Pittsburgh vein of coal, and also refused to enjoin the defendants from drilling wells on said tract at any place or places where they will not pass through said Pittsburgh vein of coal, but will pass through lower *strata* of coal. The court awarded an injunction, however, as to any wells not already drilled which would pass through the Pittsburgh vein, and, in addition to the ordinary injunction bond, the decree required that the defendants should execute and deliver to the plaintiff their bond in the sum of \$10,000, with two sureties to be approved by the court, conditioned that in putting down and operating any wells now in process of drilling, or which may hereafter be drilled under this decree, said defendants shall protect said coal and property of said plaintiff, and also the plaintiff's employes in and about said coal, from all damages by reason of said wells, and that they will use the best methods, devices, and appliances in the construction and operation of such wells; and that before said wells are abandoned they shall securely plug the same above each oil and gas bearing sand. Subsequently the decree was modified so as to remove the injunction from the two wells now commenced, but which have not gone down through the Pittsburgh coal vein, on defendants' giving bond as before stated.

The learned judge below justified his decision, as we learn from his opinion in another case heard before him, and involving substantially the same questions, upon the ground that the owner of the surface has a right of way by necessity through the coal to reach his oil and gas lying beneath it. But he concedes that to make such right available it would require a large modification of the rules in relation to a right of way by necessity over the surface. "Yet," to use his own language, "my present impressions are that it can and should be sustained in a reasonable manner, having due regard for the interest and rights of both parties. But it cannot be permitted to an extent that will destroy the grant of the coal, nor even to seriously depreciate it, without ample compensation. The owner of the surface cannot bore where he pleases, nor as often as he pleases. The right of designating the reasonable location of the one right of way by necessity, which the law recognizes, has always been held to be in the owner of the land. If he refuses to designate such way, then the owner of the right of way can designate it, or can apply to the court to have it located." This is a new question, and one that is full of difficulty. The discovery of new sources of wealth, and the springing up of new industries which were never dreamed of half a century ago, sometimes present questions to which it is difficult to apply the law, as it has heretofore existed. It is the crowning merit of the common law, however, that it is not com-

posed of ironclad rules, but may be modified to a reasonable extent to meet new questions as they arise. This may be called the "expansive property of the common law." Mining rights are peculiar, and exist from necessity, and the necessity must be recognized, and the rights of mine and land owners adjusted and protected accordingly. We have an illustration of this in *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 57 Am. Rep. 445. The mining of coal and other minerals is constantly developing new questions. Formerly a man who owned the surface owned it to the center of the earth. Now the surface of the land may be separated from the different *strata* underneath it, and there may be as many different owners as there are *strata*. *Lillibridge v. Lackawanna Coal Co.* 143 Pa. 293, 18 L. R. A. 627. The difficulty is to so apply the law as to give each owner the right of enjoyment of his property or *strata* without impinging upon the right of other owners, where the owner of the surface has neglected to guard his own rights in the deed by which he granted the lower *strata* to other owners. In the earlier days of the common law the attention of buyers and sellers and therefore the attention of the courts, was fixed upon the surface. He who owned the surface owned all that grew upon it and all that was buried beneath it. His title extended upward to the clouds and downward to the earth's center. The value of his estate lay, however, in the arable qualities of the surface, and, with rare exceptions, the income derived from it was the result of agriculture. The comparatively recent development of the sciences of geology and mineralogy, and the multiplication of mechanical devices for penetrating the earth's crust, have greatly changed the uses and the values of lands. Tracts that were absolutely valueless, so far as the surface was concerned, have come to be worth many times as much per acre as the best farming lands in the commonwealth, because of the rich deposits of coal, or iron, or oil, or gas known to underlie them at various depths. These deposits are sometimes found, however, beneath well-cultivated farms, so that the surface has a large market value apart from the value of the deposits of coal or other minerals under it. In such cases the owner is rarely able to utilize the lower stores of wealth to which he has title, by mining operations conducted by himself, and for this reason he sells them to some person or corporation to be mined and to be moved. So it often happens that the owner of a farm sells the land to one man, the iron or oil or gas to another, giving to each purchaser a deed or conveyance in fee simple for his particular deposit or *stratum* while he retains the surface for settlement and cultivation precisely as he held it before. The severance is complete for all legal and practical purposes. Each of the separate layers of *strata* becomes a subject of taxation, of incumbrance, levy, and sale, precisely like the surface. As against the owner of the surface, each of the several purchasers would have the right, without any express words of grant for that purpose, to go upon the

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surface to open a way by shaft, or drift, or well, to his underlying estate, and to occupy so much of the surface, beyond the limits of his shafts, drift, or well, as might be necessary to operate his estate, and to remove the product thereof. This is a right to be exercised with due regard to the owner of the surface, and its exercise will be restrained within proper limits by a court of equity, if this becomes necessary; but, subject to this limitation, it is a right growing out of the contract of sale, the position of the *stratum* sold, and the impossibility of reaching it in any other manner.

So far our way is clear of difficulty, because the several owners of the mineral deposits are exercising their right to have access to their respective estates against their vendor. Our question is over the right of the vendor to reach *strata* underlying a *stratum* which he has conveyed to another. Having sold the coal underlying the surface, is he to be forever barred from reaching his estate lying beneath the coal? Prior to the sale of the coal, his estate, as before observed, reached from the heavens to the center of the earth. With the exception of the coal, his estate is still bounded by those limits. It is impossible for him to reach his underlying estate, except by puncturing the earth's surface, and going down through the coal which he has sold. While the owner of the coal may have an estate in fee therein, it is at the same time an estate that is peculiar in its nature. Much of the confusion of thought upon this subject arises from a misapprehension of the character of this estate. We must regard it from a business, as well as a legal, standpoint. The grantee of the coal owns the coal, but nothing else, save the right of access to it, and the right to take it away. Practically considered, the grant of the coal is the grant of a right to remove it. This right is sometimes limited in point of time; in others it is without limit. In either event, it is the grant of an estate determinable upon the removal of the coal. It is, moreover, a grant of estate which owes a servitude of support to the surface. When the coal is all removed, the estate ends, for the plain reason that the subject of it has been carried away. The space it occupied reverts to the grantor by operation of law. It needs no reservation in the deed, because it was never granted. The grantee has the right to use and occupy it while engaged in the removal of the coal, for the reason that such use is essential to the enjoyment of the grant. It cannot be seriously contended that, after the coal is removed, the owner of the surface may not utilize the space it had occupied for his own purposes, either for shafts or wells, to reach the underlying *strata*. The most that can be claimed is that, pending the removal, his right of access to the lower *strata* is suspended. The position that the owner of the coal is also the owner of the hole from which it has been removed, and may forever prevent the surface owner from reaching underlying *strata*, has no authority in reason, nor, do I think, in law. The right may be suspended during the operation of the removal

of the coal to the extent of preventing any wanton interference with the coal mining, and for every necessary interference with it the surface owner must respond in damages. The owner of the coal must so enjoy his own rights as not to interfere with the lawful exercise of the rights of others who may own the estate, either above or below him. The right of the surface owner to reach his estate below the coal exists at all times. The exercise of it may be more difficult at some times than at others, and attended with both trouble and expense. No one will deny the title of the surface owner to all that lies beneath the *strata* which he has sold. It is as much a part of his estate as the surface. If he is denied the means of access to it, he is literally deprived of an estate which he has never parted with. In such case the public might be debarred the use of the hidden treasures which the great laboratory of nature has provided for man's use in the bowels of the earth. Some of them, at least, are necessary to his comfort. Coal, oil, gas, and iron are absolutely essential to our common comfort and prosperity. To place them beyond the reach of the public would be a great public wrong. Abounding, as our state does, with these mineral treasures, so essential to our common prosperity, the question we are considering becomes of a quasi public character. It is not to be treated as a mere contest between A. and B. over a little corner of earth. We have already seen that, when the owner of the surface parted with the underlying coal, he parted with nothing but the coal. He gave no title to any of the *strata* underlying it, and it is not to be supposed for a moment that the grantor parted with or intended to part with his right of access to it. We are of opinion that he has such right of access. The only question is how that right shall be exercised, by what authority, and under what limitations.

While there is some analogy between such right and the common-law right of way of necessity over the surface, we quite agree with the learned judge below that it would require a large modification of the common-law rule. We do not see our way clear to apply the doctrine of a surface right of way of necessity to the facts of this case. While the right of the surface owner to reach in some way his underlying *strata* is conceded, it involves too many questions affecting the rights of property, and of injury to the underlying *strata*, to be settled by the judiciary. It is a legislative, rather than a judicial, question. It needs and should promptly receive the interposition of the legislative authority. That body is now in session, and we have no doubt its wisdom will enable it to dispose of this somewhat difficult question in such manner as to protect the rights of the surface owner, and yet do no violence to the rights of others to whom he has sold one or more of the underlying *strata*. With the right conceded, there can be no serious difficulty in the lawmaking power affording a proper remedy. That remedy should be carefully guarded. The owner of the underlying *strata* should not be permitted at his mere will and pleasure to interfere with

strata lying above him. All this requires an amount of legal machinery that a court of equity cannot supply, however wide its jurisdiction and plastic its process. In all such cases there should be a petition to the court, and a decree regulating the mode of exercise of the right. There should also be a provision for the appointment of a jury of view to assess the damages. In this way the rights of the surface owner can be preserved without any wrong to the owner of the coal.

While we do not fully sustain the reasons given by the learned judge below, we will not interfere with this decree for another reason. The plaintiff company has not yet sustained any irreparable injury by reason of the sinking of these wells, and it may never do so. We find ourselves upon a new road, without chart or compass to guide us, and we propose to move slowly. The appellants have appealed to us as chancellors, and, even if we concede their right to be clear, it does not follow that, as chancellors, we will enforce it. The effect of doing so would be to leave the owner of the surface at the absolute mercy of the owner of the coal. It is true, he can buy the coal of the latter, but only on the terms dictated by the owner. To grant the injunction as claimed by the appellant would be to destroy the estate of the surface owner in the minerals below the coal. If this were the only case of the kind in the state, we might perhaps modify our views to some extent, but when we reflect upon the fact that many other similar cases exist, and that a vast quantity of the leased coal lands in the western part of the state are underlain with oil and gas, precisely as in the case in hand, we cannot close our eyes to the fact that vast interests may be affected by our decree, and great injury done to the rights of others. It is familiar law—too familiar to need the citation of authority—that the decree of a chancellor is of grace, not of right, and that he is not bound to make a decree which will do far more mischief, and work far greater injury, than the wrong which he was asked to redress. For these reasons we will not disturb the decree of the court below. The appellant company has its remedy at law, and to that we will remit it.

The decree is affirmed, and the appeal dismissed, at the costs of the appellant.

Williams, J.:

I concur in the decree made in this case, and in the opinion which so ably vindicates it, but I would go further. I would lay down the broad proposition that the several layers or *strata* composing the earth's crust are, by virtue of their order and arrangement, subject to reciprocal servitude; and, as these are imposed by the laws of nature, and are indispensable to the preservation and enjoyment of the several layers or *strata* to and from which they are due, the courts should recognize and enforce them. When the servitude is the result of natural forces affecting the conformation of the surface, the courts have taken notice of it, and enforced it for and against adjoining owners. Thus,

the owner of land crossed by a stream has a right, as against the owner above him, to insist on the delivery of the stream to him within its natural channel, and he is in turn bound to receive it from such upper owner. He is under a like duty to deliver it to the owner below him, and has a like right to insist that such owner shall receive it from him. The true foundation on which the relative rights and duties of these several owners must rest is not found in the order of their respective purchases, nor in the terms of the conveyances under which they take title. It is not found in any statute regulating the flow of streams or the duties of riparian owners. It is found in the character of the surface over which the stream flows, and the operation of the laws of gravity upon the water of the stream. A purchaser of land is bound to take notice of its situation, and is conclusively presumed to have bought with full knowledge of, and in subordination to, the servitude which that situation imposes. But the relation of successive farms along the course of a stream is no more clearly due to the forces of nature than are the order and position of the rocks and minerals which comprise the earth's crust. One who buys a single *stratum* is bound to know where it is, and how it is situated with reference to the *strata* above and below it; and he must be conclusively presumed to have taken title subject to the servitudes imposed by nature upon it as the necessary consequence of its position among the rocks that underlie the surface. He knows that his *stratum* lies upon and is supported by the rocks below it, and that other rocks lie upon and are supported by his *stratum*. He knows that his estate can only be reached by passing through the *strata* that overlie it, and that the estates below him can only be reached by passing through his. This necessity is not the result of any act of his, or of his vendor, but of the relation the several *strata* bear to each other as arranged in their order by the forces of nature. They are to each other the reciprocal obligations of access and support. The lower can only be reached through the upper; the upper can only be supported by the lower. The courts have long recognized the servitude for support, and in a multitude of cases on both sides of the Atlantic have compelled its observance and punished its neglect. They have enforced the right to support as one existing independently of, and requiring no aid from, statutes or contracts, and as resting on the order of creative work and the laws of nature. This right may be waived by the owner of the surface, (*Penn Gas Coal Co. v. Versailles Fuel Gas Co.* 181 Pa. 522,) but, if not waived, the owner of the lower *stratum* cannot escape its obligation. But the necessity for access results from the work of nature just as truly as the necessity for support. Both must be had in nature's way, or not had at all. Take away the servitude for support, and the surface may be made unsafe for either residence or cultivation, and so become valueless. Take the servitude for access which the natural arrangement of the stratified rocks imposes upon the surface, and the

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mineral deposits in them are inaccessible, and therefore useless. Recognize these reciprocal servitudes, and the value of the surface is preserved, while the mineral deposits are made accessible, and made to minister to the comfort and advancement of the race. They rest on the same foundation. To change the figure, they may be said to be the obverse and the reverse of the same coin. They are due from and due to every layer of the earth's crust in succession, from the surface to the center, because of the relation these layers hold to each other in the order of their creation. We do not hesitate to enforce the servitude for support, whether subjacent or adjacent, or to regulate the extent and manner in which it shall be rendered and enjoyed. With equal propriety and with equal ease we may enforce the servitude for access, and regulate the extent and manner in which it shall be rendered and enjoyed. The power of the chancellor would extend to all incidental subjects, and enable him to impose terms as to the manner in which an owner of the lower estate should exercise his right of access, the precautions he should employ, and the compensation he should make for actual injury done. It is interesting to note how generally business men engaged in developing the mineral resources of the state have recognized this right of access, and interposed no obstacle in the way of its exercise. I have before me, as I write, the estimate of well-informed producers and dealers, thoroughly familiar with the several oil fields in the state, and identified with the business from the early developments on Oil creek, thirty years ago, to the present time. This estimate fixes the total number of oil wells drilled in Pennsylvania at about 60,000, exclusive of wells drilled in localities known to produce only gas. Three fourths of the whole number are within the limits of the carboniferous measures, and one half have penetrated workable veins of coal. During these thirty years of active operations the question of the right of access to the sand rocks in which the oil is found has never before reached this court. This cannot be accounted for except upon the theory of the general concession of the right by all parties concerned in the ownership of the coal and in the operations of mining. The magnitude of the business, and the importance of this question, will be evident when it is remembered that these wells have had an average cost of about \$4,000 each before oil could be secured from them, and a total cost of \$240,000,000. The actual production of oil has ranged from 4,000 barrels per day thirty years ago, to 110,000 barrels per day. It is now standing at not far from 60,000 barrels. The price has fluctuated between 50 cents per barrel and \$3. A conservative estimate of the production—total production—places it about 560,000,000 of barrels, with an average value of not less than \$1 per barrel in its crude state. For twenty years the northern oil field was within and immediately adjoining the judicial district in which I presided, and I never heard of an accident in a coal mine that was charged upon, or that could be traced directly

or indirectly to, the wells that penetrated the coal, or to the escape of oil or gas from them into the coal or the mined-out openings from which the coal had been taken. The manner in which wells are cased and tubed renders the possibility of such escape so remote as to reduce the risk of accident to proportions that are practically insignificant. But if the risk was much greater it could be provided for by requiring additional precautions to be taken, and security to be given for the reimbursement of the owner of the intermediate estate for any loss he might sustain. As it now stands, the decree of this court recognizes the existence of a right of access existing in the nature of things, wholly independent of all statutory enactments, and yet refuses to enforce that right, or regulate its exercise. It says to the owner of the lower estate: "You have

an undoubted right of access to the layer of the earth's crust in which your wealth lies, but equity will not protect or aid you in its exercise. The owner of the intermediate stratum may sue you, and recover damages from you, for doing what it is your right to do, and a chancellor cannot hear your complaint, or lift his hands to protect you, until the Legislature has provided him with ears and hands for that purpose."

I would hold that the jurisdiction is as clear as the right of access; that the parties are in a court competent to deal with the whole subject; and that the decree of the court should be affirmed for that reason, and at the costs of the appellant.

Green and McCollum, JJ.: We fully concur in this opinion.

NEW YORK COURT OF APPEALS.

Re ESTATE OF James T. SWIFT, Deceased.

(.....N. Y.....)

1. **A tax on the right of succession under a will, or devolution in case of intestacy, is imposed by the New York Collateral Inheritance Tax Law of 1887, chap. 713, amending the Act of 1885, chap. 483, although the language of the statute is "all property which shall pass, etc., . . . shall be and is subject to a tax."**
2. **Real estate situated out of the state owned by a decedent residing in the state at the time of his death, is not subject to the Collateral Inheritance Tax Laws of New York, even after it has been converted into money which is in the hands of the executors.**
3. **Personal property of a resident decedent, whereever situated, whether within or without the state, is subject to the New York Collateral Inheritance Laws.**
4. **The residuary estate is not subject to any deduction for the purpose of determining the collateral inheritance tax payable thereon because of a provision of the will directing payment of the tax on the specific legacies as an expense of administration.**

(January 24, 1893.)

APPPEAL by the People of the State of New York and Theodore W. Myers, Comptroller of the City of New York, from an order of the General Term of the Supreme Court, First Department, affirming an order of the Surrogate's Court for the City and County of New York, affirming an order assessing the value of the property of James T. Swift, deceased, which was subject to taxation under the Collateral Inheritance Tax Act. *Modified and affirmed.*

The facts are stated in the opinion.

Mr. S. W. Rosendale, Atty-Gen., for appellants:

The statute known as the Collateral Inheritance Tax Law does not impose a property tax, but a charge for the privilege of acquiring property.

Re McPherson, 104 N. Y. 816, 58 Am. Rep. 502.

In the following cases, arising in various states, the tax has been held to be a succession and not a property tax:

Mager v. Grima, 49 U. S. 8 How. 490, 12 L. ed. 1168; *Eyre v. Jacob*, 14 Gratt. 422, 78 Am. Dec. 387; *Schootfeld v. Lynchburg*, 78 Va. 866; *Strods v. Com.* 52 Pa. 181; *Scholey v. Rev.* 90 U. S. 23 Wall. 881, 23 L. ed. 99; *State v. Dalrymple*, 3 L. R. A. 372, 70 Md. 294; *Fullen v. Wake County Comrs.* 66 N. C. 861; *Peters v. Lynchburg*, 78 Va. 927; *Com. v. Herman*, 16 W. N. C. 210; *Wallace v. Myers*, 4 L. R. A. 171, 88 Fed. Rep. 184.

To hold that the tax was one on property would enable an estate which had assets amounting to a large sum invested in government bonds to entirely escape taxation.

The question has not been definitely determined by this court.

See *Re McPherson*, 104 N. Y. 806, 58 Am. Rep. 502; *Re Howe*, 2 L. R. A. 825, 112 N. Y. 103; *Re Cager*, 111 N. Y. 847; *Re Sherwell*, 125 N. Y. 879.

The tax imposed by the Collateral Inheritance Tax Law is no more a tax upon property than is the Corporation Tax Act of 1880.

People v. Home Ins. Co. 92 N. Y. 328.

Under the will of decedent, the residuary legatees did not take an interest in real estate, but only in personal property.

It is immaterial that the term "devise" was used in the residuary clause of the will.

Willard, Real Estate, pp. 505, 511, 528;

NOTE—On the subject of collateral inheritance taxes, see *Re Romaine*, 12 L. R. A. 401, and note, 127 N. Y. 80; *Re Stewart*, 14 L. R. A. 836, 131 N. Y. 274; *Com. v. Ferguson*, 10 L. R. A. 240, and note, 137 Pa. 596; *Wallace v. Myers*, 4 L. R. A. 171, and note, 88 Fed. Rep. 184; *People v. Sherwood*, 3 L. R. A. 464, 18 L. R. A.

See also 18 L. R. A. 713.

113 N. Y. 174; *Catlin v. Trinity College*, 3 L. R. A. 203, 113 N. Y. 123; *State v. Dalrymple*, 3 L. R. A. 372, and note, 70 Md. 294; *State v. Gorman*, 2 L. R. A. 701, 40 Minn. 232; *Re Howe*, 3 L. R. A. 825, 112 N. Y. 100.

Myers v. Eddy, 47 Barb. 263; *Wiltse v. Shaw*, 100 N. Y. 191.

There was a conversion of the real estate into personality from the time of the death of testator, and the only duty resting on the executors was to carry out the direction contained in the will.

Dodge v. Pond, 23 N. Y. 69; *Fisher v. Banta*, 66 N. Y. 463; *Lent v. Howard*, 89 N. Y. 169; *Kane v. Gott*, 24 Wend. 641, 35 Am. Dec. 641; *Underwood v. Curtis*, 127 N. Y. 523; *Robert v. Corning*, 89 N. Y. 225; *Greenland v. Waddell*, 116 N. Y. 234.

Equitable conversion having taken place, the residuary legatees being residents of this state, such persons would have been liable in this state to taxation for state, county, and city purposes, upon their interest in the estate of Mr. Swift as personal property.

Fisher v. Banta and *Underwood v. Curtis*, *supra*; *Miller v. Com.* 111 Pa. 321.

The personal property of decedent in New Jersey was subject to the Collateral Inheritance Law.

8 Am. & Eng. Encyclop. Law, pp. 565, 566; *Re Romaine's Estate*, 12 L. R. A. 401, 127 N. Y. 80.

The actual must yield to the legal *situs*, which is that of the domicile of the beneficiaries. *Orcutt's App.* 97 Pa. 179.

Mr. Nelson S. Spencer, for respondents:

As the tax is one which is payable out of the property, neither the real estate nor its proceeds are taxable by the state of New York. The real estate is not so taxable because it is out of its jurisdiction. The proceeds are not so taxable because the tax is levied as of the date of the testator's death, and the proceeds have come into this state only since his death. There is no language in the Act under which they can be taxed.

Re Vassar's Will, 127 N. Y. 1.

No state, by any law or procedure, can tax property or persons out of its jurisdiction.

Re State Tax on Foreign-held Bonds, 82 U. S. 15 Wall. 300, 21 L. ed. 179; *Lorillard v. People*, 6 Dem. 268; *Re Devey*, N. Y. Daily Reg. Oct. 21, 1889; *Drayton's App.* 61 Pa. 172; *Re Bittinger's Estate*, 129 Pa. 353.

The tax is one paid out of capital; it is a deduction by the state from capital upon its transmission by the state from dead to living hands.

3 Dowell, History of Taxes, p. 148; Bastable, Public Finance, bk. 4, chap. 8, § 7; *Re Howard*, 5 Dem. 433.

It is quite apparent from the terms of the statute that the tax levied by the state of New York is one on property, and not on any person or persons.

New York Laws 1887, chap. 718.

Such is the purport of the decisions of this court.

Re McPherson, 104 N. Y. 806, 58 Am. Rep. 502; *Re Enston*, 8 L. R. A. 464, 113 N. Y. 174; *Re Stewart's Estate*, 14 L. R. A. 836, 131 N. Y. 274; *Re Romaine's Estate*, 12 L. R. A. 401, 127 N. Y. 80; *Re Vassar's Will*, *supra*. See also *Re Bittinger's Estate*, *supra*.

Even if the direction in the will did work an equitable conversion, it will not serve the state of New York in its effort to tax foreign real estate. The surrogate's court is not

a court of equitable jurisdiction. Not being in a court of equity, the state cannot invoke the doctrine of equitable conversion, and if it were in a court of equity, equity would not apply the doctrine. It will only apply it in favor of those persons who have a right to pray that the acts which ought to be done may be done.

2 Story, Eq. 114.

Real property in New Jersey has no protection from the state of New York.

Taxation and protection are correlative obligations, and it is contrary to justice and fundamental principles to impose the one and withdraw the other.

People v. Davenport, 91 N. Y. 574.

It cannot be supposed that the Legislature intended that our citizens should be subject to taxation here and in other states also upon the same property.

People v. Smith, 88 N. Y. 576; *Re Stewart*, *supra*.

The personal property in question was tangible property situated on the real estate in New Jersey. It also was without the jurisdiction of the state of New York and not taxable.

The policy of the statute in question here is to tax all property within the state of New York, and none out of it.

Re Romaine's Estate, *supra*; *People v. Taxes Comrs.* 23 N. Y. 224; *Alvany v. Powell*, 55 N. C. 51; *People v. Smith*, *supra*; Story, Conf. L. 8th ed. p. 543; Westlake, Private International Law, 3d ed. 1890, chap. 7, p. 168; Mr. David A. Wells' article on Taxation in Lalor's Cyclopædia of Political Science.

The passing of the personal property in question depends upon the favor of the state of New Jersey.

Johnston v. Spicer, 107 N. Y. 185.

In such a case the *lex rei sitæ* controls.

Wharton, Conf. L. § 608.

Gray, J., delivered the opinion of the court:

James T. Swift died in July, 1890, being a resident of this state and leaving a will by which he made a disposition of all his property among relatives. After many legacies of money and of various articles of personal property, he directed a division of his residuary estate into four portions, and he devised and bequeathed one portion to each of four persons named. The executors were given a power of sale for the purpose of paying the legacies and of making the distribution of the estate. At the time of his death, the testator's estate included certain real estate and tangible personal property in chattels situated within the state of New Jersey, which was realized upon by the executors and converted into moneys in hand. When, upon their application, an appraisal was had of the estate in order to fix its value under the requirements of the law taxing gifts, legacies and inheritances, the surrogate of the county of New York, before whom the matter came, held, with respect to the appraisal, that the real and personal property situated without the state of New York were not subject to appraisal and tax under the law, and the exceptions taken by

the Comptroller of the city of New York to that determination raise the first and the principal question which we shall consider.

Surrogate Ransom's opinion, which is before us in the record, contains a careful review of the legal principles which limit the right to impose the tax, and his conclusions are as satisfactory to my mind as they evidently were to the minds of the learned justices of the general term of the supreme court, who agreed in affirming the surrogate's decree upon his opinion.

The attorney-general has argued that this law, commonly called the Collateral Inheritance Tax Law, imposes, not a property tax, but a charge for the privilege of acquiring property, and, as I apprehend it, the point of his argument is that, as there is no absolute right to succeed to property, the state has a right to annex a condition to the permission to take by will, or by the intestate laws, in the form of a tax, to be paid by the persons for whose benefit the remedial legislation has been enacted. That is, substantially, the way in which he puts the proposition, and if the premise be true that the tax imposed is upon the privilege to acquire, and, as he says in his brief, is like "a duty imposed, payable by the beneficiary," possibly enough, we should have to agree with him. We might think, in that view of the act, that the *status* of property in a foreign jurisdiction was not a controlling circumstance. But if we take up the provisions of the law by which the tax is imposed, and if we consider them as they are framed and the principle which then seems to underlie the peculiar system of taxation created, I do not think that his essential proposition finds adequate support. The law in force at the time of the decease of the testator is contained in chapter 718 of the Laws of 1887, amending chapter 488 of the Laws of 1885, and is entitled "An Act to Tax Gifts, Legacies and Collateral Inheritances in Certain Cases."

By the first section it is provided that "all property which shall pass by will . . . from any person who may die seised or possessed of the same, while a resident of this state, or, if such decedent was not a resident of this state at the time of his death, which property or any part thereof shall be within this state . . . shall be and is subject to a tax . . . to be paid . . . for the use of the state," etc.

In the 4th section it is provided that "all taxes imposed by this Act, unless otherwise herein provided for, shall be due and payable at the death of the decedent," etc.

By the 6th section, it is provided that the executor shall "deduct the tax from the legacy or property, subject to said tax, or if the legacy or property be not money, he shall collect the tax thereon upon the appraised value thereof from the legatee, or person entitled to such property, and he shall not deliver, or be compelled to deliver, any specific legacy or property subject to tax to any person until he shall have collected the tax thereon," etc. The language of the Act has been justly condemned, for being involved and difficult to read clearly; but, consider-

ing the language employed in these and in other sections of the law, in its ordinary sense, I think we would at once say that if the Legislature had not actually imposed a tax upon the property itself, upon the death of its owner, it had certainly intended to impose a tax upon its succession, which was to be a charge upon the property, and which operated, in effect, to diminish *pro tanto* its value, or the capital, coming to the new owner under a will, or the intestate laws. Could any one say, after reading the provisions of this law, that it was the legatee, or person entitled, who was taxed? I doubt it. Property, which was the decedent's at the time of his death is subjected to the payment of a tax. The tax is to be deducted from the legacy; or, when deduction is not possible from the legacy not being in money, and a collection from the legatee or the person entitled to the property is authorized to be made, the tax so to be collected is described as "the tax thereon," that is, on the property.

If it should be said that such an interpretation of the law is in conflict with the doctrine which some judges have asserted, respecting the nature of this tax, I think it might be sufficient to say that the phraseology of the New York law differs, more or less, from that of other states, and seems peculiarly to charge the subject of the succession with the payment of the tax. But I do not think it at all important to our decision here that we should hold it to be a tax upon property precisely.

A precise definition of the nature of this tax is not essential if it is susceptible of exact definition. Thus far, in this court, we have not thought it necessary, in the cases coming before us, to determine whether the object of taxation is the property which passes or not; though, in some, expressions may be found which seem to regard the tax in that light. *Re McPherson*, 104 N. Y. 806, 58 Am. Rep. 503; *Re Enston*, 113 N. Y. 174, 8 L. R. A. 464; *Re Sherwell*, 125 N. Y. 879; *Re Romaine's Estate*, 127 N. Y. 80, 13 L. R. A. 401, and *Re Stewart's Estate*, 131 N. Y. 274, 14 L. R. A. 836. The idea of this succession tax, as we may conveniently term it, is, more or less, compound; the principal idea being the subjection of property, ownership of which has ceased by reason of the death of its owner, to a diminution, by the state reserving to itself a portion of its amount, if in money, or of its appraised value, if in other forms of property. The accompanying, or the correlative, idea should necessarily be that the property, over which such dominion is thus exercised, shall be within the territorial limits of the state at its owner's death, and therefore, subject to the operation and the regulation of its laws. The state, in exercising its power to subject realty, or tangible property, to the operation of a tax, must, by every rule, be limited to property within its territorial confines.

The question here does not relate to the power of the state to tax its residents with respect to the ownership of property situated elsewhere. That question is not involved. The question is whether the Legislature of

the state in creating this system of taxation of inheritances or testamentary gifts, has not fixed as the standard of right the property passing by will or by the intestate laws.

What has the state done, in effect, by the enactment of this tax law? It reaches out and appropriates for its use a portion of the property at the moment of its owner's decease, allowing only the balance to pass in the way desired by testator, or permitted by its intestate law, and while in so doing it is exercising an inherent and sovereign right, it seems very clear to my mind that it affects only property which lies within it, and, consequently, is subject to its right of eminent domain. The theory of sovereignty, which invests the state with the right and the power to permit and to regulate the succession to property upon its owner's decease, rests upon the fact of an actual dominion over that property. In exercising such a power of taxation as is here in question, the principle, obviously, is that all property in the state is tributary for such a purpose, and the sovereign power takes a portion or percentage of the property, not because the legatee is subject to its laws and to the tax, but because the state has a superior right or ownership, by force of which it can intercept the property, upon its owner's death, in its passage into an ownership regulated by the enabling legislation of the state.

The rules of taxation have become pretty well settled, and it is fundamental among them that there shall be jurisdiction over the subject taxed; or, as it has been sometimes expressed, the taxing power of the state is co-extensive with its sovereignty. It has not the power to tax directly either lands or tangible personal property situated in another state or country. As to the latter description of property no fiction transmuting its *situs* to the domicile of the owner is available, when the question is one of taxation. In this connection the observations of Chief Judge Comstock, in *People v. Taxes Commr.*, 28 N. Y. 244, and of some text-writers, are not inappropriately referred to. He had said that lands and personal property having an actual situation within the state are taxable, and, by a necessary implication, that no other property can be taxed. He says, further: "If we say that taxation is on the person in respect to the property, we are still without a reason for assessing the owner resident here in respect to one part of his estate situated elsewhere and not in respect to another part. Both are the subject of taxation in the foreign jurisdiction."

In *Judge Cooley's* work on Taxation it is remarked (p. 159) that "a state can no more subject to its power a single person, or a single article of property, whose residence or *situs* is in another state, than it can subject all the citizens, or all the property of such other state to its power."

Judge Cooley had reference in his remarks to the case of bonds of a railroad; for he cites the case of "*State Tax on Foreign-held Bonds*," in the United States Supreme Court, 82 U. S. 15 Wall. 800, 21 L. ed. 179, where Mr. Justice Field delivered the opinion, and, in the course of it observed that "the power

of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state."

Judge Story, in his work on the Conflict of Laws, speaking of the subject of jurisdiction in regard to property, said (sec. 550) that the legal fiction as to the *situs* of movables yields when it is necessary for the purpose of justice, and, further, "a nation within whose territory any personal property is actually situated has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situated there."

The proposition which suggests itself from reasoning, as from authority, is that the basis of the power to tax is the fact of an actual dominion over the subject of taxation at the time the tax is to be imposed.

The effect of this special tax is to take from the property a portion, or a percentage of it, for the use of the state, and I think it quite immaterial whether the tax can be precisely classified with a taxation of property or not. It is not a tax upon persons. If it is called a tax upon the succession to the ownership of property, still it relates to and subjects the property itself and when that is without the jurisdiction of the state, inasmuch as the succession is not of property within the dominion of the state, succession to it cannot be said to occur by permission of the state. As to lands, this is clearly the case, and rights in or power over them are derived from or through the laws of the foreign state or country. As to goods and chattels it is true; for their transmission abroad is subject to the permission of and regulated by the laws of the state or country where actually situated. Jurisdiction over them belongs to the courts of that state or country for all purposes of policy; or of administration in the interests of its citizens, or of those having enforceable rights, and their surrender, or transmission, is upon principles of comity.

When succession to the ownership of property is by the permission of the state, then the permission can relate only to property over which the state has dominion, and as to which it grants the privilege or permission.

Nor is the argument available that, by the power of sale conferred upon the executors, there was an equitable conversion worked of the lands in New Jersey, as of the time of the testator's death and, hence, that the property sought to be reached by the tax, in the eye of the law, existed as cash in this state in the executor's hands, at the moment of the testator's death. There might be some doubt whether the main proposition in the argument is quite correct and whether the law did not vest in the residuary legatees subject to the execution of the power of sale. But it is not necessary to decide that question. Neither the doctrine of equitable conversion of lands nor any fiction of *situs* of movables can have any bearing upon the question under advisement. The question of the jurisdiction of the state to tax is one of fact, and cannot turn upon theories or fictions,

which, as it has been observed, have no place in a well-adjusted system of taxation.

We can arrive at no other conclusion, in my opinion, than that the tax provided for in this law is only enforceable as to property which, at the time of the owner's death was within the territorial limits of this state. As a law imposing a special tax it is to be strictly construed against the state and a case must be clearly made out for its application. We should incline against a construction which might lead to double taxation; a result possible and probable under a different view of this law. If the property in the foreign jurisdiction was in land or in goods and chattels, where, upon the testator's death, a new title or ownership attached to it, the bringing into this state of its cash proceeds subsequently, no matter by what authority of will, or of statute, did not subject it to the tax. A different view would be against every sound consideration of what constitutes the basis for such taxation, and would not accord with an understanding of the intention of the Legislature as more or less plainly expressed in these Acts.

Another question, which I shall merely advert to in conclusion, arises upon a ruling of the surrogate with respect to appraisal, in connection with the clause of the will directing that the amount of the tax upon the legacies and devises should be paid as an expense of administration. The appraiser, in ascertaining the value of the residuary estate for the purpose of taxation, deducted the amount of the tax to be assessed on prior legacies. The surrogate overruled him in this, and held that there should be no deduction from the value of the residuary estate of the amount of the tax to be assessed either upon prior legacies, or upon its value. He held that the legacies taxable should be reported, irrespective of the provision of the will; and that a mode of payment of the succession tax prescribed by will is something with which the statute is not concerned. I am satisfied with his reasoning and can add nothing to its force. Manifestly, under the law that which is to be reported by the appraiser for the purpose of the tax is the value of the interest passing to the legatee under the will, without any deduction for any purpose, or under any testamentary direction.

A question is raised as to the effect upon the law, contained in the Acts of 1885 and 1887, of the passage of chapter 215 of the Laws of 1891; but as that has been the subject of another appeal, and is fully discussed in the opinion of the *Matter of the Estate of Prime*,—no reference will be made to it here.

My brethren are of the opinion that the tax imposed under the Act is a tax on the right of succession, under a will or devolution in case of intestacy; a view of the law which my consideration of the question precludes my assenting to.

They concur so far in my opinion as it relates to the imposition of a tax upon real estate situated out of this state, although owned by a decedent residing here at the time of his decease; holding with me that taxation of such was not intended, and that the

doctrine of equitable conversion is not applicable to subject it to taxation. But as to the personal property of a resident decedent, wheresoever situated, whether within or without the state, they are of the opinion that it is subject to the tax imposed by the Act.

The judgment below, therefore, should be so modified as to exclude from its operation the personal property in New Jersey, and, as so modified, it should be affirmed, without costs to either party as against the other.

All concur in the judgment as modified, except **Maynard, J.**, not sitting.

Re ESTATE OF Edward D. G. PRIME, Deceased.

(.....N. Y.....)

1. The amendment of a statute "so as to read as follows" does not operate as a repeal of provisions which are not retained in the same precise words if they are substantially re-enacted in equivalent words.
2. The exemption of "any religious, educational . . . or charitable corporation or corporation organized for . . . other than business purposes" from the collateral inheritance tax by Laws 1890, chap. 553, extends only to domestic corporations.
3. A state statute granting powers and privileges to corporations must, in the absence of plain indications to the contrary, be held to apply only to corporations created by the state and over which it has the power of visitation and control.
4. A statute conferring upon a corporation a limited privilege of taking and holding property in the state does not relieve it from a legacy duty.

(January 17, 1898.)

APPPEAL by legatees under the will of Edward D. G. Prime, deceased, from an order of the General Term of the Supreme Court, First Department, affirming an order of the surrogate for New York County fixing the amount of collateral inheritance tax to be paid upon their shares in the estate. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. Ralph E. Prime, for appellants:

A statute which imposes a tax, or a penalty, or a forfeiture, but which is repealed before actual assessment or final recovery, does not authorize assessment of the tax, or the recovery of the penalty or the forfeiture.

Re Cayuga County Surrogate, 46 Hun, 659; *Re Miller*, 110 N. Y. 224.

The provisions of a statute are not saved from repeal, by paraphrasing the words in an amendatory Act. The retaining of the same idea in a new statute, but expressed in different words, is not a retaining of the old statute. The change of the words is a doing away with the old words, and with them all their force

NOTE.—On the subject of the above case, see also the preceding case, *Re Swift* (N. Y.) ante, 700, and the note thereto.

and virtue, and you must start again with the new words as the new creation of the statute.

Ely v. Holton, 15 N. Y. 598; *Re Miller*, 110 N. Y. 216; *Re Arnett*, 49 Hun, 603.

The change of a single word will operate to repeal an entire statute.

Nash v. White's Bank of Buffalo, 105 N. Y. 245.

Mr. Austin Abbott, with *Mr. James McG. Smith*, for appellant, American Board of Commissioners for Foreign Missions:

The tax imposed by the Collateral Inheritance Act is special and not general, and must be strictly construed against the state.

Re Vassar, 127 N. Y. 1.

The provisions of the Act of 1890, exempting bequests to missionary societies from the legacy tax, apply in favor of this appellant.

The Act of 1890 exempts foreign and domestic corporations alike.

Effect must be given if possible to all the language employed.

People v. Matsell, 94 N. Y. 179; *Newell v. People*, 7 N. Y. 9; *People v. Purdy*, 2 Hill, 81, 4 Hill, 884.

No consideration of policy exists for limiting this benefit to domestic corporations, and especially in a case like this of a society existing solely for the propagation of the work of foreign missions in heathen lands.

Foreign corporations are to be deemed "persons" or "associations" within the meaning of a statute relating to taxation unless a different intent is indicated in the statute.

British Commercial L. Ins. Co. v. Taxes & Assessments Comrs. 1 Abb. App. Dec. 199; *People v. Horn Silver Min. Co.* 105 N. Y. 76.

The same strictness of construction will not be indulged, where an exemption from taxation is to religious, scientific, literary and educational institutions that would be applied in considering exemptions to corporations created and operated for private gain or profit.

State v. Fisk University, 87 Tenn. 233.

The rule of construction here claimed has been applied in analogous cases, arising in connection with wills.

Hollis v. Drew Theological Seminary, 95 N. Y. 166; *Chamberlain v. Chamberlain*, 43 N. Y. 424, 3 Lans. 848.

It has been held that the provisions of the Amendment of 1887, exempting legacies to children "adopted as such in conformity with the laws of the state of New York," operated in favor of a child adopted in the state of Massachusetts, under the provisions of its laws which were substantially similar to our own.

Re Butler, 58 Hun, 400.

This particular corporation is entitled to exemption by reason of the effect of Laws 1877, chap. 376.

A grant of lands to individuals by the sovereign authority to be possessed and enjoyed by them in a corporate character in itself confers capacity to take and hold in a corporate character.

North Hempstead v. Hempstead, 2 Wend. 109.

A grant of power to perform corporate acts implies a grant of corporate power.

Com. v. West Chester R. Co. 3 Grant, Cas. 200. See *McIntyre Poor School Trustees v. Zanesville* 18 L. R. A.

Canal Co. 9 Ohio, 203; *Walsh v. New York & Brooklyn Bridge Trustees*, 96 N. Y. 427.

Legislative recognition of a corporation as existing dispenses with further proof of incorporation.

People v. Farnham, 35 Ill. 562.

Messrs. Louis H. Bristol and Henry Stoddard, with *Mr. Haley Fiske*, filed a brief on behalf of Yale University.

Messrs. Arnoux, Ritch & Woodford, filed a brief on behalf of parties interested in provisions contained in the will of Daniel B. Fayerweather, deceased:

Only those are taxable who are included in both the letter and spirit of the Act.

There are in every civilized community at least two methods of raising the revenues.

1. There are the general laws that are intended to affect every individual, the burden of which ought to be borne by every individual according to the test laid down in such law. In these laws it has been said that the exceptions shall be strictly construed because there can be no intent against the plain meaning of the statute of any exception not expressly declared.

Sutherland, Stat. Constr. § 364; Hubbard v. Brainard, 35 Conn. 563; *McQuakey v. Cromwell*, 11 N. Y. 601; *People v. Davenport*, 91 N. Y. 574; *People v. New York City Comrs.* 95 N. Y. 555; *Hollis v. Drew Theological Seminary*, 95 N. Y. 166.

To this general class of taxation the Collateral Inheritance Law does not belong.

Re McPherson, 104 N. Y. 306, 58 Am. Rep. 502; *Strode v. Com.* 52 Pa. 181.

2. There is another class of laws for raising revenue which have a different construction. Where special burdens are imposed or special sources of revenue are affected, the uniform and unfailing principle of law is that no construction shall enlarge their operation.

Cooley, Taxn. 2d ed. p. 273; *United States v. Wigglesworth*, 2 Story, 269; *United States v. Watts*, 1 Bond, C. C. 590; *Partington v. Atty. Gen.* L. R. 4 H. L. Cas. 100; *Potter's Dwar.* Stat. 742, 749; *Warrington v. Furber*, 8 East, 242; *Gurr v. Scudde*, 11 Exch. 190.

In the Revenue Laws where clauses inflicting pains and penalties are ambiguously or obscurely worded, the interpretation is ever in favor of the subject.

Potter's Dwar. Stat. 641; *Hubbard v. Johnstone*, 8 Taunt. 177; *Powers v. Barney*, 5 Blatchf. 202; *Green v. Holway*, 101 Mass. 243, 8 Am. Rep. 339.

The mischief of a strict construction is easily obviated by the Legislature; but the mischief of a liberal construction may be irremediable before it can be reached.

Stetson v. Kempton, 13 Mass. 272, 7 Am. Dec. 145; *Alley v. Edgecomb*, 53 Me. 446.

3. Not only is this foregoing principle of construction recognized in every case of special legislation, but there is the further generous principle that where any exception to a general law is enacted, such exception shall likewise have a liberal construction.

Temple Grove Seminary v. Cramer, 98 N. Y. 121; *People v. New York Tax Comrs.* 6 Hun, 109, affirmed, 64 N. Y. 656; *People v. New York Tax Comrs.* 10 Hun, 246; *State v. Ross*, 24 N.

J. L. 497; Griswold College Trustees v. State, 46 Iowa, 275, 26 Am. Rep. 188; *Wesleyan Academy Trustees v. Wilbraham*, 99 Mass. 599; *Monticello Seminary v. People*, 106 Ill. 399, 46 Am. Rep. 702; *Northwestern University v. People*, 90 Ill. 833, 23 Am. Rep. 187.

4. On the other hand special authority to tax must be strictly construed.

Vanover v. The Justices, 27 Ga. 354; *Johnson v. Lexington*, 14 B. Mon. 648.

By a proper interpretation of the Act of 1890, chap. 558, p. 977, every non-business corporation is included in its operation both to hold and enjoy property, and to be exempt from the collateral inheritance tax, whether such corporation is domestic or foreign.

It is conceded that "the grammatical construction of chapter 558, Laws of 1890, is clear and unambiguous."

The duty of the court in such a case is simply to interpret the law and give it effect.

Stewart v. Lehigh Valley R. Co. 88 N. J. L. 505.

By a proper construction of the word "such" in the exempting clause, and of the proviso therein following, the Law of 1890 exempts the corporations therein referred to from the collateral inheritance tax.

1. The word "such" as therein contained is in effect the repetition of the specific corporations previously enumerated.

2. The proviso annexed to the exemption proves that foreign corporations were included therein.

The Act of 1889, as amended in 1890, is in its general effect a negative statute, and is therefore of universal application.

The Collateral Inheritance Tax Law is to be construed as if so much of the Act of 1890 as relates to corporate exemption therefrom had been embodied therein, and by such construction foreign non-business corporations are exempt from such tax.

The words in the body of the Act itself show that it was a statute of restricted application.

Re Stewart's Estate, 14 L. R. A. 836, 181 N. Y. 280; *Re Enston*, 3 L. R. A. 464, 113 N. Y. 174; *Re Stewart's Estate*, 14 L. R. A. 836, 181 N. Y. 274.

Upon broad principles of public policy these corporations should be held to be on an equal footing with domestic corporations of like character and to be exempt from such special taxation.

Mr. Frank L. Hall, with *Messrs. De Forest & Weeks*, filed a brief on behalf of the executors of the will of Mary Stuart, deceased.

Messrs. David B. Hill and Edgar J. Levey, with *Mr. Emmet R. Olcott*, for respondents:

The Amendatory Law (Laws 1891, chap. 215) did not repeal by implication the provisions of Laws 1887, chap. 713.

The tax imposed by this Act (Laws 1885, chap. 433) is a permanent one.

Re McPherson, 104 N. Y. 319, 58 Am. Rep. 502.

The fact that it has become a fixed and important feature of the system of taxation in this state is not without value in determining the intention of the Legislature in passing Laws 1891, chap. 215.

18 L. R. A.

Sutherland, Stat. Constr. 405, and cases cited.

The Statute of 1887 amended the Act of 1885 "so as to read as follows," and it was held that, "upon a state of facts arising between the passage of the two Acts, 1885 and 1887, the law continues in force as though the Act of 1887 had never been enacted."

Warrimer v. People, 6 Dem. 216; *Re Arnett*, 49 Hun, 599.

In construing any statute the intention of the law-makers must be sought for—that is the grand, central light in which all statutes must be read.

Where a section is amended "so as to read as follows," there must be something in the nature of the new legislation to show an intent with reasonable clearness before an implied repeal can be recognized.

Sutherland, Stat. Constr. 170, and cases cited.

It has been frequently held that the amendment of a statute by declaring that the same shall read as prescribed by the Amendatory Act is not a repeal of the original statute.

Ely v. Holton, 15 N. Y. 595; *Moore v. Mousert*, 49 N. Y. 332; *People v. Montgomery County Supra*, 67 N. Y. 118, 23 Am. Rep. 94.

Laws 1891, chap. 215, if passed as an independent statute, would not have repealed Laws 1887, chap. 713, § 1, by implication.

The changes in phraseology are simply those common to any revision, and, "in a revision of the laws a reform of the language is not necessarily an alteration of the law. The intention of the Legislature to alter the law must be evident."

Crowell v. Crane, 7 Barb. 195; *Potter's Dwarr. Stat.* 154, note 4, and cases cited; *People v. Harris*, 123 N. Y. 73; *Roberts v. Fahn*, 36 Ill. 268; *Keeler v. Smith*, 66 N. C. 154; *Sedgw. Stat. & Const.* L. 197; *Sutherland*, Stat. Constr. 336; *Yates Case*, 4 Johns. 359; *Taylor v. Delancy*, 2 Cal. Cas. 143; *Theriat v. Hart*, 2 Hill, 380; *Burnham v. Stevens*, 33 N. H. 247; *Sheffield v. Lovering*, 12 Mass. 492.

Especially where the statute has been well settled by judicial construction.

Crowell v. Crane, *supra*; *Douglas v. Douglas*, 5 Hun, 140; *Conger v. Barker*, 11 Ohio St. 1.

Even under the assumption that Laws 1891, chap. 215, § 1, did not operate as a repealing section, the vested right of the state to a tax once accrued would not have been lost.

Re Kemeys, 56 Hun, 119; *Sherrill v. Christ Church*, 121 N. Y. 701.

(a) The tax accrues and becomes due to the state immediately upon the death of the testator.

Laws 1887, chap. 713, § 4; *Warrimer v. People*, 6 Dem. 214; *Mellon's App.* 114 Pa. 570; *Re Vassar*, 127 N. Y. 8.

And no assessment or judicial decree is a necessary prerequisite to make the right of the state to the tax a vested right.

Laws 1889, chap. 479, explained in *Re Hughes*, N. Y. Law Jour. July 27, 1889; *Re Kemeys*, *supra*; *Re Ryan*, 18 N. Y. S. R. 992.

(b) Where the revision of a law expressly repeals existing statutes a re-enactment neutralizes the repeal so far as the old law is continued in force; and such provisions of the old

law as are re enacted operate without interruption as continuations.

Wright v. Oakley, 5 Met. 406; *Pacific Mail S. S. Co. v. Joliffe*, 69 U. S. 2 Wall. 458, 17 L. ed. 807; *Middleton v. New Jersey W. L. R. Co.* 26 N. J. Eq. 269; *Mitchell v. Halsey*, 15 Wend. 241; *Douglas v. Douglas*, *supra*.

And even inchoate statutory rights are not lost or defeated by the repeal.

Moore v. Kenockee, 75 Mich. 832.

When the state itself prescribed the amount to be paid, no assessment is required, and the tax can be recovered by suit.

United States v. Hallovay, 14 Blatchf. 1; *Dollar Sav. Bank v. United States*, 86 U. S. 19 Wall. 227, 22 L. ed. 80; *King v. United States*, 99 U. S. 239, 25 L. ed. 873; *United States v. Pacific R. Co.* 1 McCrary, 1.

It is not a property tax, but a tax on a privilege,—that of devolution.

Cooley, Taxn. 2d ed. p. 80, and cases cited; *Dos Passos*, Law of Collateral Inheritance Tax, 2d ed. and cases cited; *Re Twigg's Estate*, 15 N. Y. Supp. 548; *Re Howard*, 5 Dem. 483; *Wallace v. Myers*, 88 Fed. Rep. 184; *Strode v. Com.* 52 Pa. 181.

Therefore at the moment of a decedent's death, such a percentage of his property as is fixed by statute vests in the state as absolutely as though the whole had actually passed through the hands of the sovereign power.

Arnaud v. His Executors, 8 La. 836.

Foreign, charitable, and religious corporations are not exempt from the collateral inheritance tax.

Any such general exemption must presumably be claimed under Laws 1890, chap. 558, since it is now conclusively settled that under the Law of 1887 they were not so exempt.

Catlin v. Trinity College Trustees, 8 L. R. A. 206, 118 N. Y. 142; *Re McCoskey's Estate*, 22 Abb. N. C. 20; *Re Kavanagh's Estate*, 6 N. Y. Supp. 669.

The Act of 1890 must be strictly construed against the exemption claimed.

Re Stewart's Estate, 14 L. R. A. 836, 181 N. Y. 232; *People v. Davenport*, 91 N. Y. 586; *People v. New York City Comrs.* 95 N. Y. 554; *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 506; *Chegaray v. New York*, 18 N. Y. 220; *Roosevelt Hospital v. New York*, 84 N. Y. 115; *People v. New York City and County Comrs.* 82 N. Y. 465; *Providence Bank v. Billings*, 29 U. S. 4 Pet. 561, 7 L. ed. 955.

General words should always be restricted to the subject-matter of the Act.

Sutherland, Stat. Constr. 286; *London Tobacco Pipe Makers v. Woodroffe*, 7 Barn. & C. 838; *People v. Potter*, 47 N. Y. 875; *Smith v. People*, 47 N. Y. 830; *Delafield v. Brady*, 108 N. Y. 568; *People v. New York City Comrs.* 95 N. Y. 554; *Re Ticknor's Estate*, 18 Mich. 44.

That the "subject-matter" of Laws 1890, chap. 558, can only be domestic corporations and not foreign, is shown by the limitation in the value of property which the classes of corporations named are permitted to take and hold.

Hoyt v. Thompson, 5 N. Y. 340.

When language is employed which, if construed liberally, might be broad enough to sustain a claim of exemption, but if construed in connection with the other portions of the 18 L. R. A.

same section and Act, as well as of other statutes *in pari materia*, would imply an intention on the part of the Legislature to restrict the operations of the general words of the statute, it is the duty of the court to give effect to such intent.

People v. Davenport, *supra*.

And the general terms of a later statute will be restricted where by prior laws *in pari materia* subjects naturally falling within such general terms have been excluded, the latter law not showing an intention to abolish the distinction.

People v. Molyneux, 40 N. Y. 118; *Bishop v. Barton*, 2 Hun. 486.

Apart from the language of the statute and the strict rules of construction which must be applied to it, every presumption to be gathered from state or public policy makes against appellant's claim.

Exemption from taxation is conferred upon charitable and educational institutions by the state which creates them, under an implied contract on the part of the organizations exempted, that, in consideration thereof, they will aid the state conferring the exemption in the administration of its duties and obligations to its citizens, in respect to matters in charge of such institutions.

Horne of the Friendless v. Rouse, 75 U. S. 8 Wall. 436, 19 L. ed. 497, citing *Dartmouth College Trustees v. Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed. 629; *Re Vassar*, 127 N. Y. 16.

Another high authority bases it "upon the ground that they perform a service for the public and to some extent, at least, relieve the state from expense."

Cooley, Taxn. 202.

Such a policy is grounded in justice and common sense when applied to domestic corporations; but it fails entirely if the attempt is made to extend it to foreign institutions. Special exemption from a general rule of taxation is a bounty; and it is no part of the state policy to bestow its bounty regardless of benefit to be received in return simply for the encouragement of benevolence in the abstract.

Cooley, Taxn. p. 152; *Re McCoskey*, 6 Dem. 488.

No special exemption can be claimed in behalf of the American Board of Commissioners for Foreign Missions by reason of the provisions of Laws 1877, chap. 376.

Merrick v. Van Santvoord, 34 N. Y. 218; *Stevens v. Phinizy Ins. Co. of Hartford*, 41 N. Y. 152; *Green v. Van Buskirk*, 74 U. S. 7 Wall. 150, 19 L. ed. 118.

Andrews, Ch. J., delivered the opinion of the court:

Edward D. G. Prime, a resident of this state, died in the city of New York on the 7th day of April, 1891, leaving a will of real and personal property. By his will he gave certain legacies to collateral relatives and to three sisters of his wife, and also to two foreign corporations, the Presbyterian Board of Relief for Disabled Ministers, and the American Board of Commissioners for Foreign Missions; the former a Pennsylvania, and the latter a Massachusetts, corporation. His residuary estate, consisting of personal property and of real property within this state, was given to collateral rel-

atives. Under proceedings instituted in the surrogate's court of the city of New York, June 5, 1891, an appraiser was appointed under the Act, chapter 488 of the Laws of 1885, as amended by chapter 718 of the Laws of 1887, and chapter 215 of the Laws of 1891; and such proceedings were had that on the 12th day of October, 1891, an order of the surrogate was made, assessing and fixing a tax upon the several legacies, and upon the interest of the residuary legatees and devisees under the will, at the rate of 5 per cent on the amount of the legacies and the value of the residuary estate. This appeal is taken by the individual legatees and devisees, and by the corporations named, from the order of the general term affirming the order of the surrogate.

There are two questions in the case, one of which is common to all the appellants, and one which pertains to the two corporations alone. The general question is presented by the claim on the part of the appellants that the only statute in force at the time of the institution of proceedings for assessing the tax, in June, 1891, imposing a legacy tax, was the Act, chapter 215 of the Laws of 1891, which amended the first section of the Act of 1885, as amended by the Act of 1887, by declaring that said first section was amended "to read as follows," and then proceeded to recite the first section as amended. The Act of 1891 did not, in terms, repeal the corresponding section in the former Acts. The section, as amended, embodied the same principle in respect to the taxation of what, for brevity, may be called "collateral inheritances," as did the corresponding section in the former Acts, and made no change in the rate; but in prescribing the rate it does not follow the exact language of the prior Acts. The claim, as we understand it, is that a statute which amends a prior statute in some particulars, under the formula, "so as to read as follows," operates as a repeal of the whole statute amended, unless provisions intended to be retained are incorporated in the amended statute in the same precise words of the former statute, without change of phraseology, and that it makes no difference although the same provision, in substance, is contained in the amending as in the original statute, nor although the transposition and collocation of words in the amending Act were for the purpose of adjusting the new features brought in by the amendment so as to make the new and the old provisions harmonious in their relation and expression. Starting with this premise, it is then claimed that the first section of the Act of 1887 having been repealed by implication, without saving to the state the right to proceed under the prior law to assess and collect the tax on estates of decedents who died prior to the passage of the Act of 1891, there was no law, when the assessment in this case was made, authorizing such assessment. No assessment, it is insisted, could be made at that date under the Law of 1887, because the first section of that Act (the one imposing a tax) had been repealed by the Act of 1891 before any fixed right of the state to assess and tax the estate in question had accrued, and no assessment could be made under the Act of 1891, because that Act was prospective, and applies only to cases where death occurred subsequent

to its passage. By this process of reasoning it is sought to establish that the tax in this case was unauthorized; and although it is admitted that if the Act of 1885 had remained in force, or if the decedent had died after the passage of the Act of 1891, or if the language of the first section of the Act of 1887, as to the taxation of collateral inheritances, had been incorporated, *ipsisimis verbis*, in the Act of 1891, the interests in question would have been taxable, yet it is insisted that the right to tax has been lost by the lack of verbal identity between the two sections.

We think the contention upon this point has no support in authority or reason. The appellants rely upon the language of Denio, J., in *Ely v. Holton*, 15 N. Y. 595, in which case there was under consideration an amendment to one of the sections of the Code, which re-enacted the original section "to read as follows," but added a new provision, giving a right of appeal where none existed before, which new right was invoked by a party whose rights had been concluded before the amendment, according to the prior law. It was held that a party so situated was not entitled to the new privilege. Judge Denio, in the course of his opinion, speaking of the effect of such amendatory statutes said: "The portions of the amended sections which are merely copied without change are not to be considered as repealed, and again enacted, but to have been the law all along; and the new parts, or the changed portions, are not to be taken to have been the law at any time prior to the passage of the amended Act." The language, "copied without change," is relied upon as indicating that it is only where there is verbal identity between the language in the first Act and that of the second Act that the amended Act will be deemed a continuation of the former Act, and that it is not sufficient, to prevent a repeal by implication, that the provisions are identical in substance. The learned judge used language appropriate to the case before the court, but the general provision enforced by the decision cannot have so narrow and confined an application as is now claimed. It is very plain that the Legislature, which had established a new policy in the taxation of the right of devolution or succession, and was year by year perfecting the system, and enlarging its scope and efficiency, by new legislation, never intended to repeal the prior Acts in these respects in which the new enactment corresponded in meaning with the prior law. It is obvious that the main purpose of the Act of 1891 was to add a new class of taxable estates exempted by the former law, and to this extent there was a repeal of the inconsistent provision of the former Acts. In recasting the section much of the language of the Act of 1887 is repeated, sections are transposed, and in respect to the tax on collateral interests the rule is expressed in slightly different language, but with no change in substance. The distinction sought to be made between this case and the principle decided in *Ely v. Holton*, *supra*, is narrow, technical, and illogical. The appellants refer in support of this contention to the case of *Nash v. White's Bank of Buffalo*, 105 N. Y. 245. In that case the subsequent Act, which was held to be a repeal of the former one, changed and increased

the penalty prescribed by the first Act for taking unlawful interest, and expressly repealed "all Acts and parts of Acts inconsistent therewith," and it was properly held that this terminated proceedings under the prior law. The case of *Com. v. Herrick*, 6 Cush. 465, resembles much more nearly the case before us. The defendant had been convicted of selling spirituous liquors contrary to law, and a motion was made in arrest of judgment on the ground that the statute under which the defendant had been convicted had been since repealed. The repeal was claimed to have been effected by the Statute of 1850, which amended the former law by inserting the word "intoxicating" in place of the word "spirituous." The court, (Shaw, Ch. J.), after noting the fact that the penalty had not been changed, proceeded to inquire as to the intent of the Legislature, and said: "It is very manifest that it was not the intention to put an end to the operation of the former Act. On the contrary, they intended that it should continue in operation under a modification. Their intention, manifestly, was not to take away, diminish, or alter the penalties in existing cases, but to bring another class of cases within the operation of the Act, not included before. So far as this did include new cases, it was a new law." He then proceeded to show that the word "intoxicating" included "spirituous" liquors, and therefore that there had been no moment from the time the offense was committed that the law was not in force, punishing the offense of retailing spirituous liquors; and the motion was denied. We conceive the general rule to be that, when a statute amends a former statute "so as to read as follows," it operates as a repeal, by implication, of inconsistent provisions in the former law, and of provisions omitted in the amended law. Where the amended Act reenacts provisions in the former law, either *ipsis verbis* or by the use of equivalent, though different, words, the law will be regarded as having been continuous; and the new enactment, as to such parts, will not operate as a repeal, so as to affect a duty accrued under the prior law, although as to all new transactions the later law will be referred to as the ground of obligation. See *Moord v. Mausert*, 49 N. Y. 332; *People v. Montgomery County Suprs.* 67 N. Y. 109, 23 Am. Rep. 94. The conclusion we have reached makes it unnecessary to consider the point whether, if the Act of 1891 repealed the first section of the Act of 1887, the repeal operated to prevent the subsequent assessment and collection of a tax on the estates of decedents who died intermediate the Act of 1887 and the Act of 1891.

The more interesting question, and the one of greater importance, from the larger interests involved in its determination, arises on the appeal of the charitable corporations. It is claimed that they are exempted from a legacy tax under the Law of 1891 by the Act, chapter 553 of the Laws of 1890. Under the Act of 1887, legacies to charitable and religious corporations, whether domestic or foreign, were not exempt from the collateral inheritance tax. This was adjudged in the case of *Catlin v. Trinity College Trustees*, 118 N. Y. 183, 3 L. R. A. 206. In that case two legacies were in question,—one to a church in Poughkeepsie,

and one to Trinity College, Hartford, Conn. The Act of 1887 limited the general words in the first section of the Act, subjecting "all property" passing by will or upon intestacy to the tax, by exempting property so passing to certain near relatives and property passing to "societies, corporations, and institutions now exempted by law from taxation." It was claimed in the *Catlin Case* that the legacies there in question were within the exemption of the Act of 1887, for the reason that the personal property of a college or religious corporation was exempt from taxation under the provision of the Revised Statutes (1 Rev. Stat. 388, § 4, subdiv. 7) exempting from taxation "the personal property of every incorporated company not made liable to taxation on its capital in the fourth title of this chapter." It was held that religious or charitable corporations were not exempted from general taxation under this provision of the Revised Statutes; and, there being no other statute under which exemption from general taxation was claimed, the court affirmed the judgment sustaining the tax. The provision in the Act of 1891 as to exemptions of corporations from the collateral inheritance tax is the same as in the Act of 1887, except that the words "or from collateral inheritance tax," were added. It is obvious that the corporations now claiming exemption from the legacy tax must be able to point to some statute of this state antedating the assessment of the legacy duty, which exempts foreign religious and charitable corporations from taxation generally, or specially from taxation under the inheritance tax law. There was no such statute in existence when the *Catlin Case* was decided; and, if it is to be found, it must have been enacted between 1887 and the time of the assessment of the taxes in question, in 1891.

It is conceded by the appellants that no exemption from a legacy duty upon legacies to foreign religious and charitable corporations exists unless given by the Act, chapter 553 of the Laws of 1890; but it is claimed, and the claim has been enforced by most elaborate argument of counsel, that that Act does exempt from the operation of the Inheritance Tax Law all charitable and religious corporations, foreign or domestic, whether created by the laws of this state, or the laws of any other state or government. The respondents contend that the Act of 1890 applies to domestic corporations only, and that foreign corporations of the class mentioned in the Act are not entitled to the benefit of its provisions. The decision of the question as to the validity of the legacy tax imposed on the legacies to the foreign corporations turns upon this controversy. The Act, chapter 553 of the Laws of 1890 is entitled "An Act to amend chapter one hundred and ninety-one of the laws of eighteen hundred and eighty-nine, entitled 'An Act to limit the amount of property to be held by corporations organized for other than business purposes, and relating to such corporations.'" It amends the several sections of the former Act "so as to read as follows," and the Act is as follows: "Section 1. Any religious, educational, bible, missionary, tract, literary, scientific, benevolent, or charitable corporation, or corporation organized for the enforcement of laws relating

to children or animals, or for hospital, infirm, or other than business purposes, may take and hold in its own right, or in trust for any purpose comprised in the objects of its incorporation, property not exceeding in value three million dollars, or the yearly income derived from which shall not exceed two hundred and fifty thousand dollars, notwithstanding the provisions of any special or general Act, heretofore passed, or certificate of incorporation, affecting such corporations. In computing the value of such property, no increase in value arising otherwise than from improvements made thereon shall be taken into account. The personal estate of such corporations shall be exempt from taxation, and the provisions of chapter four hundred and eighty-three of the laws of eighteen hundred and eighty-five, entitled 'An Act to Tax Gifts, Legacies, and Collateral Inheritances in Certain Cases,' and the Acts amendatory thereof, shall not apply thereto, nor to any gifts to any such corporation by grant, bequest, or otherwise: provided, however, that this provision shall not apply to any moneyed or stock corporation deriving an income or profit from the capital or otherwise, or to any corporation which has the right to make dividends or to distribute profits or assets among its members. Sec. 2. This Act shall not affect the right of any such corporation to take and hold property exceeding in value the amount specified in section one of this Act, provided such right is conferred upon such corporation by special statute, nor affect any statute by which its real estate is exempt from taxation. Sec. 3. This Act shall take effect immediately." The Act of 1889, of which the Act above quoted is an amendment, contained no provision exempting the corporations named therein from taxation, either general or special. The sole purpose of the original enactment was, as the title indicates, to fix a limit within which corporations of the classes mentioned should be permitted to take and hold property. This legislation was the culmination of a policy, which had steadily been pursued through successive acts of legislation, to remove the close restrictions originally imposed upon the power of such corporations, as to the amount of property which they should be permitted to take and hold. The Act permitted such corporations to hold property not exceeding \$3,000,000, or property, the yearly income from which shall not exceed \$100,000. The changes effected by the Amendment of 1890 were (1) the inclusion of other corporations of a charitable character in the enumeration; (2) the extension of the limit of property from two to three million dollars, and of income from one hundred to two hundred and fifty thousand dollars; (3) the exemption of the personal estate of the corporations named from general taxation and from collateral inheritance tax; (4) the exclusion of certain corporations which, although organized for quasi charitable purposes, derived an income or profit from capital or otherwise, and dividend paying corporations, from the benefit of the provision granting exemption from taxation. It seems very plain that the purpose of the original Act of 1889, and of the amending Act of 1890, was to regulate and define the corporate powers and privileges of the domestic

corporations only. They are Acts conferring and regulating corporate capacity and privileges. The power of corporations to take and hold property is a corporate power, and depends upon their charters. The law of this state cannot enlarge or change the powers of a foreign corporation. They are solely those given by the law of the domicile. Foreign corporations are permitted, by comity, to exercise their powers within this state, when not in contravention of our statutes or public policy. Statutes have been framed, from time to time, permitting such corporations to hold property here. The Statute of 1887 (chap. 450), which authorizes corporations organized under the laws of other states, doing business in this state, to hold necessary real estate herein, is an example. But such enactments do not change, modify, or enlarge the powers of corporations given by the state which created them. They are simply enabling statutes authorizing such corporations to exercise their charter powers in this jurisdiction. The question now presented is the same as would have arisen under the original Statute of 1885, if a foreign corporation, while that statute was in force, had claimed the right to take and hold real property within this state of the value of \$2,000,000. It is scarcely possible to conceive that there could have been in the case supposed a serious question that the statute applied to foreign corporations, or was intended to give to such corporations the powers claimed. Such legislation would be unprecedented. Under the Act of 1890, if foreign charitable corporations are within its purview, they may acquire and hold in this state real estate to the amount of \$3,000,000, or property yielding an annual income of \$250,000, and are placed on the same footing as domestic corporations of the same character.

One of the amendments made by the Act of 1890 to the Act of 1889 was the insertion after the words, "may take and hold" the words, "in its own right, or in trust for any purpose comprised in the object of its incorporation." So that as the Act now stands, giving it the construction claimed by the appellants, real property of a value or yielding the income specified in the Act may be acquired and held here by any foreign corporation of the class mentioned, upon any trust authorized by its charter, however much such trust might contravene the policy of this state, or our statutes regulating and defining trusts in real property. If the statute relates to domestic corporations only, there is no inconsistency. They derive their powers from this state, and it is to be assumed that corporate powers will be granted with reference to the general policy of our laws.

Some stress is laid by the learned counsel for the appellants upon the words in the Act of 1890, "nor to any gift to such corporation by grant, bequest, or otherwise," at the end of the clause of exemption. The exemption clause commences with the words, "The personal estate of such corporation shall be exempt from taxation," etc. The words "grant, bequest or otherwise" may have been inserted at the end to cover grants or devises of real property. It is not necessary to decide whether this object was effected by the words used.

But the emphasis is not, we think, to be found on the words "any such corporation," so as to strengthen the argument of the appellants that foreign corporations are comprehended in the statute.

In general we are of opinion that a statute of a state granting powers and privileges to corporations must, in the absence of plain indications to the contrary, be held to apply only to corporations created by the state, and over which it has the power of visitation and control. Such is the natural interpretation of such legislation, in the absence of contrary intention appearing on the face of the Act. The law, in such cases, is dealing with its own creations, whose rights and obligations it may limit, define, and control. In the case of *White v. Howard*, 46 N. Y. 144, a question arose as to the construction of section 8, 2 Rev. Stat. p. 57, which declared that "no devise to a corporation shall be valid unless such corporation be expressly authorized, either by its charter or by a statute, to take by devise," as applied by a devise to a foreign corporation authorized by its charter to take by devise. The devise was held to be invalid on the ground, among others, that the words, "by its charter or by statute," in the section quoted, referred to a charter or statute of this state. Grover, J., delivering the opinion of the court, said: "Creating or chartering corporations involves an exercise of the legislative power. They may be created by a particular statute granting the charter, organized by virtue of general statutes prescribing the mode, specifying the powers and privileges to be enjoyed. In either mode the corporation is, in a legal sense, created by statute; and, where section 8 provides that no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise, it is equally clear that such charters were only intended as were granted by a statute of this state, or organized under a general statute of the state, as it is that by the words 'by statute' a statute of the state was intended. Any other construction would work a complete revolution of the policy of the state."

The claim that the test of liability of foreign corporations to a legacy tax is the liability of a domestic corporation of the same character to the payment of such a tax, and that if one is exempt the other is exempt also, has, we think, no foundation. In both cases the question is the same: Has the statute made the legacy taxable? In the *Catlin Case* exemption of both the domestic and foreign corporations was claimed under the Revised Statutes alone. If this statute did not exempt the domestic corporation, concededly it did not exempt the foreign one; and, for convenience in deciding the case, both were regarded as domestic corporations.

In *Hollis v. Drew Theological Seminary*, 95 N. Y. 166, the question was whether the two-
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months' limitation in the sixth section of chapter 819, Laws 1848, which section prohibited bequests to "any corporation formed under this Act," applied to a bequest to the defendant, a corporation of another state; and it was held that it did not (1) because the prohibition was confined to bequests to corporations organized under the Act of 1848; and (2) for the reason that no public policy existed which required its extension to bequests to foreign corporations. The absence of such a general policy was indicated by the numerous corporations in the state organized after the Act of 1848, as to which the power of testators to make bequests were not subject to the restriction in that Act.

The argument that gifts for the promotion of charity, education, and religion should be encouraged, and should not be diminished by exactions of the state, presents a moral and political, rather than a judicial, question. It is the duty of courts, in the interpretation of statutes, to declare the law as it is; and the interests of society are best subserved by a close adherence by courts to what they find to be the plain meaning,—neither narrowing the application on the one hand, nor extending the meaning on the other, to meet cases, not specified, which may seem to be within the reason of the law. A general law of the state prohibiting corporations from exercising particular powers will operate upon foreign corporations, not because the Act binds such corporations *ex proprio vigore*, but for the reason that their exercise of such powers here would violate the public policy of the state, indicated by the general restraint imposed upon our own corporations. It is the policy of society to encourage benevolence and charity. But it is not the proper function of a state to go outside of its own limits, and devote its resources to support the cause of religion, education, or missions for the benefit of mankind at large. The argument may have force that the state might, consistently with its proper function, give immunity from taxation to some of the foreign corporations engaged in the work of education or charity. But, however this may be we are convinced that the Statute of 1890 has no application to foreign corporations; and, having reached that conclusion, our duty is ended.

Upon the view we have taken, the Act (chap. 876 of the Laws of 1877) conferring upon the defendant the American Board of Commissioners for Foreign Missions a limited privilege of taking and holding real and personal property in this state does not relieve that corporation from a legacy duty. That was an enabling statute merely. The corporation remained a foreign corporation, as before, but possessing in this state a privilege granted by that statute. Our conclusion is that the judgment below should be affirmed.

All concur.

FLORIDA SUPREME COURT.

STATE of Florida, *ex rel.* John C. LAW,
v.
Frank E. SAXON.

(.....Fla.....)

*1. Statutes tending to limit the citizen in the exercise of the elective franchise are always construed liberally in his favor, and in restriction of the exceptions which exclude a ballot, rather than in extension of such exceptions, and so that a voter will not be deprived of his vote, or the public will, as expressed through the ballot box, defeated, except for causes which are plainly within the purview or clear expression of the law, or upon a plain and unambiguous provision of law.

2. Where a statute provides that a ballot shall be of plain, white paper, clear and even cut, without ornaments, designation, mutilation, symbol, or mark of any kind whatsoever, except the name or names of the person or persons voted for and the office to which such person or persons are intended to be chosen, the word "designation" is, on account of its associate words, to be construed to intend only designations in the nature of ornaments, mutilations, symbols, or marks, as distinguished from words or writings; and hence ballots having on them, in the body thereof, the words "National Republican Ticket," and "Free Suffrage Ticket," are not illegal, or contrary to the purpose of the statute.

(Taylor, J., dissents.)

(December 31, 1892.)

PROCEEDINGS *in quo warranto* to determine by what right the defendant held the office of Clerk of the Circuit Court of Hernando County. *Judgment for defendant.*

The facts sufficiently appear in the opinion. *Messrs. W. B. Lamar, Atty. Gen., Wall & Wall and Shackelford & Palmer* for plaintiff.

Messrs. E. W. Williams and T. P. Lloyd for defendant.

Raney, Ch. J., delivered the opinion of the court:

Referring to the defendant's answer as amended, it appears that he claims to have received 808 votes, and that the relator received 297, although the original official canvass returned the vote as 290 for defendant, and 297 for relator.

The point to be decided is that of the legality or illegality of at least nine, if not eleven, ballots which were thrown out by the inspectors at precinct 5 in their canvass. The objection to the ballots is that they have on their face, or the side on which are the names of the persons and offices, the words: "National Republican Ticket," and "Free

Suffrage Ticket," the former intervening the words: "For Electors of President and Vice-President," (the initial words of the ticket) and the names of the candidates for these offices; and the letter or words, "Free Suffrage Ticket" being about the middle of the ballot and intervening the names of the candidates for justices of the Supreme Court and the words: "For Senator from the Ninth Senatorial District, A. S. Mann." The offices preceding the expression "Free Suffrage Ticket," are electors of president and vice-president, representative in the 51st Congress and state offices, whereas, those following it are senator from the district indicated and member of the House of Representatives from the county, and the county officers.

The objection to these ballots is based upon the 23d section of the General Election Law of June 7, 1887, chapter 8704 of the statutes, which section is as follows: The voting shall be by ballot, which ballot shall be plain white paper, clear and even cut, without ornaments, designation, mutilation, symbol or mark of any kind whatsoever, except the name or names of the person or persons voted for and the office to which such person or persons are intended to be chosen, which name or names and office or offices shall be written or printed, or partly written and partly printed thereon in black ink, or with black pencil, and such ballot shall be so folded as to conceal the name or names thereon, and, so folded, shall be deposited in a box to be constructed, kept and disposed of as hereinafter provided, and no ballot of any other description found in any election box shall be counted.

A consideration of adjudications in other states on statutes of the same general character, and of other authorities, will aid us in reaching a correct understanding of the Statute of 1887, and in solving the question as to whether or not the ballots in controversy fall under its condemnation.

In *Com. v. Woelper*, 8 Serg. & R. 29, 8 Am. Dec. 628, a by-law of a Lutheran congregation, incorporated, provided that if "besides the names there are other things upon the tickets," they should not be counted, and tickets cast in favor of certain persons for vestrymen had an engraving of an eagle on them; and they were held to be illegal, the reason given by one of the judges being that the eagle might be seen by the inspectors even when the ballot was folded, and that it deprived voters who did not vote such tickets of the secrecy which the ballot was intended to secure.

The provision of an Indiana Act of 1867 is that all ballots shall be "written or printed on plain white paper without any distinguishing marks or other embellishments thereon except the name of the candidates

*Headnotes by RANNEY, Ch. J.

NOTE.—On the subject of marks or devices to distinguish ballots, see *Rutledge v. Crawford*, 18 L. R. A. 761, and note, 91 Cal. 523, 25 Am. St. Rep. 212. See also the later cases, *People v. Onondaga County Canvassers*, 14 L. R. A. 624, 129 N. Y. 895; 18 L. R. A.

Allen v. Glynn (Colo.) 15 L. R. A. 743; *State v. Russell* (Neb.) 15 L. R. A. 740; *Parvins v. Wimborg*, 15 L. R. A. 775, 130 Ind. 661; *State v. Ellis* (N. C.) 17 L. R. A. 382; *State v. Walsh* (Conn.) 17 L. R. A. 364.

and the office for which they are voted, and inspectors of election shall refuse all ballots offered of any other description; provided that nothing herein shall disqualify the voter from writing his name on the back thereof." In *Druliner v. State*, 29 Ind. 308, ninety-eight ballots were cast for Weaver, and forty-six for Druliner, and they were all printed on plain white paper; and with the exception that the words, "City Union Ticket," were printed on the face or inside of those cast for Weaver, there was nothing printed or written on any of them except the names of the candidates and the offices. It was held that the Act was intended to protect the elector from undue influence and control by others and to secure to him entire freedom of opinion in the exercise of the elective franchise, by enabling him to cast his vote in such a manner as would prevent others who from their peculiar relations to him might by intimidation or otherwise seek to control his vote, from being able to determine from the color of his ticket or some distinguishing mark thereon, the party or person for whom he voted; and that this purpose would seem to be secured, as far as legislative enactment could effect it, by requiring all ballots cast to be uniform in external appearance, and that therefore the act could not be construed to prohibit a distinguishing mark on the inside of the ballot. This conclusion was aided, as appears in the reasoning of the court, by the fact that the Act did not, (particularly when considered in connection with statutory provisions requiring that ballots when presented should be put "unopened" into the ballot box and not be opened or marked by the inspectors by "folding or otherwise,") authorize the inspector and judges to reject a ballot upon the discovery of such a mark or embellishment at the time of counting out the ballots as could not be seen by the inspector at the time the ballot was voted. The same conclusion was reached in *Stanley v. Manly*, 85 Ind. 275, and *Miltholland v. Bryant*, 39 Ind. 863, where the words: "Republican Ticket," or "Republican County Ticket," or "Republican Township Ticket," were printed at the head and on the inside of the ballot. In *State v. Adams*, 65 Ind. 393, the information showed that the relator received 12,251 votes, and the defendant 12,899, and that the ballots cast for relator were headed on the inside: "Democratic Ticket," and "National Ticket," and those voted for defendant: "Republican Ticket," and that five thousand of those cast, received, and counted for defendant were printed in such a manner that words: "Republican Ticket," could be seen on the outside and were seen by the inspectors, but that such was not the case as to the ballots cast for relator. The conclusion and reasoning of the court is embodied in the following language: "To push the meaning of the statute to the extreme of holding that the inspectors of elections shall refuse to receive ballots because the printing upon the inside, which is not unlawful, can be seen on the outside through the paper, we think would be a most unwarrantable construction of its language. The irregularity or mal-

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conduct in the inspectors in receiving such ballots cannot affect the case if the votes cast thereby are otherwise legal, for it is enacted that 'no irregularity or misconduct of any member or officer of a board of judges or canvassers shall set aside the election of any person unless such irregularity or misconduct was such as to cause the contestee to be declared elected, when he had not received the highest number of legal votes,'"—citing *Dobyns v. Weadon*, 50 Ind. 298; *Allen v. Crow*, 48 Ind. 301; *Hadley v. Guttridge*, 58 Ind. 302. In *State v. Wasson*, 99 Ind. 261, the decision was that the requirement as to plain white paper prescribes no grade, quality, or thickness of paper, nor absolute uniformity. The object of the statute, says the opinion, was undoubtedly to secure the privacy of the ballot, but if a voter uses a ballot which comes within the letter of the statute, his vote is not to be rejected because the quality or grade of the paper upon which it is printed differs from that of others which also comes within the letter of the statute, even though the difference be so perceptible as to partially destroy the privacy of the ballot.

In California the Statute (§ 1191 of the Political Code) provided that no ticket should be used at any election or circulated on the day of election unless written or printed on paper furnished by the secretary of state, or on paper in every respect like such paper; and is four inches in width and twelve inches in length, or within an eighth of an inch of such size; and, if printed, unless the names are in black ink and in long primer capitals—the name of the office in small capitals, and of the person in large capitals and both without spaces, except between the different words or initials in each line, and with specified margins; and, if printed, the lines are straight and the matter single leaded; and, if written, no sign appears when the paper is folded; and unless it is free from every mark, character, or device or thing that would enable any person to distinguish it by the back, or, when folded, from any other legal ticket or ballot. And section 1207 enacts that when a ballot found in any ballot box bears upon it any impression, device, color, or thing, or is folded in any manner intended to designate or impart knowledge of the person who voted such ballot, it must with all its contents be rejected; and, section 1208, that when a ballot found in any ballot box does not conform to the requirements of section 1191 it must with all its contents be rejected. In *Kirk v. Rhoads*, 46 Cal. 399, ballots were objected to because they were not printed in long primer capitals and the lines were double leaded, and the conclusion of the court was that they should be counted; and the view expressed in the opinion is that a ballot should not be rejected simply because it differs from regulations prescribed in the Code over which the elector had no control, such as its size, the kind of paper on which it is printed, or the character of the type or leading used in printing; that it was clear from the testimony that none but an expert with his dividers in his hands could possibly

tell whether or not a given ticket complied with the requirements of the law; and to reject such tickets cast in good faith by a qualified elector would be to destroy instead of protect, the freedom and purity of elections; that to defeat the will of the people in any election it would only be necessary to furnish the electors or a portion of them with tickets in which the printed lines were one sixty-fourth part of an inch—the difference in space occupied by double and single leaded lines—further apart than is required by the Code. There are, however, says the opinion, other requirements of the Code within the power of the elector to control, and these, if willfully disregarded, should cause his ballot to be rejected; he can see, for instance, that his ballot is “free from every mark, character, device, or thing, that would enable any one to distinguish it by the back,” and if in willful disregard of law he places a name, number, or other mark on it, he cannot complain if his ballot is rejected and he loses his vote. In *Wyman v. Lemon*, 51 Cal. 273, it was held that if an elector uses ink to scratch names from his ballot, and by that means the ballot becomes discolored, such discoloration is not a mark designed to distinguish the ballot from other legal ballots, and will not authorize its rejection. In *Coffey v. Edmonds*, 58 Cal. 521, a ballot had the words: “For President—Hancock and English,” written in pencil upon its face under the words at the top of the names, Eleventh Senatorial District. It had also on its face: “For Judge of the Superior Court, M. A. Edmonds,” and was counted for Edmonds, the candidate of the Republican party, and it was held that the words “For President—Hancock and English,” written on the ballots did not vitiate it, and that it had no “mark or thing thereon by or from which it could be ascertained what persons or what class of persons used or voted it.” Section 1197, Pol. Code. In *Reynolds v. Snow*, 67 Cal. 497, it was, however, decided that a ballot only eight inches and a half in length was properly rejected.

In Texas a Statute of 1879 enacted that all ballots shall be written or printed on plain white paper, “without any picture, sign, vignette, device or stamp mark, except the name of the political party whose candidates are on the ticket: *provided*, such ballots may be written or printed on plain white foolscap, legal-cap, or letter paper: *provided*, that all ballots containing the name of any candidate pasted over the name of any other candidate shall not be counted for such candidate whose name is so pasted, and any ticket not in conformity with the above shall not be counted in counting the votes, and no ticket not numbered as provided shall be counted.”

This statute has been before the supreme court of that state several times. In *State v. Phillips*, 63 Tex. 390, 51 Am. Rep. 646, ballots sufficient in number to control the result of the election were objected to as illegal on account of their being “diamond shaped.” This was urged to be a “device,” within the meaning of the Act, but it was held that the word “device,” as used, meant a figure, mark

or ornament of a similar character with the “pictures, signs, etc.,” enumerated in the same connection and placed upon the ticket in a like manner; that the decisions tend rather to restrict the exceptions which exclude a ballot than to extend them, and to admit the ballot if the spirit and intention of the law is not violated, although a literal construction would vitiate it; citing *Druliner v. State*, 29 Ind. 308; *Stanley v. Manly*, 35 Ind. 275, and *Kirk v. Rhoads*, 48 Cal. 398. In reply to the argument that the purpose of the statute was to preserve the secrecy of the ballot and the independence of the voter, and that this would be defeated by such ballots as those in question, it is observed: “If this were the case we should not feel justified in extending the provisions of the statute beyond the legal import of its terms.”

The result as shown by the tickets deposited by legal electors must not be set aside except for causes plainly within the purview of the law.” It is further observed in substance that if the lawmaking power had supposed the same evil results as to destroying the secrecy and independence of the ballot, would follow from allowing tickets to be made in different shapes, as from color, and other prohibited features, it doubtless would have prescribed the form of tickets. The tickets are said to be somewhat in the shape of a rhomboid, and not only are they not illegal from being in this shape, as the statute does not prescribe any shape, but they are easily folded in such a manner as to render it impossible for the closest observer to tell of what shape the paper is when spread out to its full size, and the spirit and intention of the law are not violated by their use, or the secrecy of the ballot, or independence of the voter interfered with by their use. In *Owens v. State*, 64 Tex. 500, ballots were objected to because headed Election Ticket, and others because the names of the candidates for president and vice-president, and the counties where the presidential electors resided were printed on them. The ballots were declared legal, the court holding the statute to have been intended to secure the secrecy of the ballot, and to preserve the voter from undue influence or restraint in voting; and that all statutes tending to limit the citizen in his exercise of this right should be liberally construed in his favor; that by the word “device,” the statute meant some figure, mark, ornament, emblem, or cypher which would distinguish the ticket from others cast at the election; that the word “device,” which did not include “the residence of the candidates, for that may be stated for their better identification,” nor the names of the candidates for president and vice president, “for they are indirectly supported by voting for the electors,” and that the words “election ticket” printed on the inside, folded as the ballots usually are, furnished no means of distinguishing the ballots from others in the box, it being a mere description of what follows, and as it would be lawful under the strict letter of the statute to place the words “Republican Ticket,” or “Democratic Ticket,” on them it could not be seen how the spirit of the law could be

violated by "the mere change of one word in the heading of the ballot." In *Williams v. State*, 69 Tex. 868, the words "Democratic Ticket" were printed at the head of the ballot, followed by the names of several candidates for state offices, while about its centre were the words "People's Ticket," followed by the names of the opposing or People's candidates for county offices, and it was held that the ticket came within the letter of the law allowing "the name of the political party whose candidates are on the ticket" to be placed on it.

The Mississippi Statute, § 187, Code of 1890, is that "all ballots shall be written or printed with black ink, with a space of not less than one fifth of an inch between each name, on plain white news printing paper, not more than two and one half, nor less than two and one fourth inches wide, without any device or mark by which one ticket may be known or distinguished from another except the words at the head of the tickets; but this shall not prohibit the erasure, correction, or insertion of any name by pencil mark or ink upon the face of the ballot; and a ticket different from that herein prescribed shall not be received or counted." In *Oglesby v. Sigman*, 58 Miss. 502, certain ballots had on their face and under the heading "Republican National Ticket," a printer's line or "dash-rule" of slightly ornamental character, and at three other distinct places under a name, a dash-rule, two of them being less fancy than the first mentioned, and the other being plain, and it was held that they vitiated the ballots, and that the effect of the statute was to condemn as illegal and not to be received or counted any ballot which has on its face or back any device or mark other than the names of the persons to be voted for, and "the words at the head of the ticket" by which one ticket may be distinguished from another. As to this case, see, however, *Lynch v. Chalmers*, 6 Cong. Elect. Cas. 888; 6 Am. & Eng. Encyclop. Law, 850, 419. In *Steele v. Calhoun*, 61 Miss. 556, a printer's dotted line between the last office named on it, and the preceding name, was held to invalidate the ballot, the court affirming that it was not permitted to distinguish between the different devices or marks which may be put on ballots. In the same state certain tickets were rejected in making the count because the names of candidates for the Legislature were found to be less than one fifth of an inch apart, and this action was affirmed in *Perkins v. Carraway*, 59 Miss. 222.

Section 5493 of the Revised Statutes of Missouri of 1879, after stating that the ballot should be a white piece of paper on which shall be written or printed the names of the persons voted for, provides that such "ballot shall not bear upon it any device whatever, nor shall there be any writing or printing thereon except the names of persons and the designations of the offices to be filled, leaving a margin on either side of the printed matter for substituting names. Each ballot may bear a plain written or printed caption thereon expressing its political character, but on all such ballots the caption or headlines shall

not in any manner be designed to mislead the voter as to the name or names thereunder. Any ballot not conforming to the provisions of this chapter shall be considered fraudulent and the same shall not be counted." In *Shields v. McGregor*, 91 Mo. 534, a case in which the feature of headlines was involved, it is said that the statute was passed in view of the well-known fact that ballots are in general previously printed, and circulated on election day by committees of persons appointed by the respective political parties, or by those who advocate the election of certain parties, and it was held that the purpose of the law was to prohibit the use of a caption calculated to induce the elector to conclude, from an inspection of the caption or headlines only, that the persons thereunder named are of his political persuasion when they, or any of them, in fact, are not; that headlines were not prohibited by the statute, but were permitted by it, yet when used they must tell the truth; that the statute fixed an absolute rule of evidence, and declares the prohibited ballots fraudulent, without regard to the fact whether they did in reality deceive the elector or not. See also *Turner v. Drake*, 71 Mo. 285. In *State v. Watson*, 9 Mo. App. 593, a ballot having the words "and collector," after "sheriff," thus, "sheriff and collector," was held to be good, and counted, the sheriff being also *ex officio* collector of taxes.

An Ohio statute provided for a single ballot on plain white paper without any device or mark of any description to distinguish one ticket from another, or by which one ticket may be known from another by its appearance, except the words at the head of the ticket; "and whenever any ballot, with a certain designated heading, shall contain printed thereon, in place of another, any name not found on the regular ballot having such heading, such name so found shall be regarded by the judges of election as having been placed there for the purpose of fraud, and such ballot shall not count for the name so found" yet it was held in *Roller v. Truesdale*, 26 Ohio St. 586, that the provision quoted did not exclude from being counted names of candidates for county offices nominated by a local party organization and printed on a ticket properly designated as a county ticket, although such ticket was printed on and made part of a ballot which contains also the names of candidates nominated by another party for state and district offices with words at the head thereof intended to distinguish it from other tickets for state and district offices, the local organization having no state and district organization or candidates, but its members adhering, some to the Democratic and others to the Republican state and district organizations.

A Statute of Connecticut, enacted in 1889, provides: (sec. 1) that the ballots shall be printed on plain white paper furnished by the secretary of state, as therein provided, and that "such ballots shall be of uniform size, color, quality, and thickness, for each ballot of the same class, to be determined by the secretary. In addition to the official in-

dorsement, the ballots shall contain only the names of the candidates, the office voted for, and the political party issuing the same. The name of the party issuing the ballot, the title of the office voted for, and the name of the candidates, shall be printed straight across the face of the ballot in black ink, and in type of uniform size, to be prescribed by the secretary of the state at least sixty days before any election held under this Act." And (sec. 9): " . . . If any envelope or ballot shall contain any mark or device so that the same may be identified in such manner as to indicate who might have cast the same, it shall not be counted, but shall be kept by the moderator and returned to the town clerk in a separate package from the ballots which are counted at such election." And (sec. 12) that, "all ballots cast in violation of the foregoing provisions, or which do not conform to the foregoing requirements shall be void and not counted; provided, however, that any voter may alter or change his ballot by erasing any name therefrom, or by inserting in place of any name thereon, in writing or by paster, the name of any person for any office to be voted for thereon other than the person thereon named for such office." At an election under this statute there were regular ballots provided which were prepared and issued by the Republican, the Democratic, and the Prohibition parties respectively, these parties being organized and known by the names stated, and each party placing its name at the head of the ballot issued by it. In addition to these ballots, a ballot was issued by the Republican party which had at its head the word "Citizens," in the place of "Republican," but was in all other respects the same as the Republican ballots mentioned above. In *Talcott v. Philbrick*, 59 Conn. 473, it is observed, upon the part of the majority of the court: "The question relates not to the paper, but to the printing or writing thereon. Four things only are allowable: the official indorsement, the names of the candidates, the office voted for, and the name of the political party issuing the ballot. . . . Does such ballot conform to the statute? The ballot does not speak the truth. It purports to have been issued by a Citizens' party, but it was in fact issued by the Republican party. It implies that there was a Citizens' party, but there was not. So if the argument that the name of the party issuing the ballot may be omitted altogether, is sound, it will hardly justify a misrepresentation. . . . The clause, 'the ballots shall contain only the names of the candidates, the office voted for, and the name of the political party issuing the same,' if construed by itself, might be regarded as permissive and not mandatory. What is the ballot? It consists, not merely of the paper of the prescribed size and quality, but also of the required printing thereon. No part may be omitted. If the name of the party may be omitted, so may the name of the candidate or office. If either of the last two is left out, its validity as a ballot is destroyed. . . . But this clause cannot be construed by itself; it must be taken in connection with other parts of the Act. The next sentence of the same sec-

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tion is mandatory in terms. . . . It will hardly do to say that the statute means that these three things" (those stated in such "next sentence") shall be printed, if printed at all. That is an interpolation inconsistent with the spirit and object of the Act. The proviso in the twelfth section is significant. No other erasure or writing is allowed. If any other writing is allowed, other provisions of the statute are rendered nugatory and meaningless. The ballots were held to be illegal (two of the five justices dissenting).

In *Fields v. Osborne*, 60 Conn. 544, 12 L. R. A. 551, a Republican caucus adjourned for the purpose of forming a Citizens' caucus. Thereupon ten or fifteen Democrats who were present, but had not participated in the proceedings, came forward and acted with the Republicans, about fifty in number, who were present, in nominating a Citizens' ticket, the candidates upon which were taken from both parties. A collection was taken for the expense of printing the tickets. No steps were taken to effect a permanent organization of a citizens' party, or to provide for its further existence. The Republican party issued no tickets, and no ballots were used at the election except those headed "Democratic Ticket," and "Citizens' Ticket." The decision was that the Citizens' tickets were issued by a political party, within the meaning of the statute. In the same case the words "For Judge of Probate, Henry H. Stedman," appeared at the bottom of the Citizens' tickets in question, the selection of such officer at the election in question not being authorized, although the Citizens' caucus had made the nomination indicated by the ballot: and on the Democratic ballot after "For town clerk," an officer to be chosen at such election, the words "and *ex officio* registrar of births, marriages and deaths," appeared. The words on the Citizens' ticket and those italicized as being on the Democratic ballots were held to avoid the ballots. "If," says the court, "it was doubtful whether the Act applied to them, if their legality depended upon a construction of the meaning or the language of the Act, our duty might not be plain. If they could be held to fall within the prohibition of any mark or device contained in the ninth section, instead of within the express prohibition of the first section, then it would be our duty to inquire whether they constituted a mark or device by which the ballot might be identified in such manner as to indicate who might have cast the same. But no. A plain provision of the law is violated in a point concerning which the Act does not authorize us to inquire into the extent or the consequences of the violation. In short, the Legislature has seen fit to say that if a ballot contains the addition to its specified contents which these do, it shall be void. . . . In regard to provisions which are plain on their face which are not dependent upon the question of good faith or the actual or possible result of disregarding them, we can only say, as in *Talcott v. Philbrick*, the Legislature has spoken, and obedience is our first and only duty. It is at liberty to throw around the ballot box such safeguards and

regulations as it may deem proper, and it is the duty of the citizen to conform thereto. Some inconvenience is not too great a price to pay for an honest and pure ballot."

In the same case, *Fields v. Osborne*, the Democratic ballots were also objected to because the word "For" was printed on each of them before the name of every office printed on them. "If it was plain and clear," says the court, "that the Act in limiting the contents of the ballot to the official indorsement, the names of the candidates, the name of the political party issuing the same, and the office voted for, prohibited the use of the word 'For' before the title of the office, we should be bound upon the principles herein already recognized as sound, to declare the ballots void for that reason. But that the statute so intended is not plain and clear. On the contrary, the language is ambiguous. There is room for honest and intelligent men to differ." Having referred to former instances in which the same word had been similarly used and to the fact that the Republican ballots in this very case contained it, and as confirmatory that the language of the Act was ambiguous it is said: "If ambiguous it is the proper subject of construction. In discharging the duty of construing it so that the voter shall not be deprived of his vote except upon a plain and unambiguous provision of the law, we feel bound to hold that the Act does not in terms and expressly, nor by necessary construction, prohibit the use of the word 'For' before the title to the office. It follows therefore that neither its use nor the failure to use it necessarily and of itself invalidates a ballot. The question of illegality is remitted to the ninth section of the Act. If the regular ballots issued by a political party contain the word 'For' before the title of the offices therein named, then it cannot be held to be a 'mark or device' so that the same may be identified in such manner as to indicate who might have cast the same, and therefore it is not obnoxious to that provision. If the regular ballots of a political party omit the word 'For,' in the connection stated, then the use of the word on some of the ballots cast, inasmuch as it would be a mark or device by which the same might be identified, would be illegal. Each case must be governed by its own circumstances and decided as a question of fact upon the principles herein stated. Upon the facts in this case we hold that the ballots in question were not illegal and void because of the use of the word 'For.'"

These decisions all recognize either expressly or by implication the right of the Legislature to make reasonable regulations as to ballots, to the end of preserving the purity of elections and the independence of the voter. In the Ohio case, *Roller v. Truesdale*, it is said: "The propriety of excluding from the count fraudulent votes is conceded by all. We also concede the power of the Legislature to declare a rule of evidence by which fraud in a particular case shall be conclusively established without inquiring into the fact whether it did or did not exist. Such rule is declared by this statute and

must be enforced. . . . The purposes intended were: (1) the prevention of actual fraud in procuring an elector to vote unintentionally for a candidate whose name is not on the regular ballot of his party; and (2), to remove inducements for attempting such fraud, by declaring that a name so printed in a regular ballot, instead of the regular candidate shall not be counted. Such wrong and such remedy were the full measure of the legislative intention." See also *Shields v. McGregor*, *supra*, and *State v. McKinnon*, 8 Or. 499, 500.

It is always a question whether statutory provisions like the one in question are directory or mandatory. In *State v. McKinnon*, *supra*, where the statute provided that the ballot should be on plain white paper without any mark or designation, and a ballot on colored paper was rejected as illegal, it was said that although the authorities cited against the rejection of the ballot sufficiently illustrated the principle governing the construction of statutes defining the duties of public officers as to their being mandatory or directory and the reluctance of the courts to construe statutes providing the manner of elections so as to defeat the public will as expressed through the ballot box, they disclosed one instance where a voter had been accorded the privilege of disregarding a plain provision of law intended to promote the purity and secure the independence of elections, even in depositing his vote. And in *McCrary on Elections*, § 501, where the decision of *People v. Kilduff*, 15 Ill. 492, 60 Am. Dec. 769, holding, (under a statute enacting that the ballot should be on "white paper without any marks or figures thereon intended to distinguish one ballot from another,") that ballots printed on common ruled foolscap paper of a blueish tinge were legal; that the paper was white within the meaning of the statute, and was used accidentally and that the ruled lines were not placed there for the purpose of distinguishing the ballots, is referred to as having been decided upon the ground that the paper was not used with an intent to violate the statute, it is said: It is quite clear that where a statute distinctly declares that ballots having distinguishing marks upon them shall not be received, or shall be rejected, it should be construed as mandatory, and not simply directory. And in the next succeeding section the same author says that if a statute prohibits the marking of ballots so that they may be distinguished by others than the voter and declares such ballots void, there is good reason for construing it as mandatory.

In our judgment the statutory provision under discussion is mandatory. Its purpose was that any ballot having any feature clearly prohibited by it should be deemed illegal, and not be treated as the lawful expression of an elector's will. To the extent that the lawmakers have gone, it is a valid regulation of the right to exercise the elective franchise. Viewing it in the light of the practical working of elections in so far as the preparation and distribution of ballots go, we see in it nothing amounting to an unconstitutional restriction of the right to vote.

The object intended to be effected was the independence of the voter, and this was sought to be secured by prescribing to a certain extent the form of the ballot, and excluding from it whatever was within the prohibition of the provision, and thereby securing the secrecy of the ballot; inviolable secrecy as to the person for whom an elector may vote, being the material guarantee of the constitutional mandate that voting at popular elections shall be by ballot. *State v. Anderson*, 26 Fla. 240, 259. The nearer the lawful approach to a perfect uniformity of ballots, the more perfect is the secrecy of the ballot, and consequently the independence of the voter secured. The greater the uniformity, the less the possibility of distinguishing marks.

It is, however, not to be lost sight of that a ballot will never be vitiated by anything which is not clearly within the prohibiting words and meaning of the statute. The elector should not be deprived of his vote through mere inference, but only upon the clear expression of the law. In *Com. v. Woolper*, *supra*, it is said: "The case is certainly within the words of the law. The ticket had something more than names on them, but is it within the meaning of the law? I think so." In *State v. Phillips*, 68 Tex. 390, 51 Am. Rep. 646, it is said that the decisions rather tend to restrict the exceptions which exclude a ballot than to extend them, and to admit the ballots if the spirit and intention of the law is not violated, although a liberal construction would violate it. The result as shown by the tickets deposited by legal electors must not be set aside except for causes plainly within the purview of the law; and, in *Owens v. State*, 64 Tex. 500, the doctrine asserted is that all statutes tending to limit the citizen in the exercise of the right to vote should be liberally construed in his favor. This is the rule by which, in our judgment, the statutory provision before us is to be judged, and its meaning arrived at and enforced. It is illustrated by the foregoing decisions of the Supreme Court of Indiana. In these cases, though the language of the statute excluding "distinguishing marks or other embellishments," did not confine such exclusion to the back of the ballots, yet as the inspectors were not given power to reject or refuse to count any ballot which had found its way into the ballot box, but were authorized only to refuse all ballots offered of any other description, the statute was construed to have been intended only to protect the voter against having the nature of his vote detected, before his ballot went into the box, through its color, or some distinguishing mark thereon, by other persons who might be seeking to control him through intimidation, or otherwise, and that this purpose could be attained as effectually as was possible to legislative enactment by securing uniform external appearance, and hence that distinguishing marks on the inside or face of the ballot could not be held to be within the purpose or purview of the statute. And it was also held that the ballots were good, even where the printing of the words on the inside was such as to be

visible on the outside, and were even actually seen by the inspectors, and that where a ballot was within the letter of the statute, it was not to be rejected, even though it had distinguishing marks.

And the rule stated above is perhaps more fully applied in the cases from Texas, referred to above. The effect of these Texas cases is that the word "device," associated as it is with the words "picture, sign, vignette, and stamp mark," is on account of such association, to be construed to have meant some "figure, mark, ornament, emblem or cypher," which would distinguish the ticket from others cast at the election, and not to include the shape of the ticket, the residence of candidates, nor the names of candidates for president and vice-president, nor the words, "Election ticket," nor the words, "People's ticket," printed about the middle of a ticket. There cannot be any doubt that the rhomboid shape or any of these words was equally as efficient an agent for identifying a ballot as an eagle, a crescent, a flag, a square, or compass, flowers, leaves and tendrils, or enigmatical characters would have been. The question, What is within the prohibition? necessarily includes that of, "What is the prohibition?" and to answer the question whether or not the ballots assailed in this action are within the prohibition of the Act of 1897, we must determine what is its prohibition. There is no question as to the paper being white or clear and even cut. We have seen what the rule is as to what may be called the different shades of white. This case turns upon the words "without ornament, designation, mutilation, symbol or mark of any kind whatever, except the name or names of the person or persons voted for, and the office to which such person or persons are intended to be chosen." It is entirely clear that the words "National Republican Ticket," and those of "Free Suffrage Ticket," printed as they are in type of the same size as the names or style of the offices voted for, and in the same plain Roman letters, are not ornaments, nor mutilations, nor a symbol. Are they designations or marks? The term "designation," if it stood alone, might necessarily mean any designation of a ballot, as Democratic, Republican, Prohibition, or by other appellation. The meaning of designation, as found in the dictionaries, includes appellation; it, according to Webster, is: "that which designates; distinctive title; appellation." According to Worcester its meaning is: "that which serves to distinguish;" but the distinctive title, or name, or appellation definition, as distinguished from the meaning of distinguishing by marks, is not within the meaning of the word as it is here used. This is shown by the use of the words "ornaments, mutilation, symbol," and particularly, in conjunction with them, those of "or mark of any kind whatsoever." Ornaments, mutilations, and symbols are marks as distinguished from words or sentences, or appellations, or distinctive titles, and not only do they indicate that it is in this character the term "designation" is used, but the terminal expression, "or mark of any kind whatsoever,"

shows both that the Legislature understood itself as meaning, by the associated use of each and all the preceding terms, including that of "designation," things in the nature of marks as distinguished from words or writings, and as intending by these terminal words to prohibit any other thing in the like nature of a mark. If it had been the intention of the Legislature to go beyond the distinctive character of the specific words, it would not have confined its concluding prohibiting words to marks, or any particular class of things, but would have used some general expression like "or anything whatsoever." As it is, the word "designation" is the only one in the group which is not confined in its meaning to the classification of marks, or that can include in its meaning words or appellations, and this being so, it must, unless there is something in the statute to prevent it, be construed to have been used as meaning only such designations as are in the nature of marks, which meaning is unquestionably included in the definition of the word.

Is there anything in the section, or in the statute, to preclude or defeat this construction? The first suggestion is, that the words, "except the name or names of the person or persons voted for, and the office to which such person or persons are intended to be chosen," have this effect. If so, it is because they are made an exception to what would be prohibited by the preceding words, but for such exception. Upon both reason and authority we do not think this position tenable. The names of the persons voted for, and of the offices which it is proposed they shall fill, are not within the prohibitory words, and would not be if the section contained nothing that follows the word "whatsoever," or, in other words, only contained what precedes the word "except." Though the provisions following the word "whatsoever," are in form of an exception seeming to exclude them from the effect of preceding words, they are in fact not within the meaning or purpose of these words. Not only was it not the purpose of these words to exclude from the ballot the names of the persons and offices, but as we have shown above, nothing is within their purpose or effect but things in the nature of marks, as distinguished from words or appellations. This same point was practically involved in the Texas cases. There the ballot was, under the statute, to be "without any picture, sign, vignette, device or stamp mark, except the name of the political party whose candidates are on the ticket." Still it was held that the prohibitory words preceding the word "except," meant only some figure, mark, ornament, emblem or cypher, and did not include the residence of candidates, nor the names of candidates for president and vice-president, nor even the words "People's Ticket," written about the middle of a ballot having the heading: "Democratic Ticket." The very same form of expression used in our statute is to be found in the Indiana statute, *supra*. In Missouri the statutory provision was that the ballot "shall not bear upon it any device whatever, nor shall there be any writing or printing thereon, except the names of persons, and

the designation of the offices to be filled," yet allowed truthful captions; still when a sheriff was *ex officio* collector, a ballot having the words "sheriff and collector" on it, was held to violate the law.

Nor do we think there is in any other part of the statute anything that can be successfully invoked to overcome the views announced above as to the effect of the prohibitory clause. The only other feature that seems worthy of consideration in this connection is the concluding clause of the section under discussion, which clause is in these words: "and no ballot of any other description shall be counted." In the Texas statute it was provided that "any ticket not in conformity with the above shall not be counted in counting the votes;" while the Missouri statute enacted that "any ballot not conforming to the provisions of this chapter shall be considered fraudulent, and shall not be counted." These provisions merely announce the consequences to attend a ballot which is in violation of the statute; they do not add to, or take from, those provisions which prescribe or regulate the ballot; it is by the latter, and not the former, that we determine what can and cannot be on a ballot without violating the law.

We fail to find in the decisions falling under our observation, unless it be those in Connecticut, anything which conflicts with the conclusion indicated above. There is certainly nothing in the Pennsylvania and California cases; on the contrary, that of *Coffey v. Edmonds*, 58 Cal. 521, might be cited as affirmatively supporting our views. In the two Mississippi cases involving the statutory provision as to "any device or mark," the printer's dash-line, on account of which the ballots were held illegal, were clearly "marks." We are not called upon to decide between the conclusion of that court in the third case, *Perkins v. Carraway*, 59 Miss. 222, and the views of the California court in *Kirk v. Rhoads*, 46 Cal. 898, as to the very slight departure from the prescribed space between names on a ballot. In the Connecticut case, the court puts the rejection of the ballot which contained the name of a candidate and office not the subject of choice at the election in question, and the one which had on it the *ex officio* duty of the town clerk, on the plain prohibition of the statute, that "in addition to the official indorsement, the ballot shall contain only the names of the candidates, the office voted for, and the political party issuing the same, as to which, in the opinion of the court, there was no room for construction, or judicial power to inquire into the extent or consequences of a violation. We do not say that this conclusion, at least in so far as the "*ex officio*" feature of one of the ballots, is not in conflict with the Missouri case of *State v. Watson*, *supra*. In the case of *Fields v. Osborne*, *supra*, we find that the Connecticut court in deciding, under the same provision of the statute, a question as to the effect of the use of the word "For," before the name of the office, admits that the statute was not plain and clear, but that its language was ambiguous, and recognizing the rule upon which

we stand and have asserted above—that in such cases the duty is to construe “so that the voter will not be deprived of his vote except upon a plain and unambiguous provision of the law—” and it held that the provision referred to did not either in terms and expressly, or by necessary construction prohibit such use of the stated word. It further held, however, that the word used as it was in all the tickets of the same class was not within the “mark or device” provision of the Act, yet expressed the opinion that it would have been if some of them had had it, and others had not. In this last expression of opinion as to what might or would be the law under certain facts alone, and not in anything decided as to a case actually before it, is there even any seeming conflict between our own conclusion and that of the Connecticut court. It is apparent that the statute of that state goes much further than ours, and that in ours there is much more room for construction,

and we find in the expression of that court: nothing in view of our statute and the authorities upon which we rest, to shake the conclusion we have reached.

Our conclusion is that the ballots assailed are legal, and that it is the respondent, and not the relator, who was duly chosen to the office in question at the election in 1888; and further, as held in a former opinion in this cause, that though the respondent did not, for the reasons there indicated, qualify and receive his commission under that election, he has, in the absence of an appointment by the governor since the commencement of the new term, continued to be clerk of the circuit court of Hernando county by virtue of his former commission, under section 14 of article 16 of the Constitution. *State v. Sazon*, 25 Fla. 792.

Judgment will be entered for the respondent. Mr. Justice Taylor dissents.

INDIANA SUPREME COURT.

CLEVELAND, CINCINNATI, CHICAGO
& ST. LOUIS R. CO., *Appt.*,

v.

Victor M. BACKUS, Treasurer of Marion
County.

(.....Ind.....)

1. **Railway companies are persons** within the provisions of the 14th Amendment of U. S. Const., § 1, relating to due process of law, and the equal protection of the laws.
2. **The Indiana state board of tax commissioners for the assessment of railroad property has the same power** in relation to the property and assessment over which it has jurisdiction that is possessed by county boards as to hearing grievances and making corrections.
3. **Courts will look to all parts of a statute** to determine the legislative purpose and intent.
4. **Courts will presume the Legislature intended a statute** to be reasonable, constitutional, and just.
5. **A statute which will admit of two interpretations**, one valid and the other invalid, will receive the interpretation sustaining its validity.
6. **An entire statute must be construed together and effect given** to every part of it, if this can be done without manifestly violating the intent of the Legislature.
7. **A railroad company is not denied the equal protection of the laws in the assessment of its property** because original jurisdiction of the assessment and valuation is given to a state board of tax commissioners, which has power to hear grievances and make corrections, instead of being given in the first instance to a county board, as in the case of other property, with the right of appeal to the state board.

8. **A law which applies alike to all persons** under like circumstances and conditions does not deny to any the equal protection of the laws.

9. **Due process of law in the assessment of railroad property is not denied** to railway companies by a law making the assessment of a state board of tax commissioners final where it allows after assessment a correction in assessments and valuation on the showing of a railroad company, or on motion of the board itself.

10. **A constitutional provision for uniform and equal taxation is complied with** in respect to railroad property when the same basis of assessment is fixed for all such property and the same rate fixed for all property in any district subject to taxation.

11. **Providing for the assessment of railroad property by a state board** while other property is assessed by local boards does not violate a constitutional provision giving the Legislature power to “prescribe such regulations as shall secure a just valuation for taxation.”

12. **Sufficient notice of the assessment of railroad property is given by the law** regulating the assessment where the statute itself fixes the time of the meeting for grievances and corrections and also requires each company to furnish a schedule of its property for use in the assessment.

13. **Courts have no power to give any relief against erroneous assessments** of boards whose assessments for taxation are made final by statute.

14. **A statute providing that the rolling stock of a railroad company shall be listed and taxed in the several counties, etc.**, in the proportion that the main track in such county bears to the total length of the main track does not impose double taxation on the ground that values of rolling stock taxable in

NOTE.—The assessment and taxation of railroads was treated in a note to *Cass County v. Chicago, B. & Q. R. Co.* (Neb.) 2 L. R. A. 188. The above case is 18 L. R. A.

a notable one in respect to the number and importance of the questions decided by it on this subject.

other states are imported into the state for the purpose of taxation.

15. The cost of the construction of a railroad and the equipment thereof, the market value of its stocks and bonds, and its gross and net earnings, with all other matters appertaining thereto that will assist in arriving at a true cash value of the property, are proper for consideration in determining the value of the railroad property for taxation.
16. Interstate commerce is not taxed by a state tax on the track of a railroad company within the state and a proportionate part of its rolling stock.
17. Members of a state board of taxation are not judicial officers within a constitutional provision requiring judicial officers to be elected by the people.

(February 3, 1893.)

APPEAL by plaintiff from a judgment of the Circuit Court for Marion County refusing to enjoin the collection of certain taxes which had been assessed against the plaintiff company. *Affirmed.*

The facts are stated in the opinion.

Messrs. Baker & Daniels, with Mr. John T. Dye, for appellant:

I. The Act of March 6, 1891, is a violation of the 14th Amendment of the Constitution of the United States, because it denies to one class the equal protection of the laws granted to all other persons against erroneous, unjust, and illegal assessments of the value of property upon which taxes are to be laid, in that it grants to all persons the right or privilege to be heard before some tribunal authorized to correct errors or give appropriate relief concerning the correctness or legality of assessments or inequalities in the same, or mistakes of fact or law, or illegal conduct of those charged with the duty of making the same, after the original assessments have been made, and before they become final and conclusive, as a protection against burdens imposed by such mistakes and errors; but as to railway companies the Act utterly denies all protection whatever against the same burdens against which others are protected.

Railroad corporations are persons within the intent of the clause in section 1 of the 14th Amendment of the Constitution of the United States, which forbids a state to deny to any person within its jurisdiction the equal protection of the laws.

Santa Clara County v. Southern Pac. R. Co. 118 U. S. 896, 80 L. ed. 118, 18 Am. & Eng. R. R. Cas. 182; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 27, 32 L. ed. 585; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650.

The 14th Amendment of the Constitution in declaring that no state shall deny to any person within its jurisdiction the "equal protection of the laws," imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property, including among them that of taxation.

San Mateo County v. Southern Pac. R. Co. 7 Sawy. 517, 8 Am. & Eng. R. R. Cas. 1; *Santa Clara County v. Southern Pac. R. Co. supra.*

The constitutional guaranty of equal protection 18 L. R. A.

tion under the laws not only extends to taxation, but embraces the entire process, and includes the assessment of the valuation of property, as well as the rate of percentage charged thereon.

Ibid.; *Scott v. Toledo*, 86 Fed. Rep. 397; *Minneapolis & St. L. R. Co. v. Beckwith, supra.*

The 14th Amendment means that no person, or class of persons, shall be denied the same protection of the laws that is enjoyed by other persons or classes in the same place under like circumstances.

Missouri v. Lewis, 101 U. S. 31, 25 L. ed. 992; *Barbier v. Connolly*, 118 U. S. 27, 28 L. ed. 923; *Henderson v. New York*, 92 U. S. 259, 28 L. ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 28 L. ed. 550; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145; *Yick Wo v. Hopkins*, 118 U. S. 357, 30 L. ed. 225.

The denial to one class of the right to resort to any tribunal to correct mistakes of law or fact, or of judgment in the assessment of values for taxation, after the original assessment has been made, when such right is by law granted to all other classes, is a denial of the equal protection of the law.

San Mateo County v. Southern Pac. R. Co. and *Santa Clara County v. Southern Pac. R. Co. supra*; *Lent v. Tillson*, 140 U. S. 816, 35 L. ed. 419; *Minneapolis & St. L. R. Co. v. Beckwith*, and *Scott v. Toledo, supra.*

Citizens cannot be classified so as to be denied equal protection of the law.

Wally v. Kennedy, 2 Yerg. 554, 24 Am. Dec. 511.

In Indiana, under a law providing for the levy of taxes upon property according to its assessed value, there can be no classification subjecting certain classes of property directly or indirectly to a higher rate of assessment than other property.

Ind. Const. art. 10, § 1.

The question as to unequal protection in denying to a class an opportunity to question the correctness of an assessment after it is made, and before it becomes final and conclusive, cannot arise in states where a mode is secured of confirming or contesting the charge imposed in ordinary courts of justice, before it becomes final.

Davidson v. New Orleans, 96 U. S. 97-104, 24 L. ed. 616-619; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 29 L. ed. 414; *Scott v. Toledo, supra*; *Garvin v. Dausman*, 114 Ind. 429; *Lent v. Tillson, supra.*

Any proceeding, the result of which is to deprive the owner of his property, or to impose upon or create a charge against it, and which is carried on under a law which makes no provision for notice, and offers the owner no opportunity to be heard concerning the correctness of the assessment, whether the amount charged against him or his property was ascertained and apportioned in good faith, and in the manner provided by law, is a contravention of the Constitution, and lacks the essential elements of due process of law.

Garvin v. Dausman, and *Lent v. Tillson, supra.*

II. The board considered and estimated, and

included and blended, in the valuation of appellant's property returned by it, values not within its jurisdiction.

Santa Clara County v. Southern Pac. R. Co. 118 U. S. 394, 80 L. ed. 118; *California v. Central Pac. R. Co.* 127 U. S. 1, 83 L. ed. 150.

This board "fixed the values of the respective railroads and parts of roads" within the state of Indiana for taxation.

a. The board certifies: "Making liberal allowances for all proper deductions, the state board of tax commissioners has fixed the values of the respective railroads and parts of roads within the state of Indiana for taxation on the first day of April, 1891, as hereinbefore set forth. In arriving at the basis for the estimate of said values, the board has considered the cost of the construction and equipment of said roads, the market value of the stocks and bonds, and the gross and net earnings of each of said roads, and all other matters appertaining thereto that would assist the board in arriving at a true cash value of the same,"—that is, "railroads and parts of roads."

b. This certificate is conclusive that the value which the board agreed upon and returned was the value of the respective "railroads and parts of roads," and includes other property besides "railroad track" and "rolling stock."

Cooley, Taxn. 418; *Van Rensselaer v. Witbeck*, 7 N. Y. 517; *Hogelskamp v. Weeks*, 37 Mich. 422; *Clark v. Orans*, 5 Mich. 151, 71 Am. Dec. 776; *Colby v. Russell*, 8 Me. 227; *Foxcroft v. Nevins*, 4 Me. 72; *Johnson v. Goodridge*, 15 Me. 29; *Kellar v. Savage*, 20 Me. 199; *Hinckley v. Cooper*, 23 Hun, 253; *Westfall v. Preston*, 49 N. Y. 849; *State Auditor v. Jackson County*, 65 Ala. 142; *Dickison v. Reynolds*, 48 Mich. 158.

"Words are to be taken according to their customary, not their original or classical signification."

Lieber, Hermeneutics, p. 144; Sedgw. Stat. & Const. L. pp. 198, 220, 224, 247; *Evansville, I. & C. S. L. R. Co. v. Meeds*, 11 Ind. 274; *Plumer v. Marathon County Supra*, 46 Wis. 163; *Scheiber v. Kaehler*, 49 Wis. 291.

c. It is also conclusive that they did not assess "railroad track" and "rolling stock" at its true cash value, but assessed railroads and parts of roads for purposes of taxation.

As to the meaning of the word "railroad," see also—

Dunn's Science of Taxation, 19; Wood, Railway Law, pp. 815, 770, 955, 1618, 1640, 1641, 1634; Jones, Railroad Securities, §§ 124, 125, 131; *Illinois M. R. Co. v. Barnett*, 85 Ill. 318; *Coe v. McBrown*, 22 Ind. 255; *Atlantic & P. R. Co. v. Lesueur* (Ariz.), 1 L. R. A. 244, 87 Am. & Eng. R. R. Cas. 370; *Com. v. Louisville & N. R. Co.* 89 Ky. 184, 37 Am. & Eng. R. R. Cas. 419; *South Nashville St. R. Co. v. Morrow*, 3 L. R. A. 853, 87 Tenn. 406, 39 Am. & Eng. R. R. Cas. 521; *State Railroad Tax Case*, 92 U. S. 586, 605, 23 L. ed. 663, 670; Ind. Rev. Stat. 1881, §§ 8987, 3938, 3941, 3953; Act of March 6, 1861, § 81; *Indianapolis, C. & L. R. Co. v. Kliner*, 69 Ind. 71; *Toledo, W. & W. R. Co. v. Lafayette*, 22 Ind. 269.

III. The state board of tax commissioners—acting by and in virtue of their public position under the state government, in the name

of and for the state, and clothed with the state's power, in making the valuation of appellant's property upon which taxes were to be laid—denied to appellant due process of law.

Ex parte Virginia, 100 U. S. 847, 25 L. ed. 679; *Yick Wo v. Hopkins*, 118 U. S. 378, 80 L. ed. 237, and cases cited.

What the law denounces when done by a body whose errors and mistakes can be corrected, becomes more odious, as it is more dangerous, when done by a tribunal whose errors cannot be questioned except for fraud or want of jurisdiction.

Lewis, Em. Dom. 420; *Peasey v. Wolfborough*, 87 N. H. 286; *Patten's Petition*, 16 N. H. 277; *Harris v. Woodstock*, 27 Conn. 567; *Lennox v. Knox & L. R. Co.* 62 Me. 322; *Moshier v. Shear*, 102 Ill. 169, 40 Am. Rep. 578; *Johnson v. Holyoke Water Power Co.* 107 Mass. 478.

To sustain such action would be to sanction and justify the means by which the whole system of making final and conclusive assessments of railroad property would be perverted and corrupted.

Moshier v. Shear, supra.

IV. The Act of March 6, 1891, denies due process of law to railroad companies in the assessment of railroad property in this, that it denies them:

1. An opportunity to be heard.

2. In an orderly proceeding adapted to the nature of the case.

3. In which they can defend, enforce, and protect their rights.

4. And in which they can prove any fact according to the usages of the common law which would be a protection to their property, before the change is made final and conclusive.

Hagar v. Reclamation Dist. No. 108, 111 U. S. 709, 28 L. ed. 572; *Stuart v. Palmer*, 74 N. Y. 188, 30 Am. Rep. 289; *Campbell v. Dwiggins*, 83 Ind. 481; *Garvin v. Dausman*, 114 Ind. 429; *State v. Dodge County*, 20 Neb. 595; *People v. Reynolds*, 28 Cal. 111; *Patten v. Green*, 18 Cal. 829; *Darling v. Gunn*, 50 Ill. 424; *Cleghorn v. Postlewaite*, 48 Ill. 428; *Griffin v. Mizon*, 38 Miss. 424; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 628; *Yick Wo v. Hopkins*, 118 U. S. 356, 80 L. ed. 230; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232; *Chicago, M. & St. P. R. Co. v. Minnesota*, 184 U. S. 418, 38 L. ed. 970; *San Mateo County v. Southern Pac. R. Co.* 7 Sawy. 517, 8 Am. & Eng. R. R. Cas. 87; *Santa Clara County v. Southern Pac. R. Co.* 118 U. S. 394, 30 L. ed. 118, 13 Am. & Eng. R. R. Cas. 182; *Palmer v. McMahon*, 133 U. S. 660, 33 L. ed. 773; *Lent v. Tillson*, 140 U. S. 816, 35 L. ed. 419.

The court erred in excluding evidence as to value of appellant's "railroad track."

Cummings v. Merchants Nat. Bank, 101 U. S. 155, 156, 25 L. ed. 904; *Chicago, B. & Q. R. Co. v. Cole*, 75 Ill. 594.

Messrs. A. G. Smith, Atty-Gen., John W. Kern, Albert J. Beveridge, W. A. Ketcham and A. C. Ayres, with Messrs. Clappool & Clappool, for appellee:

The provisions of the Tax Law of 1891, now questioned for the first time, have been in force from thirty-four to forty years. This ought to be conclusive as to their constitution-

ality, certainly so far as alleged to be against our state Constitution.

State Board of Assessors v. Central R. Co. 48 N. J. L. 276; *Moers v. Reading*, 21 Pa. 188; *Norris v. Clymer*, 2 Pa. 277; *Briccos v. Bank of Kentucky*, 36 U. S. 11 Pet. 257, 9 L. ed. 709; *People v. Marshall*, 6 Ill. 672.

County district and state boards of equalization have in this state always been created by acts making certain officers *ex officio* members of such board—the boards at different times being created by making different officers members of the board. These boards have often been vested with original and final jurisdiction.

Tax Law of June 21, 1852, 1 Gavin & Hord, 85, § 58; Act of May 23, 1852, 1 Gavin & Hord, 830, §§ 2, 5, 7; Tax Law of December 21, 1872, Acts p. 67, §§ 150, 284; Tax Law of March 29, 1881, Rev. Stat. § 6402.

The present mode of assessing and apportioning "railroad track" and "rolling stock" among counties, and the same difference in the mode of assessing such property and other property, had its inception, in this state, under Act of December 21, 1852, and has continued ever since under the provision of every tax law.

Acts 1852, § 6, pt. 2, 1 Gavin & Hord, 85; Act 1872, p. 57, Returns, §§ 71-77, 79, 81; Act 1872, Assessment, §§ 284, 291; Act 1881, Rev. Stat. 1881, Returns, §§ 6360-6369, 6371; Act 1881, Rev. Stat. 1881, Assessments, §§ 6402, 6410; Act 1891, p. 199, Returns, §§ 76-85, 87; Acts 1891, Assessment, §§ 129, 187.

And the law of Illinois, a similar law, has been decided constitutional.

State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663.

The Indiana and Illinois statutes each name the time and place of the meeting of the state boards and no provision is made for the giving of other notice. This is all the notice "that due process of law" requires.

Cooley, Taxation, pp. 861, 865; *State Railroad Tax Cases*, *supra*; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 519; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 29 L. ed. 414; *Smith v. Rude Bros. Mfg. Co.* (Ind.) April 8, 1892; *Louisville & N. A. R. Co. v. State*, 25 Ind. 177, 87 Am. Dec. 358.

The Act of March 6, 1891, respecting taxation, does not, as a matter of law, require any interstate railway corporation to be charged with and pay taxes in Indiana upon the entire "rolling stock" and equipment of their entire interstate lines of railway upon the mileage basis. Even if it did, this would not be taxation of property out of the state. A correct construction of sections 80, 88, and 85 of the Act, by themselves, demonstrates this, and when construed with the remainder of the law, as they must be, leaves no room for controversy.

Act March 6, 1891, §§ 78-80, 83, 85, 120; *Porter v. Rockford, R. I. & St. L. R. Co.* 76 Ill. 561; *State Railroad Tax Cases*, *supra*; *St. Louis, V. & T. H. R. Co. v. Surrill*, 88 Ill. 535; *Potter's Dwart. Stat.* pp. 128, 678; *Stout v. Grant County Comrs.* 107 Ind. 343.

Said Act does not, as a matter of law, require or permit the importation of any value situated in other states for taxation here; its purpose is merely to provide for taxation of certain rail-

road property within the state, and, to that end, provide means of ascertaining "the true cash value" thereof.

Act March 6, 1891, §§ 78, 83, 85, 120; *Porter v. Rockford, R. I. & St. L. R. Co.* *supra*; *Kansas Pac. R. Co. v. Riley County Comrs.* 30 Kan. 141; *State Railroad Tax Cases* and *St. Louis, V. & T. H. R. Co. v. Surrill*, *supra*.

Nor, as a matter of fact, did the state board of tax commissioners value and assess any property whatever beyond its jurisdiction. It assessed "railroad track" and "rolling stock" of appellant within the state of Indiana only.

Rapalje & Lawrence, Law Dict.; Anderson, Law Dict.; Black, Law Dict.; Bouvier, Law Dict.; Abbott, Law Dict.; Winfield, Adjudged Words and Phrases.

It is an elementary rule of statutory construction that an evil to be removed and the remedy provided shall be considered.

Miller, Const. p. 82.

The interstate commerce clause of the Federal Constitution was not intended to prevent the taxation by a state of property within its borders merely because such property was used in interstate commerce.

So that even if it were true that the "railroad track" and "rolling stock" of appellants within the state were used in interstate commerce, they would still be liable to taxation by the state.

Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 618; *Pullman Palace Car Co. v. Hayward*, 141 U. S. 86, 35 L. ed. 621.

The Tax Law of the state of Kansas, upheld by above decision.

Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 27 L. ed. 419; *Marye v. Baltimore & O. R. Co.* 127 U. S. 117, 32 L. ed. 94; *State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall. 284, 21 L. ed. 164; *Western U. Teleg. Co. v. Atty-Gen. of Massachusetts*, 125 U. S. 580, 31 L. ed. 790; *Atty-Gen. of Massachusetts v. Western U. Teleg. Co.* 141 U. S. 40, 35 L. ed. 628; *Maine v. Grand Trunk R. Co.* 143 U. S. 217, 35 L. ed. 994; *Charlotte, C. & A. R. Co. v. Gibbs*, 143 U. S. 886, 35 L. ed. 1051; *Leloup v. Port of Mobile*, 127 U. S. 540, 32 L. ed. 311.

The duties required of and powers conferred upon the board by the Act are not judicial. The board is not a court.

State Tax-Law Cases, 54 Mich. 393; *Lygon County Comrs. v. Sergeant*, 24 Kan. 572; *Wilson v. Price-Raid Auditing Commission of State*, 31 Kan. 257; *Auditor of State v. Atchison, T. & S. F. R. Co.* 6 Kan. 500; *Hannibal & St. J. R. Co. v. State Board of Equalization*, 64 Mo. 294; *Hardenburgh v. Kidd*, 10 Cal. 402; *State v. Wood*, 110 Ind. 82; *Langenberg v. Decker* (Ind.) 16 L. R. A. 108.

The tax commissioners whom the law provides shall be appointed by the governor are properly so appointed.

Ind. Const. art. 5, §§ 16, 18; Ind. Const. art. 15, § 1; *State v. Hyde*, 18 L. R. A. 79, 129 Ind. 296.

If, however, the Constitution requires said tax commissioners to be elected by the people, as appellant contends, still they would hold their office legally by appointment from the governor until the people elect them.

Ind. Const. art. 5, § 18; Ind. Rev. Stat.

§ 4648; *State v. Peelle*, 8 L. R. A. 238, 121 Ind. 495; *State v. Hyde*, 121 Ind. 20; *State v. Gorby*, 122 Ind. 17.

Even if all this were not true, and they were *de facto* officers and not officers *de jure*, still, as to third parties and the public, their acts as such officers *de facto* are valid and binding.

Mechem, Pub. Off. § 828 *et seq.*; *Blackman v. State*, 12 Ind. 556; *Bansomer v. Mace*, 18 Ind. 27; *Gumberts v. Adams Exp. Co.* 28 Ind. 181.

The duties and powers conferred upon the governor, auditor and secretary of state, by said law, are properly so conferred.

State Tax-Law Cases, 54 Mich. 893; *Lyon County Comrs. v. Sergeant*, 24 Kan. 512; *Wilson v. Price-Raid Auditing Commission of State, Auditor of State v. Atchison, T. & S. F. R. Co., Hannibal & St. J. R. Co. v. State Board of Equalization, Hardenburgh v. Kidd, State v. Wood, and Langenberg v. Decker, supra*.

Practical construction of similar statutes under our Constitution prove that such powers as are conferred by the tax laws upon the governor, auditor, and secretary of state are properly so conferred.

Hovey v. State, 119 Ind. 886; *Bruce v. Schuyler*, 9 Ill. 221, 46 Am. Dec. 447; *Rogers v. Goodwin*, 2 Mass. 475; *Franklin County Comrs. v. Bunting*, 111 Ind. 143; *Weaver v. Tomplin*, 113 Ind. 298, 301; *Stuart v. Laird*, 5 U. S. 1 Cranch, 299, 2 L. ed. 115; *Martin v. Hunter*, 14 U. S. 1 Wheat. 304, 4 L. ed. 97; *Cohens v. Virginia*, 19 U. S. 6 Wheat. 264, 5 L. ed. 257; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 213, 290, 6 L. ed. 606, 632; *Minor v. Happersett*, 88 U. S. 21 Wall. 162, 23 L. ed. 627; *State v. Parkinson*, 5 Nev. 15; *Pike v. Megoun*, 44 Mo. 491; *People v. La Salle County Suprs.* 100 Ill. 495; *State v. French*, 2 Pinn. 181.

The Act of March 6, 1891, is in accord with the 14th Amendment to the Constitution of the United States in that:

(1) (a) It does not deprive or permit the deprivation from the owners of railroad property—

1. Without notice, but to the contrary, prescribes and provides for a good and sufficient notice.

2. Without a hearing, but on the contrary, provides a proper and sufficient opportunity to be heard.

Cooley, Const. Lim. chap. 11, p. 480; 2 Hare, Am. Const. Law, p. 836; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623; *Martin v. Mott*, 25 U. S. 12 Wheat. 19, 6 L. ed. 537; *Ex parte Milligan*, 71 U. S. 4 Wall. 2, 18 L. ed. 281; *Cunningham v. Neagle*, 135 U. S. 1, 34 L. ed. 55; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 457, 33 L. ed. 980; *Pennoyer v. Neff*, 95 U. S. 733, 24 L. ed. 572; *Hyland v. Brazil Block Coal Co.* 128 Ind. 835; *Hyland v. Central Iron & Steel Co.* 13 L. R. A. 515, 129 Ind. 63; *Smith v. Rude Bros. Mfg. Co. (Ind.)* Apr. 8, 1892; *Kuntz v. Sumption*, 2 L. R. A. 655, 117 Ind. 1; *Stuart v. Palmer*, 74 N. Y. 188, 30 Am. Rep. 289; *Cooley*, Taxn. 364, 365; 1 Desty, Taxn. 599, 600; *St. Louis, I. M. & S. R. Co. v. Worthen*, 7 L. R. A. 374, 52 Ark. 529; *Adair v. Lieb*, 76 Ill. 198; *Porter v. Rockford, R. I. & St. L. R. Co.* 76 Ill. 561; *Pacific Hotel Co. v. Lieb*, 83 Ill. 608; *Cincinnati, N. O. & T. P. R. Co. v. Com.* 81 Ky. 511; *State v.*

Bunyon, 41 N. J. L. 104; *New York v. Dannenport*, 92 N. Y. 610; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *Kentucky Railroad Tax Cases*, 115 U. S. 381, 29 L. ed. 416; *Louisville, N. A. & C. R. Co. v. Boney*, 8 L. R. A. 435, 117 Ind. 501; *Hannibal & St. J. R. Co. v. State Board of Equalization*, 64 Mo. 294; *Kansas Pac. R. Co. v. Riley County Comrs.* 20 Kan. 141; *St. Louis, V. & T. H. R. Co. v. Surrell*, 88 Ill. 535; *Republic L. Ins. Co. v. Pollak*, 75 Ill. 298; *Oase v. Dean*, 16 Mich. 12; *Sterling Gas Co. v. Higby*, 134 Ill. 563; *Illinois & St. L. R. & C. Co. v. Stookey*, 122 Ill. 358; *Lowell v. Middlesex County Comrs.* 9 L. R. A. 356, 152 Mass. 380.

(b.) That it does not deny to the owners of railroad property the equal protection of the laws, but on the contrary sufficiently and amply provides by law for their protection.

State Board of Assessors v. Central R. Co. 43 N. J. L. 276; *Hovey v. State*, 119 Ind. 886; *Hovey v. State*, Id. 895; *Missouri River, S. F. & G. R. Co. v. Morris*, 7 Kan. 210; *Francis v. Atchison, T. & S. F. R. Co.* 19 Kan. 303; *Dubugue v. Chicago, D. & M. R. Co.* 47 Iowa, 196; *Louisville & N. A. R. Co. v. State*, 25 Ind. 180, 87 Am. Dec. 858; *Homes Ins. Co. v. New York*, 184 U. S. 594, 33 L. ed. 1025; *Bell's Gap R. Co. v. Pennsylvania*, 184 U. S. 232, 33 L. ed. 893; *State v. Haworth*, 7 L. R. A. 240, 123 Ind. 423; *Upshur County of W. Va. v. Rich*, 185 U. S. 467, 34 L. ed. 196; *Low v. Lincoln County Ct.* 27 W. Va. 785; *Munn v. Illinois*, 94 U. S. 118, 24 L. ed. 77; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247; *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 548; *Missouri v. Lewis*, 101 U. S. 22, 25 L. ed. 989; *Soon Hing v. Crowley*, 113 U. S. 703, 23 L. ed. 1145; *Barbier v. Connolly*, 118 U. S. 27, 23 L. ed. 923; *Wurts v. Hoagland*, 114 U. S. 606, 29 L. ed. 329; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463; *Chicago & N. W. R. Co. v. McLaughlin*, 119 U. S. 556, 30 L. ed. 477; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841; *Powell v. Pennsylvania*, 127 U. S. 678, 33 L. ed. 253; *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107; *Walston v. Nemin*, 128 U. S. 578, 32 L. ed. 544; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585; *Louisville N. R. Co. v. Woodson*, 134 U. S. 614, 33 L. ed. 1032; *Natal v. Louisiana*, 139 U. S. 621, 35 L. ed. 288; *Charlotte, O. & A. R. Co. v. Gibbs*, 143 U. S. 386, 35 L. ed. 1051; *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. ed. 164.

Assuming that the law is constitutional and the board of state tax commissioners legally constituted, then its record kept in pursuance of the requirements of the statute is conclusive as against collateral attack.

Million v. Carroll County Comrs. 89 Ind. 5; *McEnaney v. Sullivan*, 125 Ind. 407; *Ryan v. Varga & B. M. R. Co.* 37 Iowa, 78; *Olay County Comrs. v. Markle*, 46 Ind. 96; *Cooper v. Sunderland*, 8 Iowa, 114; *United States v. Arredondo*, 81 U. S. 6 Pet. 691, 8 L. ed. 547; *Evansville, I. & O. S. L. R. Co. v. Evansville*, 15 Ind. 895; *Weir v. State*, 96 Ind. 811; *Eddy v. Wilson*, 43 Vt. 363; *Sykes v. Keating*, 118 Mass. 517; *Halleck v. Boylston*, 117 Mass. 469;

Stoughton Third School Dist. v. Atherton, 12 Met. 105; *Bradbury v. Benton*, 69 Me. 194; *Mayhew v. Gay Head Dist.* 13 Allen, 184; *Cameron v. School Dist. in North Hero*, 42 Vt. 509; *Beebe v. Scheidt*, 18 Ohio St. 406; *Pierce v. Wright*, 45 How. Pr. 1; *Howland v. Eldredge* 48 N. Y. 457; *People v. Zeyst*, 28 N. Y. 145, *Steenenson v. Bay City*, 26 Mich. 44; *Hall v. People*, 21 Mich. 456; *People v. Madison County Supra*. 125 Ill. 334, 28 Ill. App. 386; *Andrews v. Boylston*, 110 Mass. 214.

The state board of tax commissioners, in assessing values upon railroad property, may act upon their own knowledge and judgment, without evidence other than the returns made by the railroad companies, and for the enlightenment of their judgment may seek information whence and in what manner they deem best.

Kansas Pac. R. Co. v. Riley County Comrs. 20 Kan. 141; *Case v. Dean*, 16 Mich. 12; *St. Louis, V. & T. H. R. Co. v. Surrall*, 88 Ill. 535; *Pacific Hotel Co. v. Lieb*, 83 Ill. 602; *Porter v. Rockford, R. I. & St. L. R. Co.* 76 Ill. 561; *Lowell v. Middlesex County Comrs.* 9 L. R. A. 856, 152 Mass. 380; *Sterling Gas Co. v. Higby*, 184 Ill. 568; *State Railroad Tax Cases*, 92 U. S. 610, 23 L. ed. 672.

Courts cannot inquire into the mental processes of the assessing officers, for the purpose of determining as to whether their assessment was or was not made upon a proper basis, and evidence addressed to such purpose is incompetent.

Republic L. Ins. Co. v. Pollak, 75 Ill. 298; *People v. Barker*, 48 N. Y. 70; *Case v. Dean*, 16 Miss. 12.

In assessing railroad track, the state board should take into consideration the whole road or system, within and without the state, its earning capacity, termini, and all other circumstances and facts connected therewith, which to them seem necessary, to enable them to fix the value of the property within their jurisdiction.

People v. Barker, State Railroad Tax Cases, and *Porter v. Rockford, R. I. & St. L. R. Co. supra*, and cases cited.

Olds, J., delivered the opinion of the court:

This is a suit brought by the appellant against the appellee to enjoin the collection of taxes assessed against the appellant railway company by the state board of tax commissioners of Indiana.

The plaintiff is a corporation organized under the laws of Ohio and Indiana, and is and has been for several years engaged in the business of a common carrier of freight and passengers, and in operating a system of railroads in the states of Ohio, Indiana, and Illinois, having various lines of railroads in Indiana and its railroad track and rolling stock was assessed for taxation by the said state board of tax commissioners, under the Act of the Legislature of Indiana, approved March 8, 1891.

The principal question involved in this case relates to the constitutionality and validity of the law under which the appellant's property was assessed, though around this question cluster some others which we will consider later on.

The Act makes provision for the assessment 18 L. R. A.

of real and personal property by township and county assessors, creates a county board of equalization in each county in the state, and section 114 gives to such county boards "power to hear complaints of any owner of personal property except railroad tracks and rolling stock of railroads, to equalize the valuation of property and taxables," and provides that "it shall pass upon each valuation, and may, on sufficient cause being shown, or on its own motion, correct the assessment or valuation of any property in such manner as will in its judgment make the valuation thereof just and equal," and provides that "appeals shall lie from the decision of any county board of review to the state board of tax commissioners, which shall hear and determine the same in such manner as it may by its rules prescribe, and certify its decisions, which shall be final, to the proper county auditor."

In relation to the assessment of railway property the Act provides, sec. 77: "Between the first day of April and the first day of June of the year eighteen ninety-one, and at the same time in each year thereafter, when required by the county auditor, any person, company or corporation so owning, managing operating or constructing a railroad shall make and file with the county auditor of the respective counties in which the railroad may be located, a statement, or schedule, verified by the oath of such person, or the president and secretary of such corporation, showing the property held for right of way, and the length of the main and all side or second tracks and terminals in such county, and in each city or town through or into which the road may run, and describe such tract of land other than a city or town lot through which the road may run, in accordance with the United States or other surveys, giving the width and length of the strip of land held in each tract and the number of acres thereof. They shall also state the value of improvements and stations located on the right of way. New companies shall make such statements in April next after the location of their roads. When such statements shall have been once made, it shall not be necessary to repeat the description as hereinbefore required, unless directed so to do by the county auditor; but the company shall during the month of April annually report the value of such property, by the description set forth in the next section of this Act, and note all additions or changes in such right of way as shall have occurred."

Sec. 78. "Such right of way including the superstructures main, side or second track and terminals, turntable, telegraph poles, wires, instruments, and other appliances and stations and improvements of the railroad company on such right of way, (excepting machinery, stationary engines, and other fixtures, which shall be considered personal property), shall be held to be real estates for the purpose of taxation, and denominated 'railroad track,' and shall be so listed and valued, and shall be described in the assessment thereof as a strip of land extending on each side of such railroad track and embracing the same, together with all the stations and improvements thereon, commencing at a point where such railroad track crosses a boundary line in entering the coun-

ty, township, city or town, extending to the point where such track crosses the boundary line leaving such county, township, city or town to the point of termination in the same as the case may be, containing — acres more or less, (inserting name of county, township, city or town or boundary line of the same, and number of acres and length in feet) and when advertised or sold for taxes, no other description shall be necessary to convey a good title to the purchaser."

Section 79 declares that the railroad track shall be listed and taxed in the several counties, etc.

Section 80 declares that "the movable property belonging to a railroad company shall be held to be personal property and denominated for the purpose of taxation 'rolling stock'; such rolling stock shall be listed and taxed in the several counties, townships, cities, and towns in the proportion that the main track used or operated in such county, township, city or town bears to the length of the main track used or operated by such person, company, or corporation, whether owned, operated or leased by him or them in whole or in part."

Section 81 provides for the taxation of tools, materials for repairs, etc., in the county, township, city or town where the same may be on the 1st day of April of each year, and section 82 provides for the taxation of all real estate of any railroad other than that denominated railroad track and improvements thereon as lands and lots in the county, township, city or town where situated.

Section 83 declares that between the first day of April and the first day of June of each year, "every person, company or corporation owning, constructing or operating a railroad in this state shall return to the county auditor a list or schedule, verified by the oath of such person so owning, constructing, or operating if an individual, or if a company or corporation, by the oath of the superintendent or secretary of such company or corporation, which shall contain:

"First. A full and correct detailed inventory of all the rolling stock belonging to or leased, hired, used, or operated by such company, and which shall distinctly set forth the number of locomotives and tenders of all classes, passenger cars of all classes, sleeping, chair and dining cars, express cars, baggage cars, horse cars, cattle cars, coal cars, platform cars, wrecking cars, freight cars, flat cars, pay cars, hand cars, tank or oil cars, and all other kinds of cars, and the true cash value thereof on the first day of April of the current year shall be set opposite each of them. Such list or schedule shall also set forth the number of miles of main track on which such rolling stock is used in the state of Indiana. For the purpose of taxation such rolling stock leased or hired from persons or corporations other than the railroad companies, shall be deemed the property of the railroad company leasing the same, and for that purpose shall be valued at such proportion of the full value thereof as the time during which the same is used on such railroad during the year bears to the whole year."

Second. Such list shall also contain a full and correct inventory of all other personal

property of such railroad company not specifically taxed, including tools, etc., separated and classified into particular county, township, etc., where the same may be on the first day of April.

The third subdivision provides for an inventory of real estate other than that denominated "railroad track."

Section 84 makes it the duty of county auditors to return to the proper assessors a copy of the lists as contained in the second and third specifications to be assessed by such assessors, the same to be treated in all respects in regard to assessments and equalization as other similar property belonging to individuals.

Section 85 reads as follows: "At the same time that the lists or schedules as hereinbefore required to be returned to the county auditor, the person, company, or corporation running, operating, or constructing any railroad in this state shall, under the oath of such person, or the secretary or superintendent of such company or corporation, return to the auditor of state sworn statements or schedules, first, of the property denominated 'railroad track,' giving the length of the main and side or second tracks and turnouts, and showing the proportions in each county and township and the total in the state. Second, the rolling stock, whether owned or hired, giving the length of the main track in each county and the entire length of the road in this state. Third, showing the number of ties in track per mile, the weight of iron or steel per yard used in the main and side tracks, what joints or chains are used in the track, the ballasting of road, whether graveled, stone or dirt, the number and quality of buildings or other structures on 'railroad tracks,' the length of time iron or steel in track has been used and the length of time the road has been built. Fourth, a statement or schedule showing (1) the amount of capital stock authorized, and the number of shares into which such capital stock is divided; (2) the amount of capital stock paid up; (3) the market value, or if no market value, then the actual value of the shares of stock; (4) the total amounts of all indebtedness except for current expenses for operating the road; (5) the total listed valuation of all its tangible property in this state. Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the auditor of state."

Section 86 subjects the persons, companies, and corporations to a penalty for failure to file such reports.

Section 87 reads as follows: "The auditor of state shall annually, on the meeting of the state board of tax commissioners, lay before said board the statements and schedules herein required to be returned to him, and said board shall assess such property in the manner hereinafter provided."

Section 117 creates the state board of tax commissioners. It provides that, "immediately upon the taking effect of this Act, the governor shall appoint two skilled and competent persons, not more than one of whom shall be of the same political party, who together with the secretary of state, auditor of state and governor, the last three of whom shall *ex officio* be members, and the governor, chairman thereof, shall constitute and be a board to be denom-

inated the state board of tax commissioners, who shall perform the duties and have the powers hereinafter specified.

Section 118 requires the governor to commission the persons so appointed and that they shall each give bond, with sureties, in the sum of \$10,000, and section 119, fixes the term of office of such commission. Of the members first appointed one shall hold for two and the other for four years, and thereafter they shall hold their offices for four years.

Section 120 and some of the sections next following prescribe the duties and powers of the board. The ninth subdivision of section 120 authorizes the board "to make such rules and regulations as the board shall deem proper to effectually carry out the purposes for which the board is constituted and to make all necessary rules and regulations not inconsistent with law, as the board may deem necessary with respect to its own meetings and procedure."

Section 129 fixes the time and place of the meeting of such state board at the office of the auditor of state on the first Monday of August each year, "for the purpose of assessing railroad property and equalizing the assessment of real estate as provided in this Act," and this section further provides that, "the state board of tax commissioners is hereby given all the powers given to county boards of review."

Two of the principal reasons on which it is contended this Act is void are first, that it denies due process of law to railway corporations touching the assessment and valuation of their property, denominated by the Act "railroad track" and "rolling stock," and is therefore repugnant to and in conflict with section 1, article 14, of the Constitution of the United States, declaring: "Nor shall any state deprive any person of life, liberty, or property without due process of law," and section 12, article 1, of the Constitution of Indiana providing that "every man, for injury done to him in his person, property, or reputation shall have remedy by due course of law." Second, that the Act is void for the reason that it denies to railway companies the equal protection of the laws granted to all other persons against erroneous, unjust, and illegal assessments of the value of property upon which taxes are assessed to be levied, in that it grants to all persons the right or privilege to be heard before some tribunal authorized to correct errors or give appropriate relief concerning the correctness or equality of assessment or inequalities in the same, or mistakes of fact or law, or illegal conduct of those charged with the duty of making the same after the original assessments have been made and before they become final and conclusive, as a protection against burdens imposed by such mistakes and errors; but as to railway companies the Act utterly denies all protection whatever against the same boards against which others are protected, and therefore the Act is in conflict with that part of the 14th Amendment of the Constitution of the United States which provides, that no state "shall deny to any person within its jurisdiction the equal protection of the laws." U. S. Const. art. 14, § 1.

We will consider these two objections to the validity of the statute in the inverse order from 18 L. R. A.

which they are stated. It is contended that railway companies are persons within the meaning of these provisions of the Constitution, and this contention must be conceded to be correct.

To determine whether or not railway companies are denied equal protection of the laws given by the Act to all other persons, we must first interpret the law, and see what rights and privileges are given to them and to others, and what burdens are likewise imposed on each, and see wherein the rights given to, and burdens imposed upon others differ from those given to and imposed upon railway companies, for if no real discrepancy, within the meaning of the Constitution in fact exists between the rights of railway companies and other persons, then the objection that the railway companies are denied equal protection of the law must fail. The fact that a wrong was committed in the execution of the law or that an error was committed and not corrected is no objection to the validity of the law.

As to property other than that denominated by the law as "railroad track" and "rolling stock" including all property, real and personal, of individuals, the law provides for its assessment by assessors and it creates county boards of review in the several counties of the state, and by section 114, from which we have hereinbefore quoted, it is provided that such county boards "shall pass upon each valuation and may, on sufficient cause being shown, or on its own motion, correct the assessment or valuation of any property in such manner as will, in its judgment, make the valuation thereof just and equal." This section while it may not give to the county boards the right to change individual assessments of parties not legally before the board, evidently contemplates and gives the right to parties whose property has been wrongfully or erroneously assessed to voluntarily appear before such county board and show that the assessment made against any property is erroneous, and have it corrected, and it vests in such county boards the power on such showing being made, or on their own motion, to make corrections and change the valuation, and from a decision made against a party who is before such county boards it gives an appeal to the state board of tax commissioners, whose decision upon the question shall be final.

By section 129 of the Statute from which we have heretofore quoted, this same right to be heard given to all property owners and the power vested in the county boards of review to correct and change assessments by section 114, is engrafted into and made a part of the law governing the proceedings before the state board, as to valuations and assessments over which such state board has jurisdiction and control, for by section 129, *supra*, it is declared that the state board is hereby given all the powers given to county boards of review. The right of parties to be heard and the right of the county boards to have showings as to assessments and to correct and change assessments and valuations are a part of the powers vested in the county boards, and all their power is transferred and vested in the state board, so that if there is any power in the county boards to hear grievances and make corrections in re-

lation to property and assessment over which they have jurisdiction, then the state board has the same power in relation to property and assessment over which it has jurisdiction. Counsel claim and argue that this right of hearing and to make corrections exists before the county boards, and we think it does, but they insist that this right does not exist before the state board, but with this latter contention we cannot agree, for certainly by the words of the statute we have quoted the same power in this respect is vested in the state board as is vested in county boards in relation to property and assessments over which it has jurisdiction, and if the state board has jurisdiction over the property and assessments of railway companies denominated "railroad track" and "rolling stock," then railway companies have the right to be heard and the state board has the right to correct any assessment and valuation made in relation to such property. That the state board has such jurisdiction and right we think there can be no doubt. By section 87 it is made the duty of the state board to assess such property in the manner afterwards in the Act provided. Section 129 provides, among other things, for the meeting of the state board and fixes the time and place of meeting for the purpose, as stated, "of assessing railroad property."

By the 9th subdivision of section 120 it is made the duty of the state board to make such rules and regulations, not inconsistent with law, as it may deem necessary with respect to its meetings and procedure.

We think the interpretation we have placed upon the statute the fair and reasonable interpretation to be given to it.

It is well settled by the rules for the construction of statutes that in construing statutes the prime object is to ascertain and carry out the purpose and intent of the Legislature; that in construing statutes courts will look to all parts of the same statute, to other statutes and to the general principles of law, and assign such meaning to the words of the statute construed as will make them all effective. *Storrs v. Stevens*, 104 Ind. 46; *Crawfordsville & S. W. Turnp. Co. v. Fletcher*, 104 Ind. 97; *Hunt v. Lake Shore & M. S. R. Co.* 112 Ind. 69.

In *Lute v. Crawfordsville*, 109 Ind. 466, it is said: "If the Legislature manifests an intention to create a system for the government of any subject, it is the duty of the court to effectuate that intention by such a construction as will make the system consistent in all its parts and uniform in its operation."

Bishop on the Written Laws, states the rule of the court in relation to statutes to be that the courts will presume the Legislature intended its acts to be reasonable, constitutional, and just; and, when possible consistently with any fair rendering of the words, will so construe them as not to make them otherwise."

A statute which will admit of two interpretations, one valid and the other invalid, will receive the interpretations sustaining its validity. *Ferguson v. Stamford*, 60 Conn. 432.

In the case last cited the supreme court of Connecticut said: "A statute which will admit of two interpretations, one just and valid, the other unjust and invalid, will ordinarily receive the former. It is no part of the duty

of the court to be astute in order to invalidate a statute. It will rather strive to so interpret it as to sustain its validity and give effect to the intention of the Legislature." *Boisdere v. Citizens Bank*, 9 La. 506, 29 Am. Dec. 453; *Bloodgood v. Mohawk & H. R. Co.* 18 Wend. 9, 31 Am. Dec. 313; *Santo v. State*, 2 Iowa, 165, 63 Am. Dec. 487.

Any other construction than that which we have given to the words of section 129 of this Act, providing that, "the state board of tax commissioners is hereby given all the powers given to county boards of review," would render the words meaningless, and this is never to be done if it can be avoided. It is a well-recognized rule that the entire statute must be construed together and that effect must be given to every part of a statute, if it can be done without manifestly violating the intention of the Legislature. *Smith v. Randall*, 6 Cal. 47, 65 Am. Dec. 475; *Belleville & I. R. Co. v. Gregory*, 15 Ill. 20, 58 Am. Dec. 589; *Parkinson v. State*, 14 Md. 184, 74 Am. Dec. 522; *Montesquieu v. Heil*, 4 La. 51, 23 Am. Dec. 471; *Gales v. Salmon*, 35 Cal. 576, 95 Am. Dec. 189.

The question as to whether any of the other powers attempted to be conferred by section 114 on county boards are by section 129 vested in the state board, which would authorize the state board to serve notice and change or increase valuations and assessments on property valued and assessed by assessors or county boards, is in no way involved in this case, and hence we indicate no opinion in relation thereto.

The statute, when viewed in the light of the construction we have placed upon it and to which it is clearly entitled, provides for the assessment of property other than "railroad track" and "rolling stock" by assessors and county boards of review, and provides that persons aggrieved may appear before county boards of review and make a showing, and vests in such county boards the power, either on such showing, or on their own motion, to correct errors made in any assessment, and further provides for appeals from the decisions of the county boards by parties aggrieved and a hearing by the state board on appeal, which is final. In relation to property denominated "railroad track" and "rolling stock" it provides for the filing by railroad companies of a complete statement in relation to such property and its value, with the auditor of state, which shall by such auditor be laid before the state board. It further authorizes the state board and the members thereof to gain further information concerning such property and its value, and to assess it at its true cash value, and that in making such assessment such state board shall not be bound by any reports or estimates of value of railroad property, real estate or other property as returned to the county auditors or auditor of state, and that such state board shall have power to correct any assessment of "railroad track" or "rolling stock" on showing or on its own motion. The difference existing in relation to the assessments of the various classes of property under the law is that the assessment of some classes of property commences with the value being first fixed by the assessor, with authority

vested in the county board to hear the complaints of aggrieved parties and correct the assessment, and a right on the part of the property owner to take an appeal to the state board. In the case of railroad companies, as respects their property denominated "railroad track" and "rolling stock," the schedule is filed with the auditor of state and the assessment is made in the first instance by the state board and their right to make a showing and to have any errors made against them corrected is to the same board that made the assessment, and that board is vested with power to correct errors and change assessments and valuation of such property in such manner as will in their judgment make the valuation thereof just and equal. Acts 1891, §§ 114, pp. 246-248.

When stripped of all verbiage, the gist of the objection to the law on account of its not affording to railway companies, in the assessment of the property denominated "railroad tracks" and "rolling stock," equal protection of the law, is that the state board of tax commissioners, the highest body or board in the state, having jurisdiction or which is given authority to either assess or correct assessments of property, is given original jurisdiction in the assessment and valuation of this class of property, while it acquires jurisdiction in other classes of property by appeal. Under the Act, the assessment and valuation fixed upon property is not necessarily final until passed upon by the state board. If parties are content with an assessment upon their property by the assessor or county board, it may rest at that point, but an appeal may be taken to the state board.

It seems to us that the claim that the statute denies to railway companies the equal protection of the law is based on an erroneous construction of the statute, for with the view we take of the statute and the rights of railway companies under it, the claim that it denies equal protection has no substantial foundation to rest upon. Equal protection of the law does not require that all persons shall have the right of a hearing or trial before the same tribunal and in all the same tribunals, and have the same right of appeal from one to another. If it has any such interpretation, then the theory upon which our courts are constructed and given jurisdiction in various causes of action, the right of appeal given in some cases, in others not, and the jurisdiction of some courts made final in one class of cases and in others not, is all wrong and our system of jurisprudence must fall; but that such is not the theory or interpretation to be given to section 1, article 14, of the Constitution of the United States, is too clear to admit of argument or the citation of authority. In our system of jurisprudence courts of different grades and jurisdictions are established and an appeal is allowed from one to another only when the right of appeal is given by statutory enactment.

In *United States v. Cruikshank*, 92 U. S. 42, 28 L. ed. 688, *Chief Justice* Waite, in delivering the opinion in discussing the provisions of the 14th Amendment says that it "prohibits a state from depriving any person of life, liberty, or property without due process of law, but this adds nothing to the rights of one citi-

zen against another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society." Following this he says: "The 14th Amendment prohibits a state from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The quality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the states and it still remains there."

From this it would seem that this phrase in the amendment added but little to what had theretofore been assumed by the states and embodied in the words "due process of law," and in the case of *Caldwell v. Texas*, 187 U. S. 692, 84 L. ed. 816, *Chief Justice* Fuller, in delivering the opinion of the court, said: "By the 14th Amendment the powers of the states in dealing with crime within their borders are not limited, but no state can deprive particular persons or classes of persons of equal and impartial justice under the law. . . . And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

It must follow that a law which operates alike upon all persons under like circumstances is not obnoxious to the provision in the 14th Amendment to the United States Constitution, that no person shall be denied the equal protection of the laws, for such a law operates alike upon every person under like circumstances. If this were not true, then a large portion of the legislation of the various states universally held valid would be obnoxious to this provision of the Federal Constitution. Laws providing for the assessment of certain property for public improvements only affect such property as designated and persons owning no such property are unaffected by the law; but all who are in like circumstances may be affected by it, and therefore the law affects all equally, under like conditions and circumstances.

The statute in question provides a general system for taxation and assessment and valuation of property and the method of ascertaining the valuation and assessing each class and kind of property applies alike to all persons holding and owning the same class of property, and it applies alike to all persons under like circumstances and conditions, and we do not think it denies railway companies the equal protection of the laws, and it is not in conflict with this provision of the Federal Constitution.

Is the Act objectionable on the ground that it denies to railway companies due process of law? If this Act is repugnant to either the Constitution of this state or the Constitution of the United States for this reason, it would seem that almost any law for the assessment and taxation of property which stopped short of resorting to a court of justice and permitting an issue to be joined and tried as to the value

of the property, would be likewise objectionable. This Act requires railway companies to first file verified inventories of their property and of its value, to be submitted to the assessing board. Then it allows, after assessment, a correction in assessments and valuation on the showing of the company or on the motion of the board itself.

Judge Cooley in his work on Taxation, 2d ed. 432, says: "Very summary remedies have been allowed in every age and country for the collection by the government of its revenues. They have been considered a matter of state necessity. Without them it might be possible for a party which had been defeated in its efforts to obtain possession of the government in the constitutional way to cripple the government for the time being, and possibly break it up altogether. If the state might be deprived of the resources for continuing its existence and performing its regular functions until a revenue could be collected by the process provided for the enforcement of debts owing to individuals, it would be continually at the mercy of factions and discontented parties. Obviously this could not be tolerated."

At page 47 the author says: "This is a constitutional guaranty which has come to us from *Magna Charta*, which declares that no person shall be deprived of life, liberty, or property except by the judgment of his peers or the law of the land. The alternative provisions of this guaranty have sometimes been supposed to mean the same thing, and the guaranty itself to entitle every person to have any demand made upon him submitted to the determination of a jury of the vicinage. Such a construction applied in tax cases would work a thorough and radical change in the principles on which taxation is now supposed to rest.

Such a construction of a clause agreed upon as an important provision in a charter of government can never have been intended. The words, the 'law of the land' and 'due process of law' mean one and the same thing, and mean that one shall hold his life, liberty, and property under the protection of the general rules which govern society, and therefore the learned author from which we have quoted on page 48, in speaking of words 'the law of the land,' well says: 'The clause recited from *Magna Charta* does not imply the necessity for judicial action in every case in which the property of the citizen may be taken for the public use. On the contrary, a legislative Act for that purpose, when clearly within the limits of legislative authority, is of itself the law of the land.'

This is true not only of an Act levying taxes, but in everything which pertains to the assessment and collection of taxes.

Judge Cooley in his work recognizes the right of a party to a hearing before his rights are finally precluded, and it is only necessary to determine what constitutes a hearing, so as that the individual will not be deprived of his property without due process of law, or what is the character of the hearing contemplated in the assessment and collection of taxes so as to constitute due process of law. Certainly it is not a judicial procedure, a trial by jury, but a summary hearing that is contemplated in such proceedings. Judge Cooley, p. 747, Cooley on 18 L. R. A.

Taxation, *supra*, says that the assessor while he still has the list or roll in his hands uncompleted may correct any assessment on his own motion or on application when satisfied that it is either wholly or in part illegal and that no statute could be necessary to give him such power. By this rule the state board who assess "railroad track" and "rolling stock" while in session and having control of the assessment could remit any illegal or unjust assessment made against any railway company, in the absence of any express statutory authority giving them the right to do so, but he says taxing officers and boards of review, in the absence of special authority, are to accept the assessment as legal and just, and levy and collect the taxes accordingly. The taxing officers and boards are such as have no power to assess, and he states the remedy usually given by statute for the correction of errors is by review, either by the assessor himself, or in some form of appellate proceedings. The rule as recognized by Dr. Cooley is that if the individual have the right of a hearing either before the assessor himself or some reviewing board having the right to correct the assessment, the requirement of the Constitution is complied with, and the individual is not denied due process of law.

In *Hannibal & St. J. R. Co. v. State Board of Equalization*, 64 Mo. 224, it was held that the state board having power to assess railway property, the assessment would be valid even though their record showed that the board heard no evidence. In the same case it was held that, under the laws of that state every person had an appeal from the assessment of his property for taxation, and that railroad companies should have the same right, and that great injustice might be done by the board, for which they would be remediless until the Legislature had provided for an appeal in their favor, and that the courts cannot interpose between the board and the companies.

In *Porter v. Rockford, R. I. & St. L. R. Co.* 76 Ill. 561, speaking of the assessment of the property of railway companies by the state board of equalization under a law very similar to the statute under consideration, the court says: "Whether property is assessed by local assessors or by the state board of equalization, it is, in the language of the Constitution, assessed by some person or persons elected or appointed in the manner the General Assembly has directed, and not otherwise. No attempt is made by this clause of the Constitution to limit the number of those who shall be elected or appointed for this purpose, or to prohibit or in any manner to prescribe how the value of property shall be ascertained by them. Admitting that the chief end had in view was to secure uniformity in valuation, it would seem that the present system by which some property is assessed by local assessors and other property is assessed by the board of equalization, would tend as much toward accomplishing that result as would a system by which all the property in the state should be assessed in the town in which it is located, by the local assessors. . . . We cannot believe that a board of equalization, having the assessed values of all other taxable property in the state before them for the purpose of equalization,

has less facility for fixing a fair proportionate value upon corporate property than the local assessors have.

"There is, moreover, an almost insuperable difficulty which must attend all attempts by local assessors to assess the capital stock, franchise, roadway, and rolling stock of most railroad companies. Such roads are usually located through several counties. The costs of construction in a particular town or county affords no criterion of the value of that portion of the road, for every mile of the road is equally indispensable to its existence as a whole, and contributes proportionally to its principal earnings. Local improvements may indeed vary, and they are required to be assessed by the local assessors; but the road and its equipments constitute a single entire property. In determining the value of such property, the question is neither one of original cost nor of the intrinsic value of the various items of which the road and its equipment are composed, taken separately, but what is it worth with all its capabilities and facilities as a railroad. The franchise extends to the entire corporate property, and it is not possible that it can be divided. It must, if assessed at all, be assessed as an entirety, and this, as we have already shown, may be in connection with the property to which it is attached."

Section 1, art. 10, of the Constitution of this state vests the power of taxation in the General Assembly. It provides that "the General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting," etc.

The first clause of this section is certainly complied with when the same basis of assessment is fixed for all property and the same rate of taxation is fixed within the district subject to taxation; that is to say there is uniformity and equality of assessment and taxation when all the property is to be assessed at its true cash value, and the same rate is fixed on all property subject to assessment for the tax. If it be a tax for state purposes the rate must be the same throughout the state; if for county purposes or township purposes the same rule would apply. The law under consideration is not subject to objection on account of inequality in rate of assessment or taxation, for it provides that all property shall be assessed at its true cash value and the rates are the same within the respective taxing districts and no objection is urged to the law on this account. *Gilson v. Rush County Comrs.* 128 Ind. 65, 11 L. R. A. 835.

As to the latter clause of the section of the Constitution providing that the General Assembly "shall prescribe such regulations as shall secure a just valuation for taxation," it leaves it to the Legislature to prescribe the mode by which the valuation of all property shall be ascertained, enjoining upon them the one obligation to provide such regulations as shall secure a just valuation, leaving to the Legislature the mode of ascertaining the value. There is certainly no reason why the Legislature may not, under the Constitution of the state, provide for fixing the value of "railroad track" and "rolling stock" of railway com-

panies by the state board of tax commissioners, while other property is assessed by local boards. The value is ascertained according to the regulations prescribed by the Legislature, and we are unable to see any reason why a valuation secured in that way should not be a just valuation. The Legislature by the Act in question has prescribed regulations for the purpose of securing the valuation of all property for taxation. The method prescribed would seem to have in view the fixing of the value on property by persons and boards best calculated to know the value of the property required to be valued by them, and with a view of arriving at a just and equal valuation of all the property within the state subject to taxation, providing county boards of review to correct errors of local assessors, and then a state board to fix the value of the property of railroad companies extending through the state, and to equalize the valuations and assessments of property throughout the state. That the method prescribed in the Act is one calculated to secure a just and equal valuation and assessment of property throughout the state, cannot be reasonably questioned, and is one which the Legislature had the right to adopt. *Lowell v. Middlesex County Comrs.* 152 Mass. 380, 9 L. R. A. 356; *St. Louis, V. & T. H. R. Co. v. Surratt*, 88 Ill. 535; *Republic L. Ins. Co. v. Pollak*, 75 Ill. 298; *Case v. Dean*, 16 Mich. 12; *State Railroad Tax Cases*, 92 U. S. 575, 28 L. ed. 668.

No notice other than that contained in the law itself is necessary to the validity of the assessment. The railroad companies are bound by the law and must take notice of its provisions. They submit a schedule to the state board through the auditor of state, for the very purpose of having the valuation fixed upon the property and the assessment thereof by such board. They, through their written schedule and statement of values are heard by the board. The board has under its control the assessment roll of railroad companies' property, and by the terms of the statute the board is given power to correct any errors in assessments and to change valuations on showing or on its own motion. Railway companies have the same right of a hearing before the state board that any other property owner has before the county board for the same powers to correct errors in assessments of property over which the respective boards have jurisdiction which are given to the county boards by the Act are given to the state board. The state board is required to make rules governing their meetings and procedure.

In *Hyland v. Brazil Block Coal Co.*, 128 Ind. 335, it is held that when the time for the meeting of a county board of equalization is fixed by law and the duties of the board also fixed by law, and notice of the time of meeting of the county board as required by law has been given, and when the law required that corporations should make out and deliver to the assessor schedules of their property, to be delivered to such county board, and the law made it the duty of such board to value and assess the property of such corporations, that no notice to the individual corporation was necessary to make the appraisal and assessment of the property of the corporation valid, the

law having fixed the time of the meeting of board, and required corporations to file schedules with the assessor to be presented to the board, and made it the duty of the board to appraise and assess the same. Corporations were bound to take notice of the time of the meeting of the board that these schedules would be presented to the board and such board would appraise and assess the same as required by the law, and no other notice is necessary. There can be no difference in this respect as to the validity of a law, or the rights of the parties under it, between a statute which fixed the time for the meeting of the board and one which fixed the time and also required the auditor or some other officer to give notice of the time of the meeting in advance, for if the law fixed the time of the meeting, all persons are bound to take notice that it will meet, and when it requires a party to file a schedule of his property, and makes it the duty of the board to appraise and assess it, he is likewise bound to take notice of such facts also, and if he desires to be heard in relation to such matters as the board are charged with the duty of performing, he must appear and make his wishes known in relation thereto. As well said in *Hyland v. Brazil Block Coal Co.*, *supra*: "The case is entirely unlike that of an individual taxpayer, for he cannot know that the board will take any action upon his list, whereas the corporation knows, as matter of law, that the board will act upon its statement, since that is the principal purpose for which the sworn statement is required. It is manifest that neither the principle decided in *Kuntz v. Sumption*, 117 Ind. 1, 2 L. R. A. 655, nor the line of reasoning there pursued, is relevant to the question here presented."

The statute under consideration fixes the time for the meeting of the state board. It requires railway companies to file schedules and inventories with the auditor of state, to be presented by him to the state board, and makes it the duty of the state board to appraise and assess the property denominated by the Act as "railroad track" and "rolling stock" belonging to railroad companies at its true cash value, and further provides that the board shall not be bound by estimates of the value of such property as returned to the auditor of state. Of all of these provisions the railway companies are bound to take notice, and if they desire to make any further showing, it is the duty of such companies to appear before the board and make their showing.

In *Cooley on Taxation*, pp. 364, 365, it is said: "It is not customary to provide that the taxpayer shall be heard before the assessment is made, except when a list is called for from him; but a hearing is given afterwards, either before the assessors themselves or before some court or board of review."

That is just what is provided for by the Act of 1891. The companies are required by the law to submit a schedule through the auditor of state to the state board, and the Act authorizes a hearing before the state board. As regards notice of the meeting of the board before a hearing may be had, the author in the same section, continuing, says: "And of the meeting of that court or board the taxpayer must in some manner be informed, either by

personal notice or by some general notice which is reasonably certain to reach him, or, which is equivalent, by some general law which fixes the time and place of meeting, and of which he must take notice. The last is a common method of bringing the assessment to the notice of the taxpayer, and it is perhaps the best of all, because it comes to be generally understood and is remembered."

This principle is common in its application. When a party brings an action in court the defendant is notified to appear on a certain day of a particular term of court. If the term at which the summons is returnable, or for which the notice is given, terminates without a disposition of the cause, the cause is still pending in court, to be heard at a subsequent term of court. All parties are bound to take notice of the time fixed by the law for the holding of subsequent terms of court. The matter of appraisal and assessment of the property of railroad companies is pending before the state board, and parties are bound to take notice of the time fixed by law for the meeting of the board, and is in harmony with the theory that all persons are presumed to know the law.

Deady, on Taxation, vol. 1, pp. 599, 600, says: "All parties are bound to take notice of the day of the meeting of the commissioners when the day is appointed by law, and under the general notice parties must attend the meetings as they would the sessions of a court until their assessment is passed upon, and when once this is done no change can afterwards be made without special notice."

The whole body of taxpayers are not required to attend a sitting of a county or state board of review, for the value is fixed upon most by the assessor, but such as are required to file with such boards, or either of them, a schedule of property, which property so scheduled is to be appraised and assessed by such board. As to such parties the matter of appraisal and assessment is pending before such board, the knowledge of which is conveyed to them by the law itself, and if they desire to be heard further, or to have errors corrected, they must appear before such board. *Smith v. Rude Bros. Mfg. Co.* (Ind.) 30 N. E. Rep. 947.

The conclusion we reach is that the statute under consideration is a valid enactment, and not in conflict with any provisions of the Constitution, either of this state or the United States, and the state board of tax commissioners had full power to assess the property of railway companies denominated "railroad track" and "rolling stock;" that the railway companies were properly before that board, and were entitled to a hearing, and were not denied due process of law or equal protection of the laws, within the meaning of the Constitution of this state or the United States; and this conclusion we think is in harmony with the almost universal line of authorities, and we deem it unnecessary to take up and discuss in detail the numerous authorities cited in this case, as it would extend the decision to an immeasurable length, and we content ourselves by adhering to what we regard the correct principles deducible from the authorities.

The state board having fixed the valuation

and assessed the property, their action in this behalf is final and cannot be avoided or set aside, except for fraud on the part of the state board of tax commissioners, which would render the assessment void. Fraud vitiates even the most solemn judicial proceedings, and would likewise vitiate the proceedings of any tribunal created for the purpose of determining the rights of parties, but we do not think it can be seriously contended that the proceedings in this case seek to attack or avoid the valuation or assessment made by the state board of appellant's property on the ground that the state board was guilty of fraud, or acted corruptly in the discharge of its duties in the appraisal and assessment of the property of railway companies, and if it were so contended, the averments of the complaint fall far short of being sufficient to present such a question.

What we have said disposes of the major portions of the questions presented in the case. The court having no power to review the proceedings, the action of the state board being final, no right of action existed to set it aside except for fraud, and it not being attacked on that ground, no evidence was admissible, for it is a well-settled rule that the courts have no power to give any relief against erroneous assessments of such boards except they are given such power by statute, and no such power is given in this state. *Cooley, Taxo*, p. 748, and authorities there cited; *Bass v. Fort Wayne*, 121 Ind. 889; *Sims v. Hines*, 121 Ind. 534; *McCollum v. Uhl*, 128 Ind. 304; *Center & W. G. R. Co. v. Black*, 83 Ind. 468.

The court cannot inquire what evidence the board made its assessment upon and determine as to whether such board arrived at just valuation or not. The board has passed upon that question, and with its adjudication the matter ends.

The decision of the state board being final, the record of that board required to be kept by the law, section 121 of the Act 1891, is conclusive.

It is contended by counsel for appellant that the law authorizes, and the state board did import values to the "railroad track" and "rolling stock" taxable in Indiana values belonging wholly to corporate property situate in other states and taxable in other states, thus imposing double taxation on railway companies owning or operating interstate lines of railways. This is based upon the provision of the statute, section 80 of the Act providing that the "rolling stock" shall be listed and taxed in the several counties, etc., in proportion that the main track used or operated in such county, etc., bears to the length of the main track used or operated by such person, and the schedules required to be filed by sections 83 and 85. These schedules are required to be filed for the purpose of giving a description to the property and as a source of information as to value, but, as expressly provided by the Act, such values are not conclusive. The board may act on other information and the personal knowledge of values, and the Act expressly provides that the assessment shall be made of this class of property at its true cash value, the same as all other property.

Section 79 provides that railroad "track" 18 L. R. A

shall be listed and taxed in counties, etc., in proportion that the length of main track in such county, etc., bears to whole length of the road in the state. It is so apparent and we think so well settled by authority that the value of a railroad or "railroad track" and "rolling stock" is so completely dependent on its length of line, connections, beginning, and terminus and the character of the country through which it runs in relation to its products and the character and extent of its population so as that it cannot be separated from these and many other surroundings and elements of value which necessarily must enter into its appraisal and assessment at its fair cash value for taxation, as that it can hardly be a controverted proposition.

It is evident that no fair or equitable value could be placed on a "railroad track" by severing it into parts extending from one township or county line to another, or even from one state line to another, and estimating only the portion lying within the borders of a single township, county, or state independently of its connection beyond such lines, or by considering the costs of constructing any such division. Nor could the value of an engine or car or other property coming within the class of property denominated in the Act under consideration as rolling stock, be determined by considering the purpose for which it was used in any state or subdivision of a state, or the costs of construction of the same, and to limit the right of the state to tax "rolling stock" which might at the date of assessment be found within the state or subdivision of the state, would be in effect to release such property from taxation.

A railroad is valuable as a whole, and every section of the line going to make up the whole is essential. The portion of a track crossing unclaimed land of practically no value is as valuable as that portion which runs through a populous city, in so far as its purpose and use is that of an interstate line, for without either the connection would be broken and its use destroyed for that purpose. The value of such portion is increased by reason of its connection.

In the *State Railroad Tax Cases*, 93 U. S. 575, 23 L. ed. 663, the court says: "This court has expressly held, in two cases, where the road of a corporation ran through different states, that the tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise and the length of the road within each state, as the basis of taxation."

In speaking of the rate of taxation, the court in the same case says: "But the contention is that the rule of treating the road, its rolling stock and franchises as a unit, and assessing it as a whole, on which each municipality levies its taxes according to the length of the road within its limits violates the principle of this section. We have already discussed this question and are of the opinion that taxes assessed by that rule on the railroad property by the municipality are uniform where the rate of taxation is the same on the assessment thus ascertained that it is on other property."

The court in the case last cited expressly recognizes the legality of an assessment on

rolling stock valued in accordance with the rule of treating the road as a unit, and taking such a proportion of its value as the length of the road lying within the state bears to the whole road, for if an appraisement and assessment of a railroad including in such valuation its rolling stock and franchises can be assessed, certainly its rolling stock can be valued and assessed separately in the same manner for values would not be imported in the one method more than the other. The court in the same case discusses and sustains the same method of assessing the railroad track, and says: It may well be doubted whether any better mode of determining the value has been devised.

The decision in *Western U. Teleg. Co. v. Massachusetts*, 125 U. S. 580, 81 L. ed. 790, is in harmony with this theory.

Presumptively the line of railroad track and rolling stock is of no greater value per mile beyond the borders of the state than within the borders of the state and we do not think the law necessarily requires a construction by which, if the line of the railroad track or rolling stock situate outside the state was of greater value per mile than that inside the state that the board should by equalizing the value import values and tax property situate and taxable without the limits of the state and taxable in another state. When the whole Act is read together it purports to be only an Act to tax such property as is subject to taxation within the state. Section 80 declares that the movable property belonging to a railroad company shall be held to be personal property and denominated personal property; while section 3 provides that "all property within the jurisdiction of this state not expressly exempted, shall be subject to taxation." Section 4 provides that for the purpose of taxation real property shall include all lands within the state, etc. Personal property shall include all goods and chattels within the state, all ships, boats, whether at home or abroad, and their appurtenances; all goods, chattels and effects belonging to inhabitants of this state, situate without this state, except the property actually and permanently invested in business in another state.

The record of the state board which, as we have said, is conclusive, affirmatively shows that the valuation of "railroad track" and rolling stock was fixed upon such property within this state. The record affirmatively shows that, "the state board of tax commissioners having had under consideration the assessment of the several railroads in the state, the following valuation per mile of the various roads within this state:" then follows the schedule and valuation. Following such schedules and valuation it is stated that "making liberal allowance for all proper deductions" they "fix the values" as hereinbefore set forth.

Objection is made to a recital in the record of the board which it is contended shows affirmatively that the board fixed the value of the roads upon a wrong basis. We think there is nothing in this objection. It is a mere statement that "in arriving at the basis for the estimate of said values the board considered the costs of the construction and the equipment of said roads, the market value of the

stocks and bonds and the gross and net earnings of each of said roads, and all other matters appertaining thereto that would assist the board in arriving at a true cash value of the same." They considered all matters appertaining to the road that would assist them in arriving at a true cash value. The things they specifically enumerate were proper to consider. The board was not limited to the schedules of the railway companies and rates fixed by them, but had the right to such other information which would enable them to arrive at a just valuation. But this court cannot consider or review the question as to what evidence the board acted upon in arriving at the value assessed.

It is further urged that the method of assessment taxes interstate commerce, but we do not think so. Taxing the property of a corporation engaged in interstate commerce is not taxing interstate commerce; but what we have heretofore said disposes of this question, for in holding the method by which the valuation and assessments were made valid relieves it from this objection.

As it cannot be and is not contended that the property is not subject to taxation, but only contended that it cannot be assessed in the manner prescribed in this Act, which it is claimed imports values into this state from other states for taxation, thereby imposing unauthorized burdens on interstate commerce.

It is finally contended that the Act creating the state board and defining its powers and duties is unconstitutional and void, for the reasons in brief that judicial powers are granted to such board, and because two state executive and administrative officers are created and made continuously appointed by the governor and not elected by the people; that executive and administrative officers cannot exercise judicial powers, and judicial officers must by the Constitution be elected. The members of the state board are not judicial officers, nor are judicial powers conferred upon them by the Act under consideration, within the meaning of the Constitution. *Langenberg v. Decker* (Ind.) 16 L. R. A. 108.

It is very common, if not an almost universal custom in this and other states, to make, by statutory enactment, certain of the state officers *ex officio* members of the state boards of equalization. Such we think has been the almost if not the entirely unbroken practice in this state since the adoption of the present Constitution, and if, as held in *Langenberg v. Decker*, *supra*, they are not vested with such judicial powers as to constitute them a court, but only exercised such quasi-judicial functions as does every public officer vested with discretionary power, they are certainly eligible to become members of such a board. Nor do we think the other members of the board whom the law provides shall be appointed by the governor are administrative state officers charged with such duties as that by the Constitution they are required to be elected by the people. They are not administrative officers in charge of any separate department of the state government. The same rule must govern in relation to their selection as the selection of members of the local and county boards of equalization, and any persons or boards for

the appraisement and assessment of values and benefits and injuries to property, and the practice of appointing such persons and members of boards has always existed. If they may be appointed for one sitting of a board, or to make appraisement of specific property, the value of which is to be ascertained, then certainly the law may authorize their appointment for a longer term, and that such appoint-

ment may be authorized by statute we have no doubt and this conclusion is in harmony with the decisions of this court in *State v. Gorby*, 122 Ind. 17, and *State v. Hyde*, 129 Ind. 296, 18 L. R. A. 79.

We have considered and decided all of the questions material to the determination of the cause. We find no error in the record.

Judgment affirmed.

CALIFORNIA SUPREME COURT.

Mark PATTY, *Resp't.*,

v.
E. P. COLGAN, State Comptroller, *Appt.*

(.....Cal.....)

A legislative appropriation for the benefit of sufferers from a flood is in violation of Const., art. 4, § 81, prohibiting the gift of any public money or thing of value to any individual.

(January 23, 1898.)

A PPEAL by defendant from a judgment of the Superior Court for San Diego County in favor of plaintiff in a proceeding for a writ of mandamus to compel defendant to draw a warrant upon the state treasurer in favor of the board of supervisors of San Diego County for the benefit of sufferers from the Tia Juana floods. *Reversed.*

The facts are stated in the opinion.

Messrs. Barham & Bolton, for appellant:

To raise the money sought to be appropriated under the provisions of this Act, there must be a tax levied upon the people, and taxation can only be for a public use.

Cal. Const. art. 4, §§ 80, 82.

The Legislature shall have no power to pay, or authorize the payment of, any claim hereafter created against the state, under agreement or contract made, without express authority of law.

The provisions of our Constitution are mandatory and prohibitory.

Whether the statute is constitutional or not is always a question of power.

Cooley, Const. Lim. p. 186.

Nothing in the distribution of powers places either department above the law. Where discretion in terms is vested or implied from the nature of the duties to be performed, they are independent of each other, but in no other case.

People v. Brooks, 16 Cal. 89.

There is no pretense upon the face of the Act, or otherwise, that the Tia Juana sufferers had any claim against the state.

To lay with one hand the power of the government on the property of the citizens, and with the other to bestow it upon favored individuals, to aid private enterprises, and build up interests, is none the less a robbery because

it is done under the forms of law and is called taxation.

Citizens Sav. & Loan Assn. of Cleveland v. Topeka, 87 U. S. 20 Wall. 664, 22 L. ed. 461.

It is not competent for the Legislature to authorize the levying of a public tax or the taking of private property for the encouragement of a purely private industry.

Consolidated Channel Co. v. Central Pac. R. Co. 51 Cal. 271; *People v. Parks*, 58 Cal. 639;

Re Townsend, 89 N. Y. 174; *Re Deansville Cemetery Assn.* 66 N. Y. 571, 23 Am. Rep. 86;

Allen v. Jay, 16 Me. 124, 11 Am. Rep. 185.

A private use cannot be transformed into a public one by a mere legislative declaration.

Logan v. Stogdale, 8 L. R. A. 58, 123 Ind. 372.

The expenditure authorized by this statute being for a private and not a public object, in a legal sense, it exceeds the constitutional power of the Legislature, and the city cannot lawfully issue the bonds for the purposes of the Act.

Lowell v. Boston, 111 Mass. 461, 15 Am. Rep. 89.

The right to take, which depends upon whether it is to be taken for a public or private use, is a judicial question.

Pittsburg, W. & K. R. Co. v. Benwood Iron Works, 2 L. R. A. 680, 31 W. Va. 710.

If the Legislature had the power to make the appropriation for the purposes named in this Act, then it should have determined the amount to which every sufferer was entitled, and should not have delegated that power to the board of supervisors.

Cooley, Const. Lim. p. 117.

Mr. Johnston Jones for respondent.

Paterson, J., delivered the opinion of the court:

This is an appeal by Hon. E. P. Colgan, state comptroller, from a judgment of the superior court of San Diego county, directing the issuance of a peremptory writ of mandate requiring him to draw a warrant in favor of the board of supervisors of San Diego county in the sum of \$5,000, for the benefit of the sufferers from the Tia Juana floods of February 22, 1891. The application of the plaintiff and the judgment of the court were based upon the provisions of an

NOTE.—As to the validity of appropriations of public money as dependent upon the public character of the use, see *Daggett v. Colgan*, 14 L. R. A. 474, and note, 33 Cal. 58; also the later cases, *Bourn* 18 L. R. A.

v. Hart, 15 L. R. A. 431, 33 Cal. 321; *Cutting v. Taylor* (S. Dak.) 15 L. R. A. 691; *Wasson v. Wayne County Comrs.* (Ohio) 17 L. R. A. 796; *Mute & Blind Inst. for Education v. Henderson* (Colo.) 18 L. R. A. 908.

See also 21 L. R. A. 474; 25 L. R. A. 770; 28 L. R. A. 187; 32 L. R. A. 344; 33 L. R. A. 752; 45 L. R. A. 788; 46 L. R. A. 381.

Act entitled "An Act to appropriate the sum of five thousand dollars for the benefit of the sufferers from the Tia Juana floods of the twenty-second of February, 1891, and to provide for the payment to the board of supervisors of San Diego county and its distribution to the sufferers." Section 1 of this Act reads as follows: "Section 1. There is appropriated the sum of five thousand dollars out of any moneys in the general fund not otherwise appropriated, to be paid to the board of supervisors of San Diego county, to be by said board held in trust and paid out for the benefit of the sufferers from the Tia Juana floods, occurring on the twenty-second day of February, eighteen hundred and ninety-one, in San Diego county." The Act is clearly in violation of the provisions of section 31, art. 4, of the Constitution, which

provides that the Legislature shall have no power "to make any gift, or authorize the making of any gift, of any public money or thing of value, to any individual." The object of this provision is well stated in *Stevenson v. Colgan*, 91 Cal. 651, 14 L. R. A. 459. An Act directing the comptroller to draw his warrant in favor of an individual cannot be impeached by evidence *aliunde*. *Rankin v. Colgan*, 92 Cal. 606. But here the facts which show the invalidity of the appropriation appear upon the face of the Act, and the application ought to have been denied. *Bourn v. Hart*, 93 Cal. 321, 15 L. R. A. 431.

The judgment is reversed, with directions to the court below to dismiss the proceeding, and enter judgment in favor of defendant for costs.

NEW YORK COURT OF APPEALS.

Ophelia J. CUTHBERT, *Resp't.*,

v.

Cordella D. CHAUVET *et al.*, *Respts.*,
and
NEW YORK LIFE INSURANCE &
TRUST CO., *Appt.*

(.....N. Y.....)

1. No court possesses the power to compel a trustee to consent to a destruction of a real estate trust which the

statutes prohibit him from doing any act to contravene.

2. Express trusts of realty which are valid in their creation are made indestructible by the New York Statute of Uses and Trusts, §§ 63, 65, 4 Rev. Stat. 8th ed. 2433, 2439, which declare that the beneficiary cannot assign or in any manner dispose of his interest and that every sale, conveyance, or other act of the trustee in contravention of his trust shall be absolutely void.

3. A trustee's offer of judgment or fail-

NOTE.—Power of court to dissolve trust.

The above case is clearly the most important one on the subject of the power of the court to dissolve a trust that has ever been decided.

In the language of the opinion "we have failed to find a case where it was ever attempted, as it is here, to strangle a trust in its infancy by judicial coercion." The cases most nearly approaching this are earlier cases in the same state referred to in the opinion.

Of these *Douglas v. Cruger*, 80 N. Y. 12, decided that an order of court could not make valid a conveyance by a trustee to a woman during her husband's life where the trust was for the payment to her of the rents and profits during the life of the husband. The declaration of the court was that "the supreme court has not the power to destroy a valid trust."

In *Cruger v. Jones*, 18 Barb. 467, it was held that an order of court could not make valid a mortgage of the trust estate by a trustee under a trust to receive and pay over rents and profits.

Somewhat approaching these cases but involving the additional element of fraud or imposition upon one of the beneficiaries was the decision in *Walker v. Sharpe*, 68 N. C. 303, in which an application for an order that a trustee should pay over the whole trust fund to those entitled to it after the death of their mother, who was entitled to the income during her life, was refused although she united in it and the trustee did not oppose it. The court characterized it as an "unblushing attempt on the part of the children and sons-in-law of a weak old woman to get the sanction of the court to a surrender of all her estate and her only means of maintenance."

General language used by the courts in respect to their power over trustees must of course be con-

strued with reference to the question before the court. Thus in *Brooke v. Mostyn*, 3 DeG. J. & S. 373, it was said that in the exercise of its jurisdiction over trustees "the court may in general order the trustees to deal with the trust property in whatever mode it may consider to be for the benefit of the cestui que trust who are infants or under disabilities." But this was not a case in which the dissolution of a trust was attempted as in the main case, but merely a case of an attempt to impeach on the ground of fraud a compromise of a suit for a legacy made under order of court. The decree of the compromise was set aside but this decision was reversed on the facts in *Mostyn v. Brooke*, L. R. 4 Eng. & Ir. App. 304.

Cases in which a trust has been terminated by order of the court have all been those in which the purpose of the trust had been already accomplished or could not be accomplished.

In *Hawthorn v. Root*; 6 Bush, 501, where the legal title to land was conveyed to a party as trustee to be conveyed to others and this could not be done because the trustee was a minor, the conveyance was set aside although the minor objected. The reason of this is clear as the retention of title by the trustee would have been a palpable fraud.

So where a trust under a will failed by a contingency not provided for and the entire beneficial interest had vested in a certain person, the court held that it had power to order payment to be made directly to the person entitled. *Taylor v. Huber*, 13 Ohio St. 238.

Where the whole objects and purposes of a trust have been accomplished, and the interests created under it have all vested, the court, with the consent of the trustee and of the persons interested, may decree a determination of the trust. *Smith v. Harrington*, 4 Allen, 560; *Bowditch v. Andrew*, 8

ure to answer in a suit attacking the trust is within the prohibition of a statute declaring that any act in contravention of the trust shall be void.

(January 17, 1893.)

APPEAL by the New York Life Insurance & Trust Company as trustee under the will of Francis W. Lasak, deceased, from an order of the General Term of the Supreme Court, Second Department, affirming an order of a Special Term for Westchester County directing defendant to join in a compromise which had been effected between the parties to a partition suit in which the validity of the Lasak will was attacked. *Reversed.*

Francis W. Lasak died seised of a quantity of real estate leaving a will by which he gave a portion of it to the New York Life Insurance & Trust Company in trust for certain specified objects including certain charities. The partially disinherited heirs instituted a number of suits for the purpose of defeating the will. Finally the adults interested in the estate reached a compromise and this action having been instituted for a partition of certain of the real estate, Victoria A. McKenzie, one of the interested parties, filed a petition by which she showed to the court:

That the said action was brought and is now pending for the partition of real estate in the city of New York and in the county of Westchester, belonging to the estate of Francis W. Lasak, late of Westchester county. That the

said Francis W. Lasak left a last will and testament, and which said will was duly admitted to probate before the surrogate of the county of Westchester, and on appeal to the court of appeals the decree of said probate was affirmed. That various litigations are now pending with reference to the validity of the said will as a will of real estate—there being so pending ten actions of ejectment, the present action for partition and an action for the establishment of the will. That in one of the actions of ejectment, tried in the county of Westchester, the trial occupied eight days and terminated in a disagreement of the jury.

That all the parties interested in the said estate as devisees or heirs-at-law have agreed, so far as they could so do, to compromise the said litigation and to allow the said will to stand as a will of personal estate, but to be declared void as a will of real estate, and for the purpose of carrying out the said settlement and compromise, have executed an agreement. That the New York Life Insurance & Trust Company, who by the said will was appointed trustee of the trusts therein contained, and among others, trustee of the trust under which your petitioner is the beneficiary during her life, has declined to become a party to the said compromise or to any compromise without the leave and direction of the court first had and obtained, and also for the reason that certain provisions of the said compromise agreement require modification and alteration, as follows:

Allen, 341; Inches v. Hill, 106 Mass. 577; *Re Stone*, 133 Mass. 470; *Nichols v. Rogers*, 133 Mass. 146; *Sears v. Choate*, 146 Mass. 305; *Whall v. Converse*, 146 Mass. 345.

Thus where executors are to hold any residue in trust for the relief of heirs "if they at any time shall need pecuniary assistance," and the entire beneficial interest has vested in the heirs and they all desire it, and the executors consent, the trust may be annulled and the property distributed among them on their executing releases. *Smith v. Harrington*, 4 Allen, 566.

And where a trust to pay a widow such portions of income of the property as may seem to her and the trustee necessary for the maintenance of her family and the support and education of children, was held to have become inoperative by the death of the children, the breaking up of the family and the widow's ceasing to keep house, a decree was made terminating the trust and distributing the property to those equitably entitled thereto. *Bowditch v. Andrew*, *supra*.

And a trust under a marriage settlement to secure income to the wife for her life and then to the husband with remainder to their children in fee was terminated by decree of the court as to one half of the estate the whole interest in which had fully vested in one of the children after the death of the wife and a transfer by the father of his interest which had become vested in that child who thereupon became entitled to the whole of the income for the father's life and the remainder in one half of the property. *Inches v. Hill*, 106 Mass. 575.

And under a trust for two daughters of the trustee which expressly provided that he should convey "as they or the survivor and myself (the trustee) may deem expedient," after the death of one daughter followed by his death the other daughter was held entitled to have the trust terminated. *Re Stone*, *supra*.

But under a trust to pay income to a widow during her life and after her death to distribute among

nephews and nieces "then surviving" the share of any deceased to go to his or her issue, the nephews and nieces cannot have a termination of a trust during her lifetime as they do not represent all the interests. *Brandenburg v. Thorndike*, 133 Mass. 102.

The absolute owner of a fund and of the income held under a simple trust to pay it over to him which is alienable by him and subject to his creditors can have the trust terminated. *Sears v. Choate*, *supra*.

The fact that a trustee objects to the termination of the trust will not prevent its dissolution where persons entitled to the whole beneficial interest desire it, at least where the founder of the trust has not shown an intention to continue it for the trustee's benefit. *Slater v. Hurlbut*, 146 Mass. 306.

Where a trustee, whose right is at most a dry trust, brings an action for a bank deposit, the admission of the beneficiary's administrator as a claimant makes any special proceeding to terminate the trust unnecessary as the termination is a matter of strict legal right. *Underwood v. Boston Five Cent Sav. Bank*, 141 Mass. 305.

Somewhat in line with cases as to the entire dissolution of a trust is a New York decision in which a trustee who held property in trust to apply the income to the use of himself, his wife, and children, was held not to have an uncontrolled discretion as to the application of the income where his wife and only child were living separate from him and not in amicable relations with him. The court in this case required him to pay each of them one third of the net income. *Ireland v. Ireland*, 84 N. Y. 321.

This, case however, belongs more properly to that class which relates to the control of the discretion of trustees which is a matter not within the scope of this note.

B. A. R.

First. That all the provisions of the will relating to personality shall stand. That a proper provision should be made for a person as yet unborn who may possibly under the said will be entitled in remainder to the principal of the share devised to the said trustee for the benefit of your petitioner for her life. That provisions should be made for the commissions of said trustee of all the trusts contained in the will. That your petitioner, and as she is informed and believes all the other parties to the said compromise will agree to such modifications as to this court shall seem just and proper. And she prays that the said New York Life Insurance & Trust Company as trustee as aforesaid by authority and order of this court, to become a party to the said agreement modified and altered as this court may direct, to the end that a final settlement and compromise of the said litigation may be attained, and the court may make such other order in the premises as to it may seem just.

Further facts appear in the opinion.

Messrs. Emmet & Robinson, for appellant:

The Revised Statutes expressly forbid and prohibit the acts and results which this proposed compromise is intended to bring about and effectuate.

N. Y. Rev. Stat. chap. 1, tit. 2, part 2.

The supreme court succeeded to the power and jurisdiction of the late court of chancery, which power and jurisdiction are co-extensive with those of the court of chancery of England, with the exceptions, additions, and limitations created by the Constitution and laws of this state.

N. Y. Rev. Stat. chap. 1, tit. 2, part 3, art. 2, § 86.

Trusts have always been within this jurisdiction so far as regards their construction and definition, the manner of their execution, the investment and charge of the trust estate, the acts of the trustee, and most particularly the protection and the rights of beneficiaries; but when a rule either of the common law or statute law is direct and governs the case with all its circumstances a court of equity is as much bound by it as a court of law and can as little justify a departure from it.

Story, Eq. Jur. § 64.

There is abundant authority against such a power as is claimed by this order.

Wood v. Wood, 5 Paige, 596, 3 L. ed. 844, 28 Am. Dec. 451; *Douglas v. Cruger*, 80 N. Y. 15; *Lent v. Howard*, 89 N. Y. 169; *Cruger v. Jones*, 18 Barb. 467.

Messrs. Edgar M. Johnson and F. R. Minrath, for respondent Cuthbert:

The trustee has power to enter into a reasonable compromise of any contested claim.

People v. Pleas, 2 Johns. Cas. 376; *Murray v. Blatchford*, 1 Wend. 583, 19 Am. Dec. 537; *Leland v. Manning*, 4 Hun, 7; *Gilman v. Gilman*, 6 Thomp. & C. 211; *Re Berrien's Estate*, 16 Abb. Pr. N. S. 23.

Should the trustee refuse to enter into a reasonable compromise agreement, it is within the general jurisdiction of the court to direct the trustee to do so.

Ireland v. Ireland, 84 N. Y. 321; *Bryan v. Knickerbocker*, 1 Barb. Ch. 409, 5 L. ed. 435. See also *Re Youngs*, 5 Abb. N. C. 353, note; 18 L. R. A.

Davey v. Ward, L. R. 7 Ch. Div. 754; *Luther v. Bianconi*, 10 Ir. Ch. Rep. 194; *Milington v. Mulgrave*, 3 Madd. 491; *Mortimer v. Watts*, 14 Beav. 616; *Wood v. Wood*, *supra*; *Leitch v. Wells*, 48 N. Y. 599; *Walker v. Walker*, 5 Madd. 424; *Cafe v. Bent*, 3 Hare, 245.

Mr. Charles F. McLean for Margaret S. Ives; **Messrs. Aaron Kahn, Christopher Fine**, and **Robert Sewell** for defendant Schermerhorn; **Messrs. C. G. Reynolds and F. Reynolds** for defendant McKenzie *et al.*; **Mr. F. A. Ward**, Guardian *ad litem*; **Mr. Frederick B. Van Vorst** for the Children's Aid Society; **Mr. Charles Donohue** for defendants Cordelia D. and Albert Chauvet;

The only question properly arising on this appeal is as to the legal right of the appellant to commissions on the real estate.

The question as to the equitable right to compensation was considered, and the amount fixed by the court below, and that finding is conclusive. There remains, therefore, only the question of strict legal right.

Re Allen, 96 N. Y. 327.

The appellant cannot raise any other question.

1. It will not be allowed to litigate unnecessarily.

Re Brewer, 48 Hun, 597.

2. It is not interested in any other question, and therefore not aggrieved by a decision of any other.

Bryant v. Thompson, 18 L. R. A. 745, 128 N. Y. 426.

3. It is protected by the order and has no occasion to question any other decision.

Bryant v. Thompson, *supra*.

The appellant has no legal right to commissions.

Perry, Trusts, p. 817, § 904, p. 825, § 916.

1. A trust will not be preserved merely that the trustee may earn commissions.

Slater v. Hurlbut, 146 Mass. 808.

2. There is no right to commissions until they are earned.

N. Y. Code Civ. Proc. § 2503.

If the appellant has no legal right to commissions the order does not affect a substantial right.

De Barante v. Deyermant, 41 N. Y. 355.

Persons of full age and sound mind can do what they will as to their own.

Slater v. Hurlbut, *supra*; *Sears v. Choate*, 146 Mass. 395; *Smith v. Harrington*, 86 Mass. 566.

All persons having any interest have been equitably provided for.

The possible party, as yet unborn, is represented by the infant Clarence McKenzie.

Moore v. Littell, 41 N. Y. 66; *Mead v. Mitchell*, 17 N. Y. 210, 72 Am. Dec. 455; *Lawrence v. Bayard*, 7 Paige, 75, 4 L. ed. 66.

The supreme court having the power to protect infants, the form adopted in exercising the power is immaterial.

N. Y. Code Civ. Proc. § 7, subsec. 3, § 2348, subsec. 2; *McCoun v. New York Cent. & H. R. R. Co.* 50 N. Y. 176; *Arthur v. Griswold*, 60 N. Y. 143; *Whitney v. Townsend*, 67 N. Y. 40.

Mr. Calvin Frost in person and for petitioner; **Messrs. Bartlett Wilson & Hayden** for the American Female Guardian Society, etc.

This is a family arrangement to save their peace and honor and avoid litigation, such as have always been favored by the courts.

1 Story, Eq. Jur. 132, and cases cited; *Stapleton v. Stapleton*, 1 Atk. 10; *Hibbard v. Kent*, 15 N. H. 516; *Cruger v. Douglas*, 4 Edw. Ch. 447, 6 L. ed. 935, aff'd, 5 Barb. 225.

The court had the power to make the order in question.

Douglas v. Cruger, 80 N. Y. 15.

If the trustee had chosen to exercise its discretion by refusing to become a party to the agreement, unless the provision for the infant should be increased in amount, can there be any doubt that the court has ample power to control this discretion?

It has never been denied by any court that it had such power, but it has been exerted and exercised in innumerable cases, a few of which will be cited here.

Dacey v. Ward, L. R. 7 Ch. Div. 754; *Constabadié v. Constabadié*, 6 Hare, (Eng. Ch.) 410; *Re Roper's Trust*, 40 L. T. N. S. 97; *Bryan v. Knickerbacker*, 1 Barb. Ch. 409, 5 L. ed. 435; *Ireland v. Ireland*, 84 N. Y. 321.

Must the court remove the trustee and appoint another, at the risk of it, or his, proving unreasonable, or will the court exercise its power of control—a power which has been exercised without question since the earliest assertion of the doctrine of the guardianship of infants by the court.

Brooke v. Mostyn, 2 De G. J. & S. 378; *Mostyn v. Brooke*, L. R. 4 Eng. & Ir. App. 804; *Wall v. Rogers*, L. R. 9 Eq. 88.

The power of the court to control the discretion of the trust company is ample.

Dacey v. Ward, *supra*; *Constabadié v. Constabadié*, 5 Hare (Eng. Ch.) 410; *Re Roper's Trust*, *Bryan v. Knickerbacker*, and *Ireland v. Ireland*, *supra*; *Re Brewer*, 43 Hun. 597.

Such compromises, fairly and reasonably made, to save the honor of a family, to prevent family disputes and family forfeitures have been constantly upheld by courts of equity in America as well as England.

1 Story, Eq. Jur. § 132, and cases cited; *Stapleton v. Stapleton*, *supra*; *Jourdan v. Jourdan*, 9 Serg. & R. 268; *Hibbard v. Kent*, 15 N. H. 516; *Cruger v. Douglas*, 4 Edw. Ch. 447, 6 L. ed. 935, aff'd, 5 Barb. 225.

And this rule has been applied as well to those acting in a fiduciary capacity as to those under disability and coverture, where the chancellor is satisfied that the compromise was conducive to the best interests of the parties.

2 White & T. Lead. Cases Eq. p. 1725, pt. 2, and cases cited.

It has been applied to trustees of charities.

Atty-Gen. v. Boucherett, 25 Beav. 116.

To the case of guardian and ward.

Cowan's App. 74 Pa. 829.

To the case of trustee and *cestui que trust*.

Wall v. Rogers, L. R. 9 Eq. 53; *Lewin Trusts*, 924 *et seq.*, and cases cited.

Maynard, J., delivered the opinion of the court:

The appellant, which is the trustee of certain express trusts of real property, under the will of Francis W. Lasak, deceased, has been authorized and directed by the order of the supreme court to enter into a stipulation, 18 L. R. A.

which provides that a judgment shall be entered adjudging the will void as a will of real property, and thus annihilating the real-estate trusts created by it. We know of no power possessed by any court to compel a trustee to consent to a destruction of the trust, and the statutes of this state have denied to a trustee the power to do any act of his own volition which will accomplish such a result. The will of Lasak was admitted to probate by the surrogate of Westchester county after a prolonged contest, having for its foundation an alleged want of testamentary capacity, and his decree has been affirmed by this court. *Re Lasak*, 131 N. Y. 624. The trustee has thus become vested with a title to the trust property which is presumptively valid, and which cannot be impeached except for the incapacity of the testator, or for fraud or undue influence in the execution of the will. The burden of establishing its invalidity is cast by law upon the party assailing it, and the situation of the trustee in this respect is not different from that of the grantee of real estate under any other mode of conveyance. The grant may always be avoided by showing the incompetency of the grantor, or that its execution was procured by fraud or duress. By the sixtieth section of the Law of Uses and Trusts (4 Rev. Stat. [8th ed.] p. 2435) the whole estate in the lands embraced in the trust provisions of the will is for the time being vested in the trustee, both in law and in equity, subject only to the execution of the trust. A judgment of the court which compels him to part with his title to this property without a trial, without the submission of competent proofs, and without the application of the well-established principles of law regulating the determination of such questions is in direct violation of the fundamental law of the state and of society. It is true that courts of chancery and other equity tribunals have always exercised a supervisory power over the management of trust estates and the conduct of trustees, but they have never, save in exceptional cases, asserted the power to dissolve a trust before the expiration of the term for which it was created. The exceptions have been rare, and have always belonged to a well-defined class, where the interference of the court did not disturb or destroy the trust scheme, but was rendered necessary in order to prevent its entire failure. Trusts which have become impossible of performance because of the existence of conditions not anticipated or foreseen when they were created, are of this character; also marriage settlements, where the marital relation has been annulled; and other kindred cases. There was also a larger class, where the court would decree dissolution of the trust upon the application of all the interested parties, but this was strictly limited to cases where the whole design and object of the trust scheme had been practically accomplished, and all the interests created by it had become vested. 2 Perry, Trusts, 8d ed. § 920; *Bowditch v. Andrew*, 8 Allen. 341. Even then the assent of the trustee was essential to the exercise of jurisdiction. In none of these cases could it be said that the plan of the trust had been defeated, or the trust funds diverted from their original purpose. In all of them the trust had become moribund, and its life

had practically terminated by the force of events not within the control of the trustee, and for which provision had not been made in the trust deed, and a final distribution of the trust estate could properly be decreed; but we have failed to find a case where it was ever attempted, as it is here, to strangle a trust in its infancy by judicial coercion. It is unnecessary to inquire whether, since the adoption of the Revised Statutes, even this limited power of a court of equity to abridge the trust term still survives, for none of the facts have been shown to exist in the present case which are necessary to call for the exercise of its jurisdiction. The design of the trust has not been accomplished, for its execution has scarcely yet been undertaken by the trustee; the trustee refuses to consent to its extinguishment; and there is no insuperable obstacle in the way of its complete performance according to the intent of the settlor. The only obstruction which it is claimed stands in the way of the consummation of the trust project, is the opposition of the heirs-at-law of the testator and of the beneficiaries of the trust, who, it seems, are not disposed to acquiesce in the decree of the surrogate as a final adjudication upon the mental capacity of their ancestor, and who have brought ten actions in ejectment to recover possession of the lands devised in trust, which have been defended by the trustee, and one of which has been tried, and resulted in a disagreement of the jury. An action of partition is also pending, in which this appeal is entitled, brought by one of the heirs, who is also a devisee. What the pleadings are we are not informed, but it is evident that under proper issues, framed according to the provisions of section 1537 of the Code, the validity of the real estate trusts can be litigated, and finally and conclusively determined in this suit. An action has also been commenced for the establishment of the will, but whether brought under section 1866 or 2653a, passed May 14, 1892, does not appear; probably under the former, as the latter is declared not to be retroactive. It must be admitted that this array of litigation is not likely to be productive of great profit to the trust estate, and may possibly tend to its depletion, but it furnishes no sufficient reason why its extinction should be abruptly and summarily decreed by the court. The trustee makes no complaint that, in consequence of it, he finds the execution of his trust duties difficult or impossible, and the parties who have initiated the litigation will hardly be permitted to make use of it as a plea for the abandonment of the trust provisions in the will. Trusts are usually created for the purpose of withholding from the beneficiaries or other interested parties the control and disposition of the principal of the trust fund for reasons which appear sufficient to the settlor, and they are not, as a general rule, regarded with satisfaction by the persons who are thus deprived of the possession of the trust estate; and, if the precedent here sought to be established should prevail, it would be easy for the parties who would profit by a dissolution of the trust to create a condition which would render such a result attainable.

We also think that this order is expressly inhibited by the provisions of sections 63 and 18 L. R. A.

65 of the Statute of Uses and Trusts, (4 Rev. Stat. [8th ed.] p. 2439,) which declare that in a trust of this character the beneficiary cannot assign or in any manner dispose of his interest, and that every sale, conveyance, or other act of the trustee in contravention of the trust shall be absolutely void. The Revised Statutes effected great changes in the Law of Trusts. Secret, passive, formal, and resulting trusts, with some exceptions, were abolished, and express trusts authorized, but limited to a few designated objects, and their creation in perpetuity prohibited. At the same time the power of the beneficiary and of the trustee to alienate the trust property, even with the approval of the court, was taken away. The statute plainly endows all express trusts of realty which are valid in their creation with the attribute of indestructibility. This statute received a construction very soon after its adoption by the chancellor in *Wood v. Wood*, 5 Paige, 596, 8 L. ed. 844, 28 Am. Dec. 451, where it was held that the trustee could not, even at the request of the beneficiary, and with the direction of the court of chancery, do any act, or consent to a different disposition of the estate which would be equivalent to a virtual alienation of the property devised to him in trust. In *Cruger v. Jones*, 18 Barb. 467, the only alienation proposed was a mortgage of the trust estate to provide funds for the erection of buildings and the making of other permanent improvements upon it for the purpose of enhancing its productiveness, and the learned judge who delivered the opinion of the court declared with great earnestness: "Large as its jurisdiction is, both in law and equity, I know of no such power, even in the supreme court, to dispense with the enactment of the Legislature, and make that valid which the lawgiver has declared shall be void. The parties interested sanction, it is said, the act, and desire that it may be done. But the law says, in such a trust, the parties beneficially interested cannot assign, or in any manner dispose of, their interest. How, then, can their consenting to or joining in the mortgage improve its efficiency? It is void as the act of the trustee, and void as the act of the beneficiary, and must, therefore, in this view, be void *in toto*." This language was quoted with approval by Judge Earl in *Douglas v. Cruger*, 80 N. Y. 19, where it is said: "The supreme court has not the power to destroy a valid trust. The purpose of the statute was to make these trust estates and trust interests indestructible, and absolutely inalienable during the existence of the trust, and if they could be rendered alienable by order of the court, the whole scheme of the statute would be greatly impaired, and its purpose thwarted. The statute does not confer upon the supreme court power to authorize such conveyances." The same doctrine was reiterated by Chief Justice Andrews in *Lent v. Howard*, 89 N. Y. 169.

The authorities to which our attention has been called by the respondent's counsel, all relate to matters resting in the discretion of the trustee. If he has been invested with a discretionary power in the trust deed, the court will closely scrutinize his acts, and interfere to control his conduct whenever necessary to prevent

him from so exercising his discretion as to oppress the beneficiary, or cause loss to the trust property. In other words, the jurisdiction of the court can always be invoked for the conservation of the trust, but never for its destruction. In the present case the trustee has no discretion to exercise. It has been suggested that he might allow judgment to be taken in this action adjudging the trust provisions of the will to be void, either by the service of an offer, or by a failure to answer. We cannot approve of this view of his powers. The absolute and positive duty is imposed upon him to defend the life of the trust whenever it is assailed, if the means of defense are known to him, or can with diligence be discovered. The statute above referred to, which enjoins upon him to refrain from doing any act which will defeat the trust, embraces defaults and other omissions of duty as well as open and avowed acts of hostility. If a stipulation which permits a judgment to be entered rendering void the trust conveyance is not an act "which contravenes the trust," it will be difficult to conceive of any action on the part of the trustee

which could produce such a result. It is urged that, inasmuch as one of the beneficiaries of these trusts is an infant, and his estate is endangered by the litigation, the court had power to intervene and compel the trustee to enter into a compromise which secures a fund for the benefit of the infant, which may otherwise be lost. Where only the rights of the infant are involved, a court of equity undoubtedly possesses large discretionary power, which it may exercise for the protection of the property of those who are in law deemed to be its wards, and which may be exerted to control the action of the custodian of the minor or of his estate. But this jurisdiction cannot be employed to deprive others of the title to property which they have lawfully acquired, and the trustee holds the estate committed to him for the benefit of all the parties who are presently or will be eventually entitled to share in its enjoyment.

The orders of the general and special terms must be reversed, and the petition dismissed, with costs out of the estate.

All concur, except Earl, J., not voting.

ILLINOIS SUPREME COURT.

City of JOLIET, *Appt.*,

v.

Mary A. SHUFELT.

(.....Ill.....)

1. **The negligence of a city in leaving a street in unsafe condition is legally the proximate cause of an injury** which results therefrom to a traveler although it would not have occurred except for the running away of a horse which became frightened and unmanageable because the bit of the bridle became loosened, if there was no negligence on the part of traveler.
2. **That the breaking of bridles and harness are of frequent occurrence** and that horses otherwise tractable and gentle are liable to run away when thus freed from restraint is a matter of common knowledge which the court may assume as a fact.

(January 19, 1898.)

APPEAL by defendant from a judgment of the Appellate Court, Second District, affirming a judgment of the Circuit Court for Will County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

Statement by Shope, J.:

Exchange street, in the city of Joliet, runs west from Bluff street, which extends north and south along the base of a bluff or hill. Exchange street was laid out 86 feet wide, and originally extended up the hill, on quite a steep grade, to an intersection with Broadway, at the top of a hill, about 248 feet west of Bluff

street. Broadway runs north and south, and extends from its intersection with Exchange in a course up a hill to Oneida street. About the year 1886 the city of Joliet cut down about two thirds of Exchange street, for the purpose of making a more level and convenient route from Bluff street west to regions lying west of Broadway, and thereby entirely severed the former connection of most of Exchange street with Broadway, and carried Broadway over the part so cut down by means of a viaduct. About one third of Exchange street was left substantially at the original grade connecting Broadway with Bluff street as before. The roadways were of stone, and were separated by a stone wall. There was a sidewalk on the north side of the upper roadway, and a carriage way next south, with a cobblestone gutter next the stone wall. The carriage way declined towards the wall, the decline from the middle being about 6 inches in 10 feet. The stone wall was made with benches or rises going up the hill, and finished with coping stones, laid level. The wall was about 4 feet higher than the carriage way proper, and from 4 to something over 5 feet higher than the gutter. A carriage could be driven in the gutter, and close to the wall. On the evening of June 2, 1889, at about 10 o'clock, Mary A. Shufelt was riding in a top-buggy, with the top partly down, drawn by a horse procured at a livery stable by a young man who was driving and managing the horse, down the hill on Broadway, from Oneida street towards the viaduct and the upper roadway on Exchange street. The horse started into a trot, and when the driver pulled the lines to check him it was found that the bit had parted at the connection of the mouthpiece with one ring, and the bridle

NOTE.—The decision in the above case is in harmony with the majority of cases in other states, 18 L. R. A.

for which, see note to *Bowes v. Boston (Mass.)* 15 L. R. A. 365.

See also 19 L. R. A. 365; 20 L. R. A. 582; 21 L. R. A. 316, 721.

was pulled back off from the horse's head upon his neck, and he was freed from any kind of restraint. The horse ran down Broadway, and turned into the upper roadway on Exchange street, towards the barn where he was kept. In making the turn the buggy struck the stone wall at a point where it was a little over 5 feet higher than the gutter, and between 16 and 17 feet higher than the lower roadway. The driver, who was nearer the wall, was thrown over it into the lower roadway, and Miss Shufelt was thrown upon the wall, and then fell from the wall into the lower roadway; the seat arm, to which she was clinging, was broken, and her hand lacerated, and she sustained injuries from which she was paralyzed, and became utterly helpless, with no prospect of recovery. The horse continued down the hill with the buggy, until it struck a telegraph pole, where the buggy was left with the right fore wheel disbed, and the thills and crossbar broken. Suit was instituted, and there was a verdict and judgment for \$5,000.

It should be added that in the direction in which appellee was going on Broadway there was a sharp descent to Exchange street, and continuing into Exchange street. The grade is sharp at this point, being about 9 feet in every 100 feet. The roadway around the curve from Broadway into Exchange street declines both ways,—towards the wall and south: that is, the outside of the curve made declines both ways. By reason of the sidewalk on the north side of Exchange street said street is reduced to about 12 feet in width. Before the accident the horse was kind and gentle, the harness practically new, and it does not appear, nor is it claimed, that appellee or the driver were guilty of any negligence or want of proper care. The charges of negligence laid in the declaration involved the construction of the street and wall; that the road was of insufficient width; that it was out of repair, and in bad and unsafe condition; and that the stone wall dividing the upper and lower roadways was insufficient in height, etc. On appeal to the appellate court the judgment was affirmed, and the city appeals.

Messrs. J. W. Downey and J. L. O'Donnell for appellant.

Messrs. George S. House and Shuman & Defrees for appellee.

Shope, J., delivered the opinion of the court:

The principal point urged for reversal arises upon the second instruction given on behalf of plaintiff. Thereby the jury were, in effect, told that if the plaintiff, with a companion, who was driving, were riding in a buggy drawn by a horse along and upon one of the public streets of the city, and that without the fault of the plaintiff or her companion, they being in the exercise of ordinary care and prudence, the bit of the bridle on the horse became loosened, so that the control of the horse was lost, and thereby the horse became and was unmanageable, and ran away, without negligence on the part of plaintiff or said driver, and turned from said street into another public street of said city, and the loosening of the bit and loss of control of the horse was a pure ac-

cident, which common prudence and sagacity could not have foreseen and provided against, and that said street into which the horse turned was so out of repair or defective that the same was not reasonably safe or secure to guard against ordinary accidents likely to occur thereon to persons using the same without fault, and in the exercise of ordinary care and prudence, and that by reason of the unsafe and defective condition and repair of said street the said buggy was thrown against the wall there existing, with such force as to throw the plaintiff out of the buggy, and cause the injury complained of, and the city had actual notice of such defects in the street, etc., the city would be liable for the injuries thus sustained. It is insisted with great force that, conceding the negligence of the defendant, such negligence was not the proximate cause of the injury; and that, in any event, the running away of the horse concurring in producing the injury, the defendant is, therefore, not liable.

We are referred to a number of Massachusetts cases, and some others may be found, which sustain the views of counsel. In this state, however, these cases have not been followed. In *Joliet v. Verley*, 85 Ill. 58, 85 Am. Dec. 842, we held that if a plaintiff, while observing due care for his personal safety, was injured by the combined result of an accident and the negligence of a city or village, and without such negligence the injury would not have occurred, the city or village will be held liable, although the accident be the primary cause of the injury, if the consequences could, with common prudence and sagacity, have been foreseen, and provided against. This doctrine has received express approval in many subsequent cases, among which may be mentioned *Bloomington v. Bay*, 42 Ill. 508; *Lacon v. Page*, 48 Ill. 499; *Cartier v. Cook*, 129 Ill. 152. And in *Lacon v. Page*, *supra*, the doctrine was applied to a case like the present, where the accident concurring with negligence of the city in producing the injury was the running away of the plaintiff's horses without fault on his part. There the city, having constructed a drain under one of its streets, allowed it to so get out of repair that a hole a foot wide, two feet long, and eight inches deep had been made in the street. The plaintiff was driving his horses to a lumber wagon, when they ran away. One wheel of the wagon going into this hole, in the rebound plaintiff was violently thrown to the ground, and injured. We then said, after approving the rule in the *Verley Case*, *supra*, and holding it applicable: "One great reason for requiring a corporation to keep its streets in repair is to reduce, as far as possible, the injuries that may result from the accidents so liable to occur in crowded thoroughfares. If the accident would not have caused the injury but for the defect in the street, and that defect is the result of carelessness on the part of the city, and the plaintiff has used ordinary care, the city must be held liable." The same doctrine has been announced in many decided cases elsewhere. See *Ring v. Cohoes*, 77 N.Y. 88, 33 Am. Rep. 574; *Baldwin v. Greenwood's Turnp. Co.* 40 Conn. 288, 16 Am. Rep. 83; *Hull v. Kansas City*, 54 Mo. 601; *Hunt v. Pownall*, 9 Vt. 411; *Winship v. Enfield*, 42 N. H. 197; *Hey v. Philadelphia*, 81 Pa. 44, 22 Am.

Rep. 738; *Sherwood v. Hamilton*, 87 U. C. Q. B. 410; *Palmer v. Andover*, 2 Cush. 600; *Kelsey v. Glover*, 15 Vt. 708.

In *Baldwin v. Greenwoods Turnp. Co.*, *supra*, it is said: "If the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to the negligence of the defendants, combined with some accidental cause, to which the plaintiff has not negligently contributed, the defendants are liable. Nor will the fact that the horse of the plaintiff was uncontrollable for some distance before the injury occurred in any way affect the liability of the defendants." And the court held the loss should be charged upon the party guilty of the first and only negligence. In *King v. Cohoes*, *supra*, after reviewing the authorities upon this subject, it is said: "When, without any fault of the driver, a horse becomes uncontrollable, or runs away, it is regarded as an incidental occurrence, for which the driver is not responsible; and the rule, as laid down in the cases cited, may be formulated thus: When two causes combine to produce an injury upon a traveler upon a highway, both of which are in their nature proximate, the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible, the municipality is liable, provided the injury would not have been sustained but for such defect. This appears to us to be the reasonable rule." And, after noting the care and diligence required of municipalities, the court adds: "They are not bound to furnish roads upon which it will be safe for horses to run away, but they are bound to furnish reasonably safe roads, and if they do not, and a traveler is injured by culpable defects in the roads, it is no defense that his horse was, at the time, running away, or was beyond his control."

We are aware that the courts of Massachusetts, Maine, Wisconsin, and perhaps other states, have adopted the contrary rule, but we are as already seen committed to the doctrine already announced; and, independently of that, it seems to us to be the better and more reasonable rule. It imposes no additional duty or obligation upon the municipality, but requires only that it use reasonable skill and diligence in making its streets reasonably safe for travel, and to provide for such use of them as may reasonably be expected, and foreseen by the exercise of reasonable foresight and judgment. The general doctrine is that it is no defense, in actions for negligent injuries, that the negligence of third persons, or an inevitable accident, or an inanimate thing, contributed to cause the injury of the plaintiff, if the negligence of the defendant was an efficient cause, without which the injury would not have occurred. *Wabash, St. L. & P. R. Co. v. Shacklet*, 105 Ill. 384; *Union R. & Transit Co. v. Shacklet*, 119 Ill. 282; *Consolidated Ice Mach. Co. v. Keifer*, 184 Ill. 481, 10 L. R. A. 696; *Pullman Palace Car Co. v. Laack* (Ill.) 82 N. E. Rep. 285 (not yet officially reported); *Peoria v. Simpson*, 110 Ill. 801, 51 Am. Rep. 683. See 18 Am. & Eng. Encyclop. Law, 440-448, and notes; 2 Thomp. Neg. 1085.

This being the general rule, we are unable to perceive in what way the intervention of the mere brute force or will of the horse at liberty without fault or negligence of the plaintiff, 18 L. R. A.

and for which neither party is responsible, can be different in its effects or consequences from the intervention of the act of a third person, or of an accident having a like effect, provided the injury would not have occurred but for the negligence of the defendant. In such case, neither the running away of the horse nor the defects in the street are alone sufficient to produce the injury, but it is produced by the combination of both, and they become, therefore, in combination, the efficient and proximate cause. The causal relation is direct between the defective street, occasioned by the negligence or omission of duty by the defendant, and the injury to the plaintiff, and without any intervening efficient cause.

The verdict of the jury in this case was general, and might have been predicated on either of the charges contained in the declaration. They may have found that the negligence consisted in not raising the wall a sufficient height to prevent the plaintiff from being precipitated 17 feet upon the stones at the bottom of the cut; or that the road was left too narrow; or because of its sloping towards the wall. The horse had already run down the declivity upon Broadway, and, upon reaching the intersection with Exchange street, made the turn into this narrow, 12-foot street, with a descent of about 9 feet in 100 to the east or lengthwise of the street, and descending also to the south, or towards the wall separating this roadway from the other cut by the city; and the natural result, the road, as stated by counsel for appellant, being smooth, would be to give the buggy a violent lateral motion in the direction of the wall, which would be accelerated by the declivity of the road, and which might have been avoided had the road been level, or the outer edge of the segment of the circle described by the horse in turning been higher than the inner, or had the road sloped from, instead of to, the wall. The evidence shows that the horse did not come in contact with the wall, and the jury would be justified in finding that, if the street had been of reasonable width, or had been so constructed that the buggy would not have been thrown against the wall, the injury would not have occurred. If they found that the injury resulted from either of said causes, and that the city was negligent therein, they would also be justified in finding that such negligence was the proximate cause of the injury.

It is, however, urged that the court in this instruction assumed that the accident by which the horse became uncontrollable was an ordinary accident, likely to occur, and, that being a question of fact, proper to be passed upon by the jury, it was error. Without pausing to discuss or determine whether the instruction is susceptible of that interpretation, if the point be conceded, it is not prejudicial error. The requirement of the instruction before the jury could find the defendant guilty was that they should believe from the evidence "that said Exchange street was so out of repair or defective that the same was not reasonably safe or secure to guard against ordinary accidents likely to occur thereon to persons using the same" in the exercise of ordinary care and prudence. By another instruction, given by the court at its own instance,

the jury were told that the defendant was not liable for the injury if they believed from the evidence that the wall in question was of sufficient height to be safe for persons exercising reasonable care, etc., and sufficiently high to prevent horses, carriages, and persons from tipping or falling over the same "in case of accidents ordinarily likely to occur while driving on said street at that point, and that the street at said point was otherwise, as to its condition of repair, in a reasonably safe condition for persons driving thereon," etc. Taking these instructions together, it seems impossible that the jury could have understood the court as assuming the fact stated. But if this was otherwise, it would form no just ground for reversal. The breaking of bridles and harness and of vehicles are of constant occurrence. That horses, although otherwise tractable and

gentle, are liable to and do run away when thus freed from restraint, is a common and ordinary experience, against which every reasonable and prudent man takes precaution. There was nothing extraordinary in this horse running away, and it might reasonably have been anticipated. No one would think it necessary to prove that it was an accident likely to occur; it is a matter of common knowledge and experience. And if the case were sent back for another trial, and the question submitted as one of fact, the finding could by no possibility be different as to the accident being one ordinarily likely to occur. Other objections were interposed, which we have carefully examined, but deem without merit.

Finding no prejudicial error, *the judgment of the Appellate Court will be affirmed.*

MINNESOTA SUPREME COURT.

Emil MALMGREN *et al.*, *Respts.*,

v.

Albert S. PHINNEY *et al.*, and Charles J. BERRYHILL *et al.*, *Appts.*

(.....Minn.....)

- *1. **Steinmets v. St. Paul Trust Co.** (filed July 12.) followed as to the time and manner of commencing actions to enforce mechanics' liens.
2. **The service of a summons by publication** is valid, although one of the publications is made on May 30, (Memorial day.)
3. **The vendor and vendee in an executory contract** for the sale of real estate cannot, by any stipulation between themselves, deprive third persons (not parties to the contract) of their statutory rights to liens for material or labor subsequently furnished to the vendee for the construction of buildings on the premises.
4. **B. contracted to sell P. certain real estate** for a consideration to be partly paid in cash on delivery of the deed, and the balance to be secured by mortgage on the premises. The contract provided that P. might execute a mortgage to a third person, which should be superior to the purchase-money mortgage to be executed to B. P. went into possession, and commenced the erection of a building on the premises, and for labor and material furnished therefor mechanics' liens attached to his interest in the property. Subsequently, in pursuance of their contract, B. conveyed to P., who thereupon executed a first mortgage to H., and a second mortgage for purchase money to B. Held, that, in an action to enforce the mechanics' liens, upon a sale of the property there should be paid out of the proceeds (1) H's mortgage to the extent of the amount due on B's mortgage; (2) the mechanics' liens; (3) the balance of H's mortgage; and (4) B's mortgage.

(July 14, 1892.)

* Headnotes by MITCHELL, J.

NOTE.—A peculiar case is presented above and an equitable result is reached in an ingenious way.

A purchase-money mortgage which would otherwise have been prior to mechanics' liens was by agreement postponed to another mortgage to a third person which would otherwise have been inferior to such liens. The court transfers the priority of the purchase-money mortgage *pro tanto* to the other mortgage and then holds the balance of such other mortgage and the purchase-money mortgage to be inferior to the mechanics' liens.

A PPEAL by defendants Berryhill *et al.*, from a judgment of the District Court for Ramsey County in favor of plaintiffs in an action brought to enforce a mechanics' lien. *Modified.*

The facts are stated in the opinion.

Messrs. H. F. Stevens and Charles J. Berryhill, for appellants:

If the basis of the right to enforce a claim as a lien against property is the consent of the owner—"by virtue of any contract with, or at the instance of the owner,"—what legal objection can be urged to the landowner insisting that the claimant look only to the personal responsibility of the contractor? And is not this in effect the change made by section 4 of the Statute of 1889 from the rule of Hill against Gill?

In this instance the limitation qualifies the power and not the exercise of the authority conferred by the contract between vendors and vendees as in *Paine v. Tillinghast*, 53 Conn. 532.

The New Jersey Lien Law required the consent of the owner of the fee to be in writing. Certain materials were furnished and labor done for the tenant where written permission of the landlord had been given, "all at their cost and expense." The court holds: "The written consent which, under the lien law, will bind the land of the owner for repairs contracted for by the tenant, must be absolute in its terms. Before giving credit, inquiry can be made if the owner of the premises had given such written consent to repair as the law contemplates, and if not, the work need not be done nor the materials furnished, unless willing to trust the tenant for payment."

Hervey v. Gay, 43 N. J. L. 176.

A Pennsylvania statute required "written consent of the owner" as a prerequisite of a lien right. Such consent was given by landlord to tenants to make repairs "at their own

cost." The court holds: "As between the parties to the covenant, this was a consent on the part of the lessor that the lessees might make the improvement. But was not such a consent as is required by the Act in order to entitle the plaintiff to a lien for the work which he did, and the materials which he furnished at their instance in making the improvement."

McClintock v. Criswell, 67 Pa. 188; *Nolander v. Burns* (Minn.) Jan. 6, 1892; *Shaver v. Murdock*, 36 Cal. 298; *Henley v. Wadsworth*, 38 Cal. 861; *Bruen v. Aubrey*, 23 Cal. 571; Phillips, *Mechanics' Liens*, § 272, p. 589; *Long v. Caffrey*, 93 Pa. 528; *Macintosh v. Thurston*, 25 N. J. Eq. 242; *Moroney's App.* 24 Pa. 872; *Shaw v. First Baptist Church of Winona*, 44 Minn. 22; *St. Paul & N. P. R. Co. v. Bradbury*, 42 Minn. 226; *Johnson v. Howard*, 20 Minn. 322; *Barter v. Hutchings*, 49 Ill. 116; *Kneeland, Mechanics' Liens*, § 137; *Schmale v. Mead*, 125 N. Y. 188.

A summons by which a suit is commenced in the district court is designated process though it does not issue out of the court, but it serves the purpose and is in the nature of process and therefore may with propriety be so called.

Dorman v. Bayley, 10 Minn. 384.

The plain intent of the statute was to make the three days *dis non* except in cases of public necessity of which the officer was to judge at the time.

Gibbs v. Queen Ins. Co. 68 N. Y. 119, 20 Am. Rep. 518; *McLaughlin v. Wheeler* (S. Dak.) Dec. 22, 1891; *Lampe v. Manning*, 38 Wis. 678.

Messrs. Humphrey Barton, Howard L. Smith, William H. Yardley, Williams & Schoonmaker, John B. Sanborn, W. H. Sanborn and H. G. Otis for respondents.

Mitchell, J., delivered the opinion of the court:

April 8, 1890, defendants, Berryhill and Davison, being the owners of a certain lot in St. Paul (164 feet in length from north to south), contracted to sell it to one Wick for \$2,500, of which \$1,500 was to be paid in cash on delivery of the deed, and the remaining \$1,000 to be secured by mortgage on the lot. This contract also provided "that, if Wick shall erect, or cause to be erected, a dwelling-house on said lot, he may incumber said lot by a mortgage in an amount not exceeding \$3,000, which said mortgage said Berryhill and Davison agree may be superior and paramount to the mortgage to be executed to them, as hereinbefore described, provided said house so to be erected upon said lot shall cost at least as much as the amount of said first mortgage. Said Wick is to, and hereby agrees to, protect said premises from all claims and liens of laborers or materialmen, and to pay the same; and it is expressly agreed that the title and lien of the said second mortgagees in and to said lots shall not be affected by any claims or liens of material men or laborers for material or labor furnished or performed for and in the erection of said house." May 1, 1890, defendant Phinney, who succeeded to Wicks' interests in this contract, took possession of the lot, and commenced the erection of a

dwelling-house, and also a barn, thereon; the house being located on the north 104 feet of the lot, and the barn on the 20 feet immediately south of the 104 feet. The following parties furnished Phinney labor and material for the construction of the dwelling-house, except that that furnished by plaintiff was for the barn. The dates show when each party furnished the first item of labor or material: Burns & Shaw, May 19, 1890; Anderson & Plaster, June 8, 1890; Shandrew & Scheible, June 11, 1890; St. Paul Glass Co., July 29, 1890; Knauff, October 2, 1890; Malmgren & Hokanson (plaintiffs), November 1, 1890. July 3, 1890, Berryhill and Davison conveyed the lot to Phinney, who on the same day executed a first mortgage to defendant Huntsaker for \$3,250, and a second mortgage, subject to the Huntsaker mortgage, to Berryhill and Davison for \$1,100, the balance of purchase money due them. This second mortgage was subsequently assigned to defendant Resser. The deed and the two mortgages were all promptly recorded. When Huntsaker took his mortgage he had actual notice that the house was being constructed and was uncompleted. July 7, Phinney conveyed the south 40 feet of the lot to Wigus, who afterwards conveyed it to defendant Konantz. August 28, Phinney conveyed the north 104 feet to defendant Mahan. November 1, Phinney conveyed the remaining 20 feet to defendant Peterson. These deeds were recorded July 8, September 1, and November 11, respectively. The trial court held that defendants Burns and Shaw were entitled to a lien on the whole lot, and that the other lien claimants, including plaintiffs, were entitled to liens on the whole lot, except the south 40 feet; also that the liens of the Huntsaker and Resser mortgages were both subject and subordinate to the liens of Burns and Shaw, Anderson & Plaster, and Shandrew & Scheible. The court also directed the sale of the south 40 feet and the remainder of the lot to be sold separately. Berryhill and Davison, Huntsaker, Resser, and Konantz, alone appeal, and hence only the alleged errors of which they complain can be considered.

1. The court held that the lien claimants, other than Burns and Shaw, were not entitled to liens on the south 40 feet, because the action was not commenced as against Konantz, the owner, within one year from the time of furnishing the last items of labor and material by the claimants. This is fully sustained by *Steinmetz v. St. Paul Trust Co.* (Minn.) 52 N. W. Rep. 915 (just decided).

2. The court erred in holding plaintiffs entitled to a lien on the north 104 feet of the lot. This had been conveyed by Phinney long before they furnished any labor or material. They should have been given a lien only on the 20 feet conveyed to Peterson. This error was doubtless a mere oversight or inadvertence on part of the learned trial judge.

3. It is urged that Peterson, the owner of 20 feet of the lot, and consequently a necessary party, was never served with the summons in this action. He was a nonresident, and service was had upon him by publication for six successive weeks once in each week; and, as one of the publications was made on May 30

(Memorial day), it is claimed that the publication was invalid, because the statute provides that "no civil process shall be served" on that day. Laws 1891, chap. 123. We have not overlooked the case of *Sevall v. St. Paul*, 20 Minn. 511 (Gil. 459), in which it was held that a notice published six days, one of which was Sunday, was invalid, although there is respectable authority holding the contrary. See *Saving & Loan Soc. v. Thompson*, 82 Cal. 347. But we think there is a clear distinction between a publication on Sunday, and one on what we may term a "secular holiday." The Sunday issue is commonly considered as really a distinct paper from the issue on week days, and to a considerable extent circulates among a different class of subscribers. A large and respectable portion of the community who take the week-day issues do not take the Sunday issue. Hence a publication on Sunday would not be so likely to come to the attention of the parties for whom it is intended. It would not be so likely to serve the purpose for which it was designed, to wit, notice. Not so with papers issued on such holidays as Memorial day, the Fourth of July, and the like, which are part of the regular issue, and are distributed among the same subscribers. Again, the publication of a notice does not come within the spirit of the statute. The object of the prohibition against serving process on these holidays is to prevent any interference with their quiet enjoyment or observance, either by the intrusion of officers to serve process, or by the parties being compelled to obey them on those days. This reason applies to personal service, but not to service by publication. Our conclusion is that the service on Peterson was valid.

4. Counsel for appellants contend that both the mortgages are entitled to preference over all the mechanics' liens, because of the provision in the contract between Berryhill and Davison and Wick (Phinney's assignor) that the latter was to protect the property from all such liens, and that the title and lien of these mortgages (which were provided for in the contract) should not be affected by any claims of materialmen or laborers for labor or material for the erection of the house. It is claimed that the authority of the vendee in such a contract to charge the interest of the vendor rests upon the principle of agency, and that this provision is a limitation upon the agency, and that the rights of every one who furnishes labor or material are subject to this limitation. If this is so, it would be a very convenient way to repeal the provisions of the Lien Law. Such a stipulation cannot deprive of their rights under the statute persons not parties to it. It is the law which at once creates the authority to charge the land, and defines its extent. It is the statute, and not the stipulation of Berryhill, Davison, and Wick, which must determine the rights of third parties. *Miller v. Mead*, 127 N. Y. 544, 18 L. R. A. 701.

5. The only remaining question is whether the court was right in holding that the Resser mortgage, given to Berryhill & Davison for purchase money is subject and subordinate to the mechanics' liens. These liens attached while the legal title was still in Berryhill and

Davison, and consequently attached only to the equitable interest of Phinney, the vendee. Hence, if the Huntsaker mortgage was entirely out of the case, and Berryhill and Davison had simply conveyed to Phinney, and taken back a mortgage for the purchase money, this mortgage would unquestionably have taken precedence of all the mechanics' liens, being merely a continuation in changed form of the vendor's lien. But, doubtless, the trial judge followed the case of *Reilly v. Williams*, 47 Minn. 590, in which we held that, where the vendor accepts from the vendee as security for part of the purchase money a mortgage subject to a prior mortgage by the vendee to a third party, he holds it also subject to a mechanics' lien which attached prior to the lien of the first mortgage. The result arrived at in that case was clearly right, because the vendor conveyed in April, while the mortgages were not executed until August, and in the meantime (July 1st) the mechanics' lien had attached, while the unincumbered title, both in fact and of record, was in the vendee. On this state of facts the result arrived at was undoubtedly correct; but, on further consideration, we are satisfied that the ground upon which the decision was placed, although plausible, was unsound. The controlling principles underlying the whole doctrine of marshaling funds are equality and equity; and it is not apparent why a vendor, by subordinating his lien for purchase money to another mortgage, necessarily subordinates it also to all liens having priority over the other mortgage, thus placing them in a better position than they would otherwise have occupied. Take the present case for example. According to their original and equitable order, these mechanics' liens, although prior to the Huntsaker mortgage, were subject to Berryhill and Davison's lien for purchase money; but under the rule of *Reilly v. Williams* they are moved forward, and take precedence of both mortgages. Such a rule lacks equity, and ought not to be adopted unless unavoidable. There is no practical difficulty in the way of applying another rule that will work out exact justice, and give to each lien the place which it is entitled to equitably, and according to the agreement of the parties. In the present case, as between the Resser mortgage and the mechanics' lien, the former is entitled to priority, while by the convention of the parties the Huntsaker mortgage is entitled to priority over the Resser mortgage. Hence, when the land is sold, then, as between Resser and the respondents, the former is entitled to a preference to the amount of his mortgage, but as between the two mortgagees Huntsaker is entitled to a preference over Resser. The result is that out of the proceeds of sale there should be paid (1) the Huntsaker mortgage to the extent of the amount of the Resser mortgage (this not because of any priority of the Huntsaker mortgage over the mechanics' liens, but because of its priority over the Resser mortgage); (2) the mechanics' liens prior to the Huntsaker mortgage; (3) the balance of the Huntsaker mortgage; (4) the Resser mortgage; (5) mechanics' liens subsequent to both mortgages. We have not considered what changes, if any, in the

manner of sale will be necessary, but have left that matter for the consideration of the trial court.

Cause remanded, with directions to modify the judgment in accordance with this opinion. Rehearing denied October 5, 1892.

KANSAS SUPREME COURT.

C. FOGARTY, *Plff. in Err.*,
v.
JUNCTION CITY PRESSED BRICK CO.

(.....Kan.....)

*1. When a company engaged in burning brick upon leased land uses a process in burning that generates noxious gases, that are wafted upon the adjacent lands of the lessor, injuring and destroying a growing crop of wheat, this is such a nuisance that the lessor may maintain an action to recover damages by reason thereof.

2. A landowner who leases land to a company for the manufacture of pressed brick, and the company uses a process in burning that generates noxious gases, that injure and destroy his growing crops, is not estopped from claiming damages for the injury occasioned by the nuisance because he leased the land for that purpose, as he had a right to presume that the process used would be a reasonable and lawful one.

(January 7, 1893.)

ERROR to the District Court for Geary County to review a judgment in favor of defendant in a proceeding to enjoin if from using coal and other materials injurious to plaintiff's crops, in burning its brick kilns, and for damages. *Reversed.*

The facts are stated in the commissioner's opinion.

Mr. John E. Hessin for plaintiff in error.

Mr. J. R. McClure, for defendant in error:

If the brick plant had been erected upon the land of the company without the consent or acquiescence of the plaintiff and the method of making and burning brick prosecuted in a lawful manner and in the ordinary way, with the exercise of proper care, and some unforeseen and inevitable damage resulted to the property of another, under the authorities, at least in this county, the company would not be liable. "The exercise of ordinary rights for a lawful purpose and in a lawful manner is no wrong, even if it causes damage."

5 Am. & Eng. Encyclop. Law, pp. 68-75, and authorities cited in notes; 2 Shearm. & Redf. Neg. § 700.

In the case of *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357, it is held "that a man may enjoy his land in the way such property is usually enjoyed, without being answerable for the indirect or consequential damages which may be sustained by an adjoining landowner."

Headnotes by SIMPSON, C.

He may set fire to his fallow-ground; and though the fire runs into and burn the woodland of his neighbor, no action will lie.

Clark v. Fouts, 8 Johns. 421.

He may open and work a coal mine in his own land, though it injure the house which another has built at the extremity of his land.

Partridge v. Scott, 8 Mees. & W. 220.

He may do the same thing, though it cut off an underground stream of water which before supplied his neighbor's well, and leave the well dry.

Acton v. Blundell, 13 Mees. & W. 324.

He may build on his own land though it stop the lights of his neighbor.

Parker v. Fouts, 19 Wend. 809.

And even though he build for the very purpose of stopping the lights.

Mahan v. Brown, 13 Wend. 261, 28 Am. Dec. 461.

He may pull down his own house, though the adjoining house fall for the want of the support which it before had; and he may do it without shoring up the adjoining house—that being the business of the owner.

Peyton v. London, 9 Barn. & C. 725.

He may pull down his own wall, though the vaults of his neighbor may be thereby destroyed.

Chadwick v. Trower, 6 Bing. N. O. 1.

He may build a house and make cellars upon his soil, whereby a house on the adjoining soil falls down.

Comyns' Dig. *Action on the Case for Nuisance*. See also *Loose v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623; *Thurston v. Hancock*, 13 Mass. 220, 7 Am. Dec. 57.

No liability attaches in the use of one's own property unless damage was occasioned by some wrongful or negligent act.

Kansas Pac. R. Co. v. Butts, 7 Kan. 303. See also *Emerson v. Gardiner*, 8 Kan. 452; *Missouri, K. & T. R. Co. v. Davidson*, 14 Kan. 849; *Kansas Pac. R. Co. v. Brady*, 17 Kan. 880; *Leavenworth, L. & G. R. Co. v. Cook*, 18 Kan. 261; *Sweeney v. Merrill*, 33 Kan. 216.

In *Loose v. Buchanan*, 51 N. Y. 484, 10 Am. Rep. 623, the court says: "We must have factories, machinery, dams, canals, and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all our civilization. If I have any of these upon my lands, and they are not a nuisance and are not so managed as to become such, I am not responsible for any damage they accidentally and unavoidably do my neighbor."

The lease of the property carried with it whatever was essential to its use for the purpose for which it was rented, and if the company has not violated any of the conditions of

NOTE.—In *Robb v. Carnegie*, 14 L. R. A. 320, 145 Pa. 324, injury to crops by gases from a manufacturing establishment was held to be an actionable 18 L. R. A.

damage. On the subject of nuisances by lawful business, see also note to *Bohan v. Port Jervis Gaslight Co.* (N. Y.) 9 L. R. A. 711.

the contract, it is clear under every principle of equity that the plaintiff has no remedy. In the absence of an express contract, if the works had been constructed with the implied consent of plaintiff, equity would not restrain their use, although they proved injurious.

Hulme v. Shreve, 4 N. J. Eq. 116; Bigelow, Estoppel, 688, and cases cited in *notes*.

No duty was imposed upon the company to inform the plaintiff upon any detail it intended to pursue in the manufacture of brick. If the plaintiff was ignorant of the methods required in making brick and desired information, it was his place to seek it. And the company can surely not be held responsible for his ignorance or negligence.

2 Pom. Eq. § 810.

Simpson, C., filed the following opinion:

The plaintiff in error filed his petition in the court below, and the material allegations are as follows: That the said defendant, the Junction City Press Brick Company, is a corporation created by, and existing under and by virtue of, the laws of the state of Kansas, and engaged in the business of burning brick at Junction City, in said county. That said plaintiff is now, and has been for a long period of time, the owner and in the possession of the following described real estate in the said county of Geary, and described as follows, to wit: Special section number nine, (9), and also lots numbered seven (7) and eight, (8), all in township number twelve (12) south, of range six (6) east. That, at the time and times hereafter mentioned, the said plaintiff was in possession of said real estate, except a small tract of about two acres leased to the said defendant company, as hereinafter stated. That said land has been cultivated in fall wheat for several years last past, and was sowed to fall wheat in the fall of 1888. That said plaintiff had growing upon said land, in the season of 1888 and 1889,—acres in fall wheat, which, in the spring of 1889, was growing and in good condition on said land owned and possessed by the said plaintiff. That on or about the 1st day of August, 1888, the said defendant brick company leased from the plaintiff about two acres of said land for the period of one year, with option to renew said lease from year to year for five years; said lease to commence on the 1st day of August, 1888. Said defendant company was to have the use of the water power owned by the said plaintiff, and known as "Fogarty's Mill," to run one Eureka brick press. The rental was \$100 per month. Said lease was upon further condition that said defendant company was to carefully and properly manage and control the power so to be supplied, and in no way to interfere with or injure the property rights of the said plaintiff, and to commit no injury on the said premises of the said plaintiff, during the existence of said lease. A copy of said lease is hereto attached, marked "Exhibit A." That at the time of making said lease the plaintiff was unacquainted with the methods to be used by the said defendant brick company in burning brick, and was not informed by the said defendant company whether it would use bituminous coal or wood in burning their kilns. That the said defendant com-

pany went into possession of said two acres of land, and erected kilns thereon, and during the season of 1889 burned several kilns of brick thereon. That in burning said kilns of brick said defendant company, by its employes and agents, used bituminous coal in considerable quantities, placed in spaces left in the kilns among the unburned brick, and also in the flues left in said kilns, for the purpose of burning said kilns. That by the methods used by the said defendant company, and by the fuel used, to wit, bituminous coal, during the burning of said kilns a very considerable quantity of corrosive gas, called "sulphuric acid gas," was generated, and, having been compressed to a certain degree, when allowed to escape from and above said kilns was carried up by draught, and disseminated above the kilns of the said defendant company, and in the direction of the wind, for quite a distance, and over and upon the growing wheat of the plaintiff. That said sulphuric acid gas so generated in the burning of said brick kilns by the use of bituminous coal was and is injurious to vegetation of all kinds, and particularly growing wheat. That this poisonous gas, when carried upon the wind, falls upon plants in minute amounts, and when the blades and leaves are damp, the gas is absorbed, and vegetation blighted. That during the months of April, May, and June, A. D. 1889, the smoke and poisonous gas from the kilns of the said defendant company, impregnated with sulphuric acid gas produced by the use of bituminous coal, was carried from the said kilns of the defendant company, and settled over and upon the growing wheat of the said plaintiff upon the above described premises, and thereby destroyed and injured the grain then forming on the stems of said wheat, and so blighting said wheat, by said poisonous gas settling upon said crop, thereby destroying 40 acres of said wheat, of the value of \$770. That, in addition to said 40 acres being destroyed so that it was a total loss, 60 acres of said wheat was greatly damaged and injured by said smoke and gas from said kilns, so that it was almost worthless, to the damage of the said plaintiff in the sum of \$1,280,—in the aggregate, damages to plaintiff in the sum of \$2,000 by means of and from the effects of the said poisonous gases generated in and coming from the said defendant's brick kiln. That by reason of such acts of the defendant company in the use of bituminous coal in burning its said brick kilns the plaintiff had suffered great damage in the loss of his crop of wheat. That if the said defendant company continues the use of bituminous coal in burning its said kilns, as it threatens to do, it will work great and irreparable loss and damage to the said plaintiff, and to the nuisance of the said premises of the said plaintiff. That on or about the 16th day of July, A. D. 1889, the plaintiff requested the said defendant company to remove said brick kilns from said premises, and to abate said nuisance, but it has not done so. That said defendant company still maintains said brick kilns, and is still engaged in burning brick by the use of bituminous coal as fuel, which, if continued, will kill vegetation, and the crop which plaintiff is desirous of sowing

upon said premises. That, if said defendant company continues the use of bituminous coal as fuel in burning its said kilns, the plaintiff will be unable to cultivate said premises, or derive any benefit therefrom. That if said nuisance is continued the plaintiff must inevitably suffer great and irreparable damages, and his property thereby be greatly depreciated in value. The plaintiff therefore prays for a judgment against the said defendant company for the sum of \$2,000, his damages so as aforesaid sustained, and for a decree, upon the final hearing of this case, perpetually enjoining the said defendant company from using bituminous coal or other combustible material which will generate poisonous gas injurious to vegetation and crops growing upon the plaintiff's premises while burning its said brick kilns, and for such other and further relief as in equity he may be entitled to, and for the costs of suit.

EXHIBIT A.

"I, C. Fogarty, of Junction City, Kansas, hereby lease to the Junction City Press Brick Company of the same place, for the term of one year, with the option on the part of said company to renew said lease from year to year for five years, said lease to commence on the 1st day of August, 1888, the following described premises and right of water power, to wit: Two acres of land on the north side of the public road leading from Sixth street, Junction City, to the bridge over the Smoky Hill river, and on the west side of said river, near the banks thereof, as the same has been selected and staked off by said company; also the right of attachment to and use of the water power now owned by said C. Fogarty, as that is known as 'Fogarty's Mill,' on said Smoky Hill river, for running one Eureka brick press, the amount of power to run said press and machinery being estimated at thirty horse power, all expenses and costs of making such attachment to be paid by said company. And the said C. Fogarty further agrees to give the right of way for a railroad switch on and over any land owned by him, from the line of the Union Pacific or Missouri Pacific Railroads, between Junction City and the plant of said company near his mill, as aforesaid. The said Junction City Press Brick Company agrees to pay to the said C. Fogarty for the rental of said premises and water power, as aforesaid, at the rate of \$100 per month for each and every month or part of month said water power is used; said rental to be paid on the first of each and every month, the first payment to commence on the 1st of September, 1888. It is expressly agreed and understood by the parties hereto that if, for any reason not the fault of the said C. Fogarty, the said water power should fail or become insufficient to supply the amount of power required by said company, that no claims for damages shall be incurred or maintained against the said C. Fogarty by said company. It is further agreed that said company shall carefully and properly manage and control the power supplied as aforesaid, so as to in no way interfere with or injure the property or rights of said C. Fogarty, and to commit no injury or waste on his lands during the time

of the existence of this lease. It is further expressly understood and agreed that, at any time it is so determined by said company, it shall have the right to remove off said leased premises all the property and improvements placed thereon, and to leave the said premises and water power in the same condition as when it took possession thereof, usual wear and tear alone excepted. In witness whereof the said parties hereunto set their hands and seal this 30th day of July, 1888. C. Fogarty. Jno. K. Wright, Pres. P. B. C."

Afterwards the defendant in error filed a demurrer to the petition for the reason that said petition does not contain sufficient facts to constitute a cause of action against said defendant. Upon argument thereof in the court below the demurrer was sustained, and the plaintiff not desiring to amend his petition, but being willing to stand upon the same, the court rendered a judgment in favor of the defendant for costs and against the plaintiff, to which ruling of the court the plaintiff at that time excepted.

The question here is, Does the petition state a cause of action? Every allegation contained therein is admitted by the demurrer. The improper use of a certain kind of coal, that produced the destroying gas; that the business could be just as successfully carried on by the use of wood, or another kind of coal, that would not produce the noxious gas; the deadly effect of this peculiar gas on the growing wheat crop of the plaintiff; the ignorance of the plaintiff of the manner of conducting the business and the agencies to be employed; the destruction of the growing wheat by this gas generated in the burning kilns of the brickyard; and every other material fact necessary to constitute a cause of action, if one can legally exist,—are all to be accepted as established facts for the purposes of this inquiry. There is a line of decisions of courts of last resort in this country, and elsewhere, that hold that an action for damages can be maintained under the facts set forth in this petition. Many of the cases so holding are cited in *Campbell v. Seaman*, 63 N. Y. 563, 20 Am. Rep. 587. The essence of the decision in that case is that "where one manufacturing brick upon his lands uses a process in burning by which noxious gases are generated, which are borne by the winds upon the adjacent land of his neighbor, injuring and destroying trees and vegetation, this is a nuisance, and the party injured may maintain an action to recover damages, and to restrain the use of the process complained of." Early and modern English decisions are cited; the case of *Huckensline's App.*, 70 Pa. 102, 10 Am. Rep. 669, is noticed; and the following cases, in which useful industries which produce smoke or noxious gases or vapors or odors were declared nuisances, are relied upon as being analogous; *Catlin v. Valentine*, 9 Paige, 575, 4 L. ed. 82, 38 Am. Dec. 567; *Peck v. Elder*, 8 Sandf. 129; *Taylor v. People*, 6 Park. Crim. Rep. 352; *Davis v. Lamberton*, 56 Barb. 490; *Hutchins v. Smith*, 63 Barb. 251; *Whitney v. Bartholomew*, 21 Conn. 218; *Cooper v. Randall*, 53 Ill. 24; *Rez v. White*, 1 Burr. 337; *Cooks v. Forbes*, L. R. 5 Eq. 166; *Sampson v. Smith*, 8 Sim. 272; *Typing v. St. Helens Smelt. Co.* 4 Best & S. 608.

The theory of all these decisions is that every one is bound to make such a reasonable use of his own property as to not occasion unnecessary annoyance or damage to his neighbor. If he makes an unreasonable or unlawful use of it, so as to produce material injury or great annoyance to his neighbor, he will be guilty of a nuisance to his neighbor, and the law will hold him responsible for the consequent damage. Of course, all we now say is upon the assumption that the petition alleges the facts as they will appear at the trial. A different state of facts may call for the application of another and totally distinct rule of action.

2. The second contention in support of the ruling below is that the plaintiff in error is estopped by the terms of his lease, and by his conduct, from maintaining this action, the line of argument being that the lease carried with it whatever was essential to its use for the purpose for which it was rented; and this is true to the extent of its reasonable and lawful use, consistent with the rights of the neigh-

borhood. But the gist of the complaint is that, while burning brick is a lawful business, the burning is not being done in a reasonable manner, with reference to the rights of adjacent landowners. If, at the time he made the lease, the plaintiff in error knew the process of burning that would be employed, he would not be heard to complain of it; but he alleges in his petition that at the time he made the lease he was unacquainted with the methods to be used. He had a right to presume that these would be reasonable and lawful. See, generally, upon this branch of the inquiry, the cases of *Sturges v. Bridgman*, 11 Ch. Div. 885; *Smith v. Phillips*, 8 Phila. 10; and *Central R. Co. v. English*, 73 Ga. 366.

We recommend that the judgment be reversed, and the cause remanded, with instructions to overrule the demurrer to the petition.

Per Curiam:

It is so ordered.

All the Justices concur.

PENNSYLVANIA SUPREME COURT.

John N. KOELSCH *et al.*
v.
PHILADELPHIA CO., *Appt.*

(.....Pa.....)

1. A higher degree of care and vigilance is required in dealing with a dangerous agency than in the ordinary affairs of life or business which involve little or no risk of injury to persons or property.
2. A gas company is required not only to have pipes and fittings of such material and workmanship and laid with such skill and care as to provide against the escape of gas therefrom when new, but also to have such system of inspection as will insure reasonable promptness in the detection of all leaks that may occur from deterioration of the material of the pipes or from any other cause within the circumspection of men of ordinary skill in the business.
3. If injury to a gas main is a natural and probable consequence of the construction of a sewer in close proximity to it, it is the duty of the gas company which has or ought to have knowledge of the sewer to guard against the damage likely to be sustained.
4. It is for the jury to determine whether from the notoriety attending the construction of a sewer, a gas com-

pany having a proper system of inspection would or ought to have knowledge of a leak in its pipe caused by construction of the sewer sooner than the leak was in fact discovered.

5. The fact that an explosion of gas which has accumulated in a cellar by negligence of a gas company was caused by the act of a third person in lighting a match will not relieve the gas company from liability.

(January 3, 1898.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Allegheny County in favor of plaintiffs in an action brought to recover for injuries caused by an explosion of gas which was alleged to have resulted from the negligence of defendant. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. Dalzell, Scott & Gordon for appellant.

Messrs. Josiah Cohen and A. Israel for appellees.

Heydrick, J., delivered the opinion of the court:

That the plaintiff's house was supplied by the defendant with natural gas for fuel through a service pipe connected with a main pipe in the adjacent street, and that it was wrecked,

NOTE.—See, as to various things held or claimed to belong to the class of dangerous agencies, *Chaddock v. Plummer*, 14 L. R. A. 675, and *note*, 88 Mich. 225 (guns, etc.); *Fort Worth & D. C. R. Co. v. Robertson* (Tex.) 14 L. R. A. 781, and *note* (railroad turntables); *Schubert v. J. R. Clark Co.* (Minn.) 15 L. R. A. 818, and *note*; also *Heizer v. Kingsland & D. Mfg. Co.* (Mo.) 15 L. R. A. 821 (manufacturer's liability); *Scanlon v. Wedger* (Mass.) 18 L. R. A. 886, and *note* (fireworks); *Southwestern Tele. & Teleph. Co. v. Robinson*, 18 L. R. A. 545, 50 Fed. Rep. 810, 3 U. S. App. 205 (telephone wire); *Knott* 18 L. R. A.

nerus v. North Park Street R. Co. (Mich.) 17 L. R. A. 728 (roller coaster); *Standard Oil Co. v. Tierney*, 14 L. R. A. 677, 13 Ky. L. Rep. 623 (naphtha).

See also, as somewhat akin to this subject, *notes* on the subject of blasting, as follows: liability for negligence of independent contractor,—*note* to *Hawver v. Wharton* (Ohio) 14 L. R. A. beginning on page 690; injuries to land and buildings, *note* to *Benner v. Atlantic Dredging Co.* (N. Y.) 17 L. R. A. 220; injury to persons,—*note* to *Blackwell v. Moorman* (N. C.) 17 L. R. A. 723.

and the plaintiff and several members of his family seriously injured, one of them fatally, by an explosion of such gas, which had accumulated in the cellar of the house, are undisputed facts. It is alleged by the plaintiff that the gas which had so accumulated in his cellar, and there exploded, was negligently permitted by the defendant to escape through a leak in its main pipe near to his house, and found its way thence through the loose shale and broken rock of which the street at that point was formed, and a rudely constructed sewer or drain, to the place of the explosion. The defendant denies that the gas escaped from its main, and did or could find its way through the material of which the street was composed, in the manner described, but alleges that it escaped through a leak in the plaintiff's own pipe, for the existence of which he alone was responsible. It further denies that, if the gas did escape through a leak in its main, it is chargeable with negligence in respect to the existence of that leak; and contends earnestly that no such evidence was produced by the plaintiff upon the points in controversy as ought to have been submitted to the jury. The testimony of George Walters, if believed, would warrant a finding that the gas did not escape from the plaintiff's service pipe. According to his statement he tested that pipe, between the time of a slight explosion in the kitchen in the morning, and the greater explosion in the cellar by which the house was wrecked at 10 o'clock the same forenoon, by "lighting a match, and running it along the pipe," and found no leak. If he was entitled to belief, his test was made in the same manner that the defendant's experienced servant made his most crucial test of the pipes in the kitchen and upper rooms immediately before the explosion, and it would seem improbable that, if a leak in the pipe in the cellar existed, it could have escaped detection. Whether the testimony of the defendant's witnesses, to the effect that the service pipe was found after the explosion to be broken off, and that part of the break appeared old, and part new or fresh, indicating that there had been an old crack through which gas might have escaped, followed by an entire severance by the force of the explosion, ought to have overborne Walters' testimony by casting discredit upon either his truthfulness or the thoroughness of his test, was a question wholly for the jury. If the gas which exploded in the cellar did not escape from the plaintiff's supply pipe, whence did it come? That was a question to be answered by the plaintiff, and he seems to have answered it conclusively, if the testimony of his witnesses can be relied upon. He adduced testimony to the effect that on the day after the explosion, and the following day, the defendant uncovered its main pipe in the vicinity of his premises; that before it was fully uncovered, but after the digging had commenced, gas was seen to escape from the trench. To use the language of an intelligent witness: "There was some evidence of trouble of that kind before the ground was entirely uncovered, from the fact that there was something like a mist or haze arising from the ground before they reached the pipe, something like vapor;" and that when the pipe was reached

at a point about 86 feet distant from the house, two or more holes or cracks were found in it, one of them having "the appearance of being rusted,—worn out,"—through which the gas poured in such dense volume that it could be seen, and with such force that it could be heard at the distance of from 50 to 75 feet. He further showed that the street, from the point where the leaks were found, to a point opposite his house, was "made ground,"—that is to say, that a depression in the natural surface had been filled with loose shale and broken rock, over which clay had been spread and compacted by the travel upon it,—and that he had constructed an underground drain from his cellar to a point in the street near the gas main, where it discharged its drainage in the loose material beneath the surface. His evidence further tended to show that the shale and rock filling of the street was so porous that gas could pass through it from the leaks in the defendant's main to the end of his drain, and that there was nothing to obstruct its passage thence to the place of the explosion, which was somewhat higher than the street. Assuming that George Walters' testimony, that there was no leak in the plaintiff's supply pipe, was true, and in the absence of evidence or allegation that there was any other source from which the gas could have reached the plaintiff's cellar, the inference from the facts proved is irresistible that it came from the leaks in the defendant's main. If the plaintiff's testimony be believed, the loose shale and broken rock of the street, covered with clay, and that compacted by the travel upon it, formed the equivalent of a pipe connecting the leaks in the gas main with the underground drain from the cellar, through which the gas might, and, as the cellar was higher than the street, naturally would, pass. There was, therefore, sufficient evidence to justify the jury in finding that the gas which exploded had escaped from the defendant's main.

The next question is, Was there sufficient evidence to charge the defendant with negligence with respect to the leaks in its pipe? The definitions of negligence which have been attempted imply that a higher degree of care and vigilance is required in dealing with a dangerous agency than in the ordinary affairs of life or business, which involve little or no risk of injury to persons or property. While no absolute standard of duty in dealing with such agencies can be prescribed, it is safe to say, in general terms, that every reasonable precaution suggested by experience and the known dangers of the subject ought to be taken. This would require, in the case of a gas company, not only that its pipes and fittings should be of such material and workmanship, and laid in the ground with such skill and care, as to provide against the escape of gas therefrom when new, but that such system of inspection should be maintained as would insure reasonable promptness in the detection of all leaks that might occur from the deterioration of the material of the pipes, or from any other cause within the circumspection of men of ordinary skill in the business. Something like this was said in *Kibele v. Philadelphia*, 105 Pa. 41; and in *Bolly v. Boston Gas-light Co.*, 8 Gray, 123, 69 Am. Dec. 233, and

Smith v. Boston Gaslight Co., 129 Mass. 818; and the principle is recognized in many kindred cases. It requires nothing unreasonable,—it does not require that the company shall keep up a constant inspection all along its lines, without reference to the existence or non-existence of probable cause for the occurrence of leaks or escape of gas,—and is not in conflict with *Hutchinson v. Boston Gaslight Co.*, 123 Mass. 219, relied upon by the defendant. There the escape of gas complained of was the result of an overwhelming calamity that laid a great part of the city of Boston in ashes, and fractured and severed the company's pipes in so many places that all the force it could employ could not guard against all possible consequences of the escape of gas immediately without shutting off the supply from the whole city, and this it was excused from doing on the ground that more mischief would result therefrom than was likely to result from the neglect so to do. The escape of gas from the defendant's main was, in the absence of any exculpatory explanation, some evidence of neglect, (*Smith v. Boston Gaslight Co.*, *supra*;) and when to this was added the testimony, already quoted, of one of the plaintiff's witnesses, in respect to the appearance of the aperture through which it escaped, a prima facie case was made out against the defendant. The jury would have been justified in finding, either that the pipe was defective when put in place, or that it had been in use so long that the defendant ought to have known that it was unsafe to use it longer, if no explanation of its condition, actual or apparent, had been given. The defendant's witnesses described an opening in the pipe different from that described by at least one of the plaintiff's witnesses, and said it was caused by the pulling of the pipe out of joint, and undertook to account for the separation of the joints by the fact that a sewer had recently been constructed in the street in close proximity to the pipe, and inferred that the ground had settled and allowed the pipe to sink in places, thereby putting a strain upon it. Their inference was valueless, unless the fact inferred was the natural and probable consequence of the construction of the sewer. If such injury to a gas main be a natural and probable consequence of the construction of a sewer in close proximity to it, and the defendant had knowledge, or ought to have had knowledge, of the construction of this particular sewer, it was its duty to efficiently guard against the damage that was likely to be sustained. *Kibele v. Philadelphia*, *supra*. It could not shift the responsibility upon the municipality or its contractor. *Oil City Gas Co. v. Robinson*, 99 Pa. 1. And it was for the jury to determine whether, from the notoriety attending the construction of a sewer, a gas company having a proper system of inspection would, or ought to, have knowledge within a shorter time than elapsed between the commencement of the work upon the sewer in question and the discovery of the leak.

It is further contended that, although the defendant may have negligently permitted the gas to escape from its main into the plaintiff's cellar, that negligence was not the proximate cause of the explosion, and that if George

Walters, and not its servant sent to examine the premises, lighted the match, it is not responsible. Under the facts of this case it is immaterial whether Walters or Householder, the defendant's servant, struck the match. The concurrence of the presence of the gas and the lighting of the match, the negligence of the defendant with that of Walters, was necessary to and did cause the explosion. In such cases the injured party has his redress against either of the wrong-doers, or both, at his election, except where goods or passengers are injured through the concurrent negligence of a common carrier and a third person. *Carlisle v. Brisbane*, 118 Pa. 544, 57 Am. Rep. 483.

The judgment is affirmed.

COMMONWEALTH of Pennsylvania

v.

Thomas MATTHEWS, App't.

(.....Pa.....)

Selling 'Sunday newspapers is not a work of necessity or charity within a proviso excepting such works from the operation of a statute imposing a penalty for doing and performing worldly employment on Sunday.

(January 3, 1893.)

A PPEAL by defendant from a judgment of the Court of Quarter Sessions for Allegheny County convicting him for violating the Sunday Law by selling Sunday newspapers. *Affirmed.*

The section of the law under which this conviction was had is as follows:

"If any person shall do or perform any worldly employment or business whatsoever on the Lord's day, commonly called Sunday (works of necessity and charity only excepted), and shall use or practice any unlawful game, hunting, shooting, sport or diversion whatsoever on the same day, and be convicted thereof, every such person so offending shall, for every such offense, forfeit and pay four dollars, to be levied by distress; or in case he or she shall refuse or neglect to pay the said sum, or goods or chattels cannot be found, whereof to levy the same by distress, he or she shall suffer six days' imprisonment in the house of correction of the proper county; provided, always, that nothing herein contained shall be construed to prohibit the dressing of victuals in private families, bakehouse, lodging-houses, inns and other houses of entertainment for the use of sojourners, travelers, or strangers, or to hinder watermen from landing their passengers, or ferrymen from carrying over the water travelers, or persons removing with their families on the Lord's day, commonly called Sunday, nor to the delivery of milk or the necessities of life, before nine o'clock in the forenoon, nor after five o'clock in the afternoon of the same day."

The facts of the case sufficiently appear in the opinion of the Supreme Court and in that of the court below, which was as follows:

NOTE.—For an exhaustive note on Sunday labor, see *Quarles v. Stato* (Ark.) 14 L. R. A. 122.

"It is established by the evidence in this case, that the defendant kept open his place of business on Sunday, December 27, 1891, and that Sunday papers of that date were upon that day sold therein, and that he received and caused to be delivered to the customers upon his route as a carrier, upon that day, the newspapers which had that day been published.

"This prosecution was instituted under the Act of April 22, 1794, and the Amendment thereto, approved April 26, 1855; the latter Act increasing the penalties as to Allegheny county. These Acts, like all others, are to be construed solely with the view of ascertaining and enforcing the purposes set forth in, and sought to be accomplished by the legislation. The evidence clearly establishes that the defendant did "perform worldly employment or business upon the Lord's day, commonly called Sunday." We have no power to repeal the Act of 1794, nor to make its exemption of works of charity and necessity include works of mere convenience. That carrying on any business on Sunday may be profitable to the persons engaged in it; that it may serve the convenience, or tastes, or wishes of the public generally, is not the test which the statute applies. The words of the exemption are works of necessity and charity only excepted.

"It cannot be contended under the evidence that the object of the defendant was to do charity or supply a necessity; on the contrary, it is quite clear that he was influenced by the usual motives which govern men when following their worldly avocations, the securing of trade, gathering in of compensation and laying away of profit. If we decide that necessity and charity mean convenience, and all things which contribute to satisfy individual taste, we emasculate the statute and sweep away the guards which the Legislature threw around not only the morals of society, but the physical health and well-being of its members. To do this would be for the court to assume legislative functions. Our duty requires us to construe the statute so as to accomplish its purpose, which was to enforce an observance of Sunday. In the case of *Sparhawk v. Union Pass. R. Co.*, 54 Pa. 408, Judge Strong said: 'It is not for me, called as I am to administer the law as it is, rather than as the defendants may think it ought to be, to decide that what is but affording a facility amounts to a necessity. The Legislature has not exempted from the prohibition acts which may conduce to the convenience of individuals, or even large portions of the people. It must be presumed they considered what inconveniences would follow a prohibition of worldly labor on the Lord's day. In view of them, as well as of the evils flowing from the absence of a prohibition of such labor, they enacted the Statute of 1794. Their controlling object was to protect the community against vice and immorality. This they attempted to do by declaring illegal all worldly labor and business, except works of necessity and charity. But they did not overlook public and individual convenience. In the proviso of the Act they declared how far worldly labor might be done, not necessary to the agent, but contributing to the necessity of others. The enumeration in the proviso of things allowed to be done, shows what was

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intended by accepting works of necessity from the prohibitory clause.'

"Without disregarding every principle established for the interpretation of statutes, as well as the uniform decisions of the courts of the commonwealth upon the statute in question, we cannot hold the defendant exempt from the operation of the Act of 1794. He is therefore adjudged guilty."

Messrs. William B. Rodgers and A. M. Brown, for appellant:

The law does not condemn those employments which society regards as necessary, even when they encroach on the Lord's day, if, according to the ordinary skill of the business, it be necessary to do so.

Com. v. Nesbit, 34 Pa. 398.

The Act of 1794 is not to be interpreted literally. The courts have construed it in the light of circumstances and conditions, illustrated by the habits, usage, and needs of the people.

Accordingly it has been held that the hire of carriage on Sunday by a son to visit his father creates a legal contract.

Logan v. Matthews, 6 Pa. 417.

A subscription towards the building of a church is within the exception.

Dale v. Knepp, 98 Pa. 389, 43 Am. Rep. 634.

A verdict may be taken on Sunday.

Huidekoper v. Cotton, 8 Watts, 56; *Com. v. Marra*, 8 Phila. 440.

And a will may be executed on that day.

Beitenman's App. 55 Pa. 183.

In defining worldly business or employment, necessity itself can be only approximately defined. The law regards that as necessary which the common sense of the country, in its ordinary mode of doing its business, regards as necessary.

Com. v. Nesbit, 34 Pa. 398.

Sunday being a day of rest, millions of people find both pleasure and profit from their Sunday newspaper.

The latest definition of the terms used in the exception contained in the Act of 1794 is found in the Century Dictionary, vol. 4, p. 3952, and is as follows: "Works of necessity, in the Sunday laws, any labors which are necessary to be done on Sunday for life, health, comfort, general welfare and reasonable convenience for enjoying the leisure and the privileges of the day, such as the running of cars, ferries and, within reasonable limits, railroad trains, and such labors as are requisite for maintaining in their necessary continuity those manufactures incidental to civilization."

Mr. William Yost, for appellee:

In a suit upon a contract for the publication of an advertisement in a Sunday newspaper it was said by the Court of Appeals of New York "The publication of the advertisement was to be and was by a public sale of the newspaper in which it was printed on Sunday. The opening of a place for the sale and the actual selling of newspapers is within the mischiefs which the Act for the observance of Sunday was designed to remedy."

Smith v. Wilcox, 24 N. Y. 353, 83 Am. Dec. 303.

In a suit in which the validity of the publication of a legal notice in a Sunday newspaper was questioned, the Supreme Court of Illinois

said: "The notice stands in place of process and it must be given on those days of the week which the law recognizes as appropriate to business of this character. To permit it to be given on Sunday is against the spirit and policy of our law."

Scammon v. Chicago, 40 Ill. 146.

The owner of a Sunday paper is pursuing his ordinary vocation when he is engaged in circulating his paper, and he who engages in his ordinary vocation on that day transgresses the law.

Shaw v. Williams, 87 Ind. 158, 44 Am. Rep. 756.

Unless the issuing and circulating of a newspaper on Sunday is, within the meaning of the statute, a work of necessity, it is prohibited by it as much as any other business or work. The newspaper is a necessity of modern life and business, but it does not follow that to issue and circulate it on Sunday is a necessity. There are a great many other kinds of business just as necessary; many, indeed most, kinds of manufactures and mercantile business are indispensable to the present needs of men, but no one would say that, because necessary generally, the prosecution of such business on Sunday is a work of necessity. That carrying on any business on Sunday may be profitable to persons engaged in it; that it may serve the convenience or tastes or wishes of the public generally, is not the test the statute applies.

Handy v. St. Paul Globe Pub. Co. 41 Minn. 188.

The sale of Sunday newspapers on Sunday, while not a breach of the peace is a violation of the Act of 1794.

Com. v. Teamann, 1 Phila. 460.

And a conviction was had for the same offense and sustained by the Supreme Court of Massachusetts in 1887.

Com. v. Osgood, 144 Mass. 362. See also *Com. v. Dextra*, 143 Mass. 28; *Sawyer v. Car-gile*, 72 Ga. 290.

As these violations of the Act of 1794 have been instigated and defended by the Union News Company, a foreign corporation (*McMullen v. Union News Co.* 144 Pa. 332), and by the large corporations owning and publishing the Sunday newspapers of the city of Pittsburgh, the language of this court in the case of *Friedeborn v. Com.*, decided in 1886, 113 Pa. 244, is particularly appropriate: "There are but few of our statutes which, in principle, are of more importance than the Act of the 22d of April, 1794, commonly called the Sunday Act, in that it recognizes the first day of the week as a Sabbath of rest for the well disposed and religious people of our commonwealth, and we can entertain but little respect for those who willfully and persistently violate its proscriptions. Against all such its penalty should be enforced until they are taught that a respect for its provisions may at least be profitable from a pecuniary point of view."

Per Curiam:

This was an appeal in the court below from the judgment of Alderman Robe of Pittsburgh, convicting the defendant (appellant) of doing and performing worldly employment on De-

cember 27, 1891, commonly called "Sunday," contrary to the Act of Assembly of April 22, 1794, and the supplemental Acts of February 26, 1855. The charge, as shown by the record, was "selling a paper known as 'The Pittsburgh Sunday Leader,' exposing the same for sale, and keeping his place open for business at No. 13 Frankstown avenue, Pittsburgh." It was established by the evidence in the case, to the satisfaction of the learned judge below, that the defendant kept open his place of business on Sunday, December 27, 1891, and that Sunday papers of that date were upon that day sold therein, and that he received and caused to be delivered to his customers upon his route as a carrier, upon that day, the newspapers which had that day been published. There is no dispute about the facts. The defendant kept open his place of business on the day referred to, and sold and delivered Sunday papers on that day, in the regular course of business. This brings the case directly within the Act of 1794, and the Supplemental Act of 1855, which increases the penalty. Unless, therefore, the case comes within the exceptions of the Act of 1794, the judgment must stand.

The Act of 1794, while prohibiting the performance of any worldly employment or business on the Lord's day, commonly called "Sunday," excepts "works of necessity and charity" from the penalty of the Act. The proviso, however, recognizes, to some extent, the wants and convenience of the people, where it provides "that nothing herein contained shall be construed to prohibit the dressing of victuals in private families, bake houses, lodging houses, inns, and other houses of entertainment, for the use of sojourners, travelers, or strangers, or to hinder watermen from landing their passengers, or ferrymen from carrying over the water travelers, or persons removing with their families on the Lord's day, commonly called Sunday, nor to the delivery of milk or the necessities of life, before nine o'clock in the forenoon nor after five o'clock in the afternoon of the same day." It is now almost 100 years since the passage of the Act of 1794. It is hardly likely the framers of the Act contemplated the possibility of Sunday newspapers. There were but few newspapers in existence at that time, and, with perhaps one or two exceptions, those were weekly papers, of limited circulation. Since then, there has been a vast development in the business of newspaper publishing, as well as in other departments of trade and business. The development of the resources of the commonwealth has been phenomenal, as well as its growth in population. This growth has developed new wants, and to some extent changed the habits of the people. Among the changes which it has caused is the Sunday newspaper. Its circulation has become very extensive, and it is read by a large portion of our citizens. It has become a part of the ordinary life of the people, and it will require far more stringent legislation than the Act of 1794 to uproot it. It is not our province to approve or condemn Sunday newspapers, but it is worse than useless to ignore their existence, or the favor with which they have been regarded by a large portion of the community. The framers of the Act of 1794, could they have seen the development of the next hun-

dred years, and the change in the habits and wants of the people, might or might not have included the traffic in Sunday newspapers among the exceptions in the Act. It is sufficient for us that they have not done so. The defendant must not expect us to administer the law to suit his case, or as he thinks it ought to be administered. There are many persons who have no higher opinion of judicial duties than to think that the law should be administered according to their caprice, or their notion of what the law ought to be. It is our plain duty to enforce the Act of 1794 as we find it upon the statute book. While the Sunday newspaper may be a great convenience to a large portion, perhaps a large majority, of the people, it does not, in our opinion, come within

the exceptions of the Act of 1794. No one pretends that it is a charity, and we cannot say, as a matter of law, that it is a necessity. It is a convenience; nothing more. We are of opinion the defendant was properly convicted. The Act of 1794 is a wise and beneficial statute, and we would regret to see it interfered with. We must, however, be allowed to express the fear that too literal an interpretation and enforcement of it may create an antagonism that may lead to its repeal, or at least serious modification. There may be such a thing as excessive zeal in invoking its penalties in extreme cases. The Act is in more danger from its friends than from its enemies.

Judgment affirmed.

NEW YORK COURT OF APPEALS.

Mary BIRMINGHAM, by Guardian, *Respt.*,
v.
ROCHESTER CITY & BRIGHTON R.
CO., *Appt.*

(.....N. Y.)

1. A street railway company is not liable for injury to a passenger caused by iron falling from a canal bridge belonging to the state and over which the railroad company has no control but which it is necessary to cross on its route, if the company has not been guilty of negligence in failing to discover the defect.
2. The failure of a street railway company to discover a defective welding in an iron on a canal bridge belonging to the state which the street railway was obliged to cross is not evidence of negligence sufficient to go to the jury where there was nothing to suggest to the general traveler or to the company the presence of any such defect and it was not discoverable by one using the bridge merely for the purpose of crossing.

(January 17, 1898.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Fifth Department, affirming a judgment of the Monroe County Circuit in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. Theodore Bacon, for appellant:

Carriers of passengers for hire are not responsible in all particulars like common carriers of goods. They are not insurers of personal safety against all contingencies except those arising from the acts of God and the public enemy. For an injury happening to the person of a passenger by mere accident, without fault on their part, they are not responsible, but are liable only for want of due care, diligence or skill.

NOTE.—The peculiar situation is presented in the above case of a carrier's use of a bridge belonging to the state and which the carrier was under the circumstances obliged to use although it had no 13 L. R. A.

Bennett v. Dutton, 10 N. H. 481; *Angell*, Carr. § 521.

The measure of such "care, diligence, or skill," is undoubtedly severe. It has been said to extend "as far as human care and foresight will go, that is, the utmost care and diligence of very cautious persons."

Story, Bailm. §§ 590, 601, 602; *Christie v. Griggs*, 2 Campb. 79; *Atton v. Heaven*, 2 Esp. 533.

Where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer, as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense.

Ingalls v. Bills, 9 Met. 1, 43 Am. Dec. 846; *McPadden v. New York Cent. R. Co.* 44 N. Y. 478, 4 Am. Rep. 705; *Cherroll v. Staten Island R. Co.* 58 N. Y. 126, 17 Am. Rep. 231.

The trial court overlooked the broad distinction between the transportation of passengers in the streets of a city in omnibuses which simply use a flat iron surface let into the pavement for the diminution of friction, and the transportation of passengers and freight through the country upon structures, which, while they have in common with the street railroads the iron surface for their car wheels are operated upon property which is absolutely private, upon which no stranger may enter, except by trespass, and which is completely controlled, inspected, and regulated by the carrier company itself without other interference.

New York v. Third Ave. R. Co. 117 N. Y. 404; *Covington & C. Bridge Co. v. South Covington & C. Street R. Co.* 15 L. R. A. 838, 14 Ky. L. Rep. 52.

Messrs. John Van Voorhis and Quincy Van Voorhis, for respondent:

The contract of a carrier of passengers with

authority whatever in respect to the condition or management of the bridge. The decision constitutes an interesting instance of applying old principles to a new state of facts.

the passenger is to use the utmost care and skill to secure the safety of the passenger during the act of transportation.

Palmer v. Delaware & H. Canal Co. 120 N. Y. 170; *Carroll v. Staten Island R. Co.* 58 N. Y. 126; *Hegeman v. Western R. Corp.* 18 N. Y. 9, 64 Am. Dec. 517.

A carrier of passengers by railroad is under the same obligation as to the safe condition of the roadway that it is in respect to the carriages.

Curtis v. Rochester & S. R. Co. 18 N. Y. 534, 75 Am. Dec. 258; *Shearm. & Redf. Neg.* 499.

It is negligence for a railroad company to leave trees standing in a position where they are liable to fall upon a railroad track if blown over by the wind (*Texas & St. L. R. Co. v. Vallie*, 60 Tex. 481), or a poll erected by a telegraph company which is liable to fall.

Shearm. & Redf. Neg. 406; *Chicago & I. R. Co. v. Russell*, 91 Ill. 298, 33 Am. Rep. 54.

The defendant is responsible for any negligence in the construction of the bridge in question by which its passengers were put in jeopardy.

Hegeman v. Western R. Corp. and Carroll v. Staten Island R. Co. supra; *Caldwell v. New Jersey S. B. Co.* 47 N. Y. 282; *Thomp. Carr.* p. 221.

Railroad companies have been held liable repeatedly for the negligence of sleeping and palace car companies.

Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141; *Cleveland, C. C. & I. R. Co. v. Walrath*, 38 Ohio St. 486; *Thorpe v. New York Cent. & H. R. R. Co.* 76 N. Y. 402, 32 Am. Rep. 825.

Where one railroad company leases a road of another, it is liable for the negligence of the lessor.

Philadelphia & R. R. Co. v. Anderson, 94 Pa. 351, 39 Am. Rep. 787; *Murch v. Concord R. Corp.* 29 N. H. 9, 61 Am. Dec. 681; *Seymour v. Chicago, B. & Q. R. Co.* 3 Blas. 43; *John v. Bacon*, L. R. 5 C. P. 487.

A railroad company owes the same duty to inspect the cars of another company as its own.

Goodrich v. New York Cent. & H. R. R. Co. 5 L. R. A. 750, 116 N. Y. 898; *Gotlieb v. New York, L. E. & W. R. Co.* 100 N. Y. 462; *Fuller v. Jewett*, 80 N. Y. 46, 36 Am. Rep. 575.

Railroad companies are liable for the negligence of connecting lines.

McElroy v. Nashua & L. R. Corp. 4 Cush. 400, 50 Am. Dec. 794. See also *Illinois Cent. R. Co. v. Barron*, 72 U. S. 5 Wall. 104, 18 L. ed. 594; *Peters v. Rylands*, 20 Pa. 497, 59 Am. Dec. 746; *McLean v. Burbank*, 11 Minn. 277; *Patterson, Railway Accident Law*, §§ 129-139; *Thomp. Carr.* p. 413; *Maverick v. Eighth Ave. R. Co.* 36 N. Y. 373.

The fact that this defendant had laid its tracks across this bridge, carried with it an obligation to keep the bridge in repair. And no notice to it of the defect was necessary.

Worster v. Forty-Second St. & G. S. T. F. R. Co. 50 N. Y. 208; *Francis v. Erie R. Co.* 2 Hun, 518.

The happening of the accident made out a prima facie case of negligence against the defendant, and placed upon the defendant the

burden of proving that it was not responsible for injury.

Curtis v. Rochester & S. R. Co. 18 N. Y. 534, 75 Am. Dec. 258; *Angell, Carriers*, § 509; *Shearm. & Redf. Neg.* § 59; *Livery v. Manhattan R. Co.* 99 N. Y. 158, 52 Am. Rep. 12; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Breen v. New York Cent. & H. R. R. Co.* 109 N. Y. 297; 1 *Thomp. Neg.* p. 46; *Bowen v. New York Cent. R. Co.* 18 N. Y. 408, 72 Am. Dec. 529.

Peckham, J., delivered the opinion of the court:

The defendant owns and operates a street railroad in the city of Rochester. The Erie canal intersects West Main street, in that city, and at the intersection the canal is crossed by a bridge built, owned, and maintained by the state, and in effect the bridge forms a continuation of the highway of West Main street. It was built under the authority of the Act, chapter 851 of the Laws of 1888, and under the direction of the superintendent of public works, upon plans and specifications drawn up and prepared by the state engineer and surveyor. Its character as a lift bridge was determined by the statute cited, and the above-named state officers had respectively the exclusive control of the plans and construction of the bridge. When boats were to pass under the bridge it was so constructed as to be lifted vertically by hydraulic power. In order to act as a counterbalance, and thus to reduce the amount of power necessary to lift the bridge, heavy weights made of iron troughs filled with pig iron were suspended in the upper part of the framework of the bridge. They were suspended by cables fastened to the floor of the bridge, and passing over pulleys in the upper framework. The troughs were fastened by means of stirrups which were made of iron. The plaintiff was a passenger on one of the defendant's cars on the 4th of October, 1889, and while the car was slowly crossing the bridge in question one of the stirrups gave way, and let one end of the troughs drop so that the pieces of pig iron placed in the troughs slid out, and some of them fell upon the car beneath and broke through, and one of them struck and severely injured the plaintiff. This action was brought to recover of the defendant the damages thus sustained.

The proof showed there was a defect in the welding of the stirrup, which defect was discoverable by the maker in the process of manufacture; but the imperfection was probably not discoverable from an inspection of the stirrup after it was placed in position in the bridge, and it certainly could not be discovered by any means that a person who had used the bridge for the purpose of crossing it, either in a wagon or car, because, when the bridge was in condition for a car to cross, the stirrups would be eleven or twelve feet above the floor of the bridge. They were movable, and raised as the bridge came down to the grade for crossing it. It was claimed that this plan or mode of construction was manifestly dangerous, and that the danger was so apparent as to be open to ordinary observation; and again "the dangers incident to such defective

mode the defendant was bound by its contract to protect its passengers. The defect in the plan or method was alleged to consist in the suspension of the iron in the troughs over the heads of people using the bridge, as such troughs were liable to be precipitated upon them whenever a defect should develop itself in the means of suspension.

The evidence as to the defect in the welding of the stirrup and how it was discoverable, and the plan and method of construction of the bridge itself, as above detailed, was uncontradicted. Upon such evidence the trial judge refused to submit the question of defendant's negligence to the jury, but held that the defendant was liable, and only the question of damages was left to the jury. This liability had been in substance announced by the general term, upon a former appeal to that court from a judgment of nonsuit in the case. The court accordingly charged the jury that, although the bridge was built by the state, yet the defendant had laid its track thereon, and used it as the bed of its road, and had thereby adopted it as part of its track and roadway; and, although the state built the bridge, and the defendant neither built it, nor had any control over it, such fact was wholly immaterial, and the defendant was bound to precisely the same liability with regard to any defect in the bridge as though it had built the bridge originally to serve as a part of its railroad, and it was bound by the same rules which the law applies to every other common carrier of passengers with reference to the means it adopts as a part of its roadway, and part of the appliances which it may have occasion to use in the transaction of its business as a common carrier; that if by any known test the carrier could ascertain that the thing adopted as part of the appliance of its roadbed or car was or was not fit for the purpose to which it was to be applied, if the carrier failed to apply such test, and as a result of that failure an accident happened to its passenger and he was thereby injured, the carrier failed to perform its duty, and was liable for such injury. The court further charged that the undisputed evidence showed that a stirrup with a defective welding was placed upon the bridge, and that it might have been discovered had an effort been made so to do before it was put there, and as a result of such defect the stirrup gave way at the welding, and the trough tipped, and the iron fell upon the plaintiff; and, applying the law as laid down by the general term, the learned trial judge said these undisputed facts showed necessarily that the defendant was liable, and so he left to the jury only the question of damages. The defendant moved for a nonsuit at the close of plaintiff's evidence, and renewed the motion at the close of its own evidence. The court denied the motion in each case, and the defendant duly excepted.

In refusing to nonsuit the plaintiff, and in directing the jury as he did upon the question of defendant's liability, the learned judge erred. We think the error consisted in applying to their full extent, and to the facts of this case, the well-known general rules as to the liability of common carriers, for the absence of that extreme care and caution which the law exacts from them in relation to the condition both of

their roadbed and of the appliances employed by them in operating their roads. We do not think the defendant rested under any such extreme liability upon the undisputed facts in this case. It may be assumed that defendant is a corporation organized under the General Railroad Act for the purpose of building a street railroad through certain streets in the city of Rochester. Under that Act it acquired no right to cross the canal on any bridge it might build. It acquired no right to build any bridge, and although it might possibly have the power of eminent domain to acquire land for some purposes, it could acquire none in order to build a bridge over the canal. Further legislation for that purpose would have been necessary. And its organization under the General Railroad Act for the purpose of a street railroad required it to keep to the public streets or highways, and gave it no right to lay its tracks elsewhere. In the treatment of the question of supplying bridges over the canals, the Legislature at an early day provided that bridges should be built by the town in which they should be situated, and that they should be maintained at the expense of such town, but that no bridge should be constructed across any canal without the permission in writing of one of the canal commissioners, under penalties as provided in the Act. Laws 1820, chap. 202, 1 Rev. Stat. 2d ed. *248, §§ 191-193. In 1839, by chapter 207, the Legislature directed the canal commissioners to construct and thereafter maintain, at the public expense, road and street bridges over the canal in all places where such bridges had been theretofore constructed, if in their opinion the public convenience required it. In 1854, by chapter 332, § 9, the Legislature prohibited the building of any street or road bridge over any canal, except upon such streets or roads as were laid out, worked, and used previous to the construction of the canals by which the streets were obstructed; and the Legislature by special enactment provided for the construction of this particular bridge. It would seem from this brief reference to legislative action that the canal bridges, while under the care, custody, and control of the state, have always been substantially regarded as a part of the street which is obstructed by the canal.

In substance and effect the bridge mentioned in this case was nothing more than a continuation of the city street which it connected, and although it might have been necessary for the defendant to have obtained permission of the state authorities before laying its rails and running its cars over the bridge, yet we are of the opinion that in crossing such bridge it did not thereby make an appliance of its own to the extent stated in the charge of the court below. We think there is a great difference in the position occupied by this defendant in crossing this canal bridge, from that taken by a steam railroad crossing a piece of water or a ravine by means of a bridge of its own building on its own land, and for the purpose of operating its own railroad along its own private roadway. We think there is the same difference, although the steam railroad company uses the track of another road or the bridge of another company, which it in neither case

owns or controls, but which it simply leases or otherwise legally obtains the right to use. The steam railroad company which owns its roadbed, and builds and controls the bridge on its own property, is without doubt within the strict liability of the common carrier to its passengers. The same may be said of the company which by contract obtains the right to use the track or the bridge of another road. In doing so it makes the roadway or bridge, which it in some way obtains the right to use, its own, and is under the same liability by virtue of its own act as if it had itself built, equipped, and operated the roadbed or bridge. Where, however, the space to be crossed is a canal belonging to the state, and it is necessary to cross it in order to carry out the purpose of the company to lay railroad tracks in the public streets of a city, and the bridge forms, in substance, a continuation and a part of one of the public streets of the city, the mere use of such bridge by the company with the consent or license of the state for the one purpose of continuing its route along such public highway does not render such bridge an appliance of the street railroad company. We think its liability while on the bridge is none other or different from its liability while traversing the rest of the public street. To negligently drive along the street so as to fall, or precipitate the stage or car, into an open hole in the street, would render the person or company guilty of such negligence liable for the injury to a passenger. To drive upon a bridge which was manifestly unsafe, or not strong enough to bear the proposed weight, might be negligence which the company would be responsible for if any injury happened therefrom to the passenger.

We do not criticise the rule, or assume here to question it, as to the extent of liability ordinarily attaching to a carrier of passengers, including the liability for a perfect roadbed and all proper appliances. We simply say that this case is not one in which to make the application of such extreme liability. We say the bridge was not such an appliance as is contemplated by the rule alluded to, and that the liability of the defendant was no greater while on the bridge than while pursuing its route along the public street in the city. The defendant had no control over or voice in the plan to be adopted, or in the selection of the materials for the structure. It had no right of superintendence in the process of manufacture, or of inspection of the thing manufactured. It was without power to change the method adopted to adjust these counterbalancing weights, or to maintain the slightest control over the manner in which the structure was to be operated. The defendant had no right to itself build a bridge over this canal, and it was not occupying the position of exercising a choice between building a bridge of its own or using one furnished by the state. There was no choice about it. That bridge must be used, or the canal could not be crossed. Where a

steam railroad has the right to build a bridge, and, instead of building, leases the right to cross the bridge of another, the reason for holding that such bridge is thereby adopted as its own by the company using it is obvious. It is a voluntary matter on the part of the company whether to build its own or to lease the bridge of another, and if it choose the latter mode of crossing the obstruction it is but another way of obtaining a bridge of its own, and, when it thus contracts for its use, it of course adopts it as its own structure. The position of a street railroad in attempting to carry on its business of running cars through the public streets of a city has nothing in common with that occupied by a steam railroad under the circumstances mentioned; and where the street railroad is confronted by one of the canals of the state, over which it has no right to build a bridge, but when it is necessary to cross in order to carry out the purpose of its organization, the company may cross such bridge with the permission of the state authorities, without thereby making it a part of its appliance, for a latent defect in which it must be held responsible if discoverable in the process of manufacture. The contract to carry safely does not, and ought not to, extend that length.

Nor was the evidence in this case sufficient, in our judgment, to submit to the jury the question of negligence on the part of the defendant in driving on this bridge while the weights were suspended in the manner described. The plan and method had received the approval of the state engineer and surveyor, and the bridge had been built under the direction and supervision of another state officer, the superintendent of public works. It had been in position for over a year, and subjected daily to the strain arising from the traffic over it of all sorts of vehicles; and, so far as the evidence shows, there had not been a doubt expressed or felt as to its entire safety, both of plan, material, and workmanship. There was nothing to suggest to the general traveler or to the defendant the presence of any defective welding of any of the stirrups which supported the weights of iron, and nothing to cause any action on its part in relation thereto, even if any action were possible. If a defect in the welding were dangerous, and if any such defect might be discovered by proper inspection in the course of manufacture, it might justly be supposed by the defendant that all such precautions had been taken by the authorities of the state before the stirrups were placed in their position, and that the opening of the bridge for travel was an assurance that no discoverable or preventable defects existed. Under these facts we think no case was made for the submission of any question of negligence to the jury.

The plaintiff should have been nonsuited, and the judgment in her favor must therefore be reversed, and a new trial granted with costs to abide the event.

All concur.

Louisa RAUENSTEIN, *Resp't.*,
v.
NEW YORK, LACKAWANNA & WEST-
ERN R. CO., *Appt.*

(.....N. Y.)

The liability of a railroad company to abutting owners for constructing an embankment for its track in a street which practically closes the street to such abutters for ordinary street purposes does not extend to persons whose premises abut only on an intersecting street in which a corresponding embankment is made solely to change the grade so far as the railroad embankment at the intersection of the streets makes it necessary.

(January 17, 1898.)

A PPEAL by defendant from an order of the General Term of the Superior Court of Buffalo reversing a judgment of nonsuit entered at the trial term in an action brought to recover damages for the alleged wrongful obstruction of the highway in front of plaintiff's property. *Reversed.*

Statement by Gray, J.:

This action was brought to recover damages of the defendant for injuries alleged to have been sustained by the elevation of a part of the roadway of Commercial street, in the city of Buffalo, in front of her premises, which she alleges to be an unlawful encroachment upon the street, an obstruction to her lawful rights in it, and a nuisance. The facts are that the defendant railroad was laid through Water street, and where it intersected Commercial street, was constructed upon an embankment about five feet and nine inches above the former grade of Water street, made necessary in order to cross Commercial slip. In order to permit of travel upon Commercial street over the railroad at this intersection of the streets, it was necessary to raise the grade of Commercial street on either side of Water street; and this elevation of the grade of the street extended in front of, and nearly the whole length of, the street line of the plaintiff's premises. The embankment was within about a foot of plaintiff's sidewalk, and was some 20 feet in width. The plaintiff did not abut upon Water street, and her title to her lands was bounded upon Commercial street by the line of the street. As an abutting owner upon Commercial street, she bases the right to recover damages for the obstruction of the roadway in front of her premises, practically, upon the ground that if the construction by defendant of its embankment in Water street was illegal, as to abutting owners there, the illegality of its act extended to the grading up of Commercial street, and in such degree as to subject it to liability to injured property owners in that street. An appeal from judgments recovered by her in the superior court of Buffalo was heard by this court in its second division,

(*Rauenstein v. New York, L. & W. R. Co.* 120 N. Y. 661,) and the judgments were reversed, expressly, upon the authority of our decision in the *Case of Ottenot* against this same company, (*Ottenot v. New York, L. & W. R. Co.* 119 N. Y. 603,) and a new trial was ordered. Upon the new trial the jury rendered a verdict for the defendant, by the direction of the trial judge. The defendant appealing to the general term of that court, the judgment was reversed, and it now appeals to this court from the general term order of reversal.

Mr. John G. Milburn, for appellant:

The case of *Ottenot v. New York, L. & W. R. Co.* 119 N. Y. 603, is decisive of this.

To sustain the plaintiff's position in this case the case of *Conklin v. New York, O. & W. R. Co.* 102 N. Y. 107, must be overruled as well as the *Ottenot Case*.

Reining v. New York, L. & W. R. Co. 14 L. R. A. 183, 128 N. Y. 169, did not overrule the *Conklin Case*.

The distinction which the general term failed to seize is that between a structure in a street being totally unauthorized, and therefore illegal as to everybody and a nuisance, and its being legal as to the public and city and an invasion only of private property rights. Its decision is based on the assumption that the *Reining Case* held that the structure in Water street was illegal as to all the world, and therefore a nuisance, whereas, what the court held was, that though existing by lawful authority as to the public and the city, it was an invasion of the private property rights of the owners of the property abutting on Water street. That distinction runs through all the cases on this subject and is clearly pointed out in *People v. Kerr*, 27 N. Y. 188, and *Story v. New York Elev. R. Co.* 90 N. Y. 123, 43 Am. Rep. 146.

The railroad in Water street was built with legal authority, as also the crossing in Commercial street, and this court has held over and over again that what exists by legal authority, and within the scope of that authority, is not a nuisance though it be the cause of consequential damages to property owners.

Radcliff v. Brooklyn, 4 N. Y. 195, 53 Am. Dec. 857; *Cogswell v. New York, N. H. & H. R. Co.* 103 N. Y. 10, 57 Am. Rep. 701; *Bellinger v. New York Cent. R. Co.* 23 N. Y. 42, *London, B. & S. C. R. Co. v. Truman*, L. R. 1: App. Cas. 45; *Hammersmith & C. R. Co. v. Brand*, L. R. 4 H. L. 71.

If the embankment in Water street involved a change of the grade of any portion of Commercial street for street purposes there was due authority for it in the charter without conferring any right to compensation upon an adjoining owner excepting that provided by the charter, and that remedy is exclusive.

Heiser v. New York, 104 N. Y. 68.

Mr. George W. Cothran, with Mr. O. C. DeWitt, for respondent:

It has been determined finally by this court that the action of the common council, under

NOTE.—The opinion in the above case is valuable for its discussion of the limits of the rule as to compensation to abutting owners for erecting an embankment in the street and construing it in connection with the rule which denies compensation for mere change of grade. See, in connection with 18 L. R. A.

this case, the notes to *Selden v. Jacksonville (Fla.)* 14 L. R. A. 370, and *Egerer v. New York Cent. & H. R. Co.* (N. Y.) 14 L. R. A. 381. See also *Reining v. New York, L. & W. R. Co.* 14 L. R. A. 183, 128 N. Y. 167; *People v. Ft. Wayne & E. R. Co.* (Mich.) 16 L. R. A. 752; *Brown v. Seattle (Wash.)* 18 L. R. A. 161.

See also 22 L. R. A. 668; 24 L. R. A. 392, 516.

which the placing of this embankment in Commercial street is sought to be justified, did not amount to a change of grade, as applied to Water street.

Reining v. New York, L. & W. R. Co. 14 L. R. A. 133, 128 N. Y. 157.

As the action taken by defendant in Water street, and also in Commercial street, was based upon identically the same proceedings of the common council, it follows that, if the action of the common council did not authorize a change of grade in Water street it did not in Commercial street; hence the plaintiff was not entitled to the remedy provided in the charter of the city for the recovery of damages in case of a change of grade of a street.

2 N. Y. Laws 1887, chap. 519, title 9, §§ 1, 2, 6; title 8, § 19.

The superior court of Buffalo in other cases has held substantially that the action taken by defendant in Water and Commercial streets was illegal, and consequently a nuisance.

Jeauime v. New York, L. & W. R. Co. 128 N. Y. 623.

As no change of grade was authorized or provided for, or established, by the common council, in the action taken by it, and under which defendant acted, it follows that the erection of the embankment in Commercial street and Water street was an illegal structure (*Reining v. New York, L. & W. R. Co. supra.*) and it makes no difference as matter of law that the embankment in Commercial street is but an approach to the embankment in Water street.

The rule that, where there has been a change of grade in a public street or highway, under competent legal authority, the owner of property on a cross street or highway has no remedy for any injury resulting to his abutting property from the elevation or depression of the street in front of his property to correspond with the change of grade in the other street, — *Conklin v. New York, O. & W. R. Co.* 102 N. Y. 107; *Heiser v. New York*, 104 N. Y. 68; *Bohan v. Port Jervis Gas Light Co.* 9 L. R. A. 711, 123 N. Y. 18; *Rudcliff v. Brooklyn*, 4 N. Y. 195, 58 Am. Dec. 357, — has no application to this case.

Those, and kindred cases that might be cited, all proceed upon the ground that there was a change of grade effected, by virtue of lawful authority.

Conklin v. New York, O. & W. R. Co. 102 N. Y. 111.

The authority vested in the common council to "permit the track of a railroad to be laid in, along, or across any street or public ground," (2 N. Y. Laws 1870, chap. 519, title 8, § 19,) and also the authority conferred by the General Railroad Law (N. Y. Laws 1850, chap. 140, § 24), has reference to placing tracks on grade, or in such manner as that no private rights are invaded thereby.

Reining v. New York, L. & W. R. Co. supra.; *Fobes v. Rome, W. & O. R. Co.* 8 L. R. A. 453, 121 N. Y. 505.

Gray, J., delivered the opinion of the court:

The only difference between the facts of this case and that of the *Ottenot Case*, 119 N. Y. 608, but fully reported in 23 N. E. Rep. 169, is that Ottenot's premises were on the 18 L. R. A.

opposite side of Commercial street, and the embankment in the street did not extend so as to entirely cover his side of the street; a fact, however, which can have no bearing upon the legal aspect of the question presented. Though the members of this court did not all concur with the opinion which was delivered in the *Ottenot Case*, they concurred in the result reached, on the ground of there being another remedy, as also because of error in the admission of evidence as to damages. That other remedy was referred to in the opinion as being given by a certain provision of the city charter, providing for compensation to abutting owners under certain conditions, where damaged by alterations in the grade of a street. Therefore, while the members of the court failed to concur with the opinion in the general discussion of the question of the defendant's liability to plaintiff, all did agree that the defendant was not liable in damages, inasmuch as the construction in Commercial street was a change in the grade of the street, for any injury from which a remedy was given under the provisions of the city's charter. The position, then, is this: the concurrence of views in the *Ottenot Case* being that there was a change in grade of the street, and hence no liability on the part of the company, can we now sustain this reversal by the general term without overruling the *Ottenot* decision, and likewise the decision of the second division of this court, which held the present case disposed of by the *Ottenot Case*? If we are prepared to do this, we must still go further and hold that the rule laid down in *Conklin v. New York, O. & W. R. Co.*, 102 N. Y. 107, is no longer authoritative.

The general term opinion holds what seems to me a rather strange view of our recent decision in the case of *Reining* against this same defendant (128 N. Y. 157, 14 L. R. A. 133). It was supposed by that court that its effect was to so far modify previous views with respect to the legality of the structures in Water and Commercial streets as to leave the general question open to further examination, notwithstanding the *Ottenot Case*. Proceeding, thereupon, to consider the decisions in the *Conklin Case*, *supra*, and the *Uline Case*, 101 N. Y. 98, 54 Am. Rep. 661, a distinction was deemed to exist between them and the Buffalo cases, in that the railroad, in the former cases, was a lawful structure, whereas, in these cases, on the strength of the view taken of the opinion in the *Reining Case*, the construction in Water street was such an illegal appropriation of the street, and so unauthorized an act, as to constitute the structure a nuisance, not only as to property owners upon the street, but as to those upon Commercial street who were injuriously affected by the raising of the grade of the street to meet the railroad grade. The *Reining Case* has been quite misapprehended by the court below. That case is no more controlling upon the disposition of the present one than was the *Ottenot Case* upon the *Reining Case*, as was remarked by Judge Andrews, who wrote in the *Reining Case*. The plaintiffs in that case were property owners upon Water street; and their right to recover compensation was placed upon the ground that the railroad company had practically excluded them from the use of the street by the presence of the railroad upon

the embankment, and had thus invaded a legal right belonging to the abutting property owner. The reasoning of the decision was that, while it was quite probable that the general interests of Buffalo and of the public were promoted by the appropriation of the street, it by no means followed that a lotowner whose property is injured should bear the loss for the public benefit. The learned judge said that the public cannot "justify such an appropriation of a street by a municipality in aid of a railroad enterprise," and that "the Legislature cannot legally authorize structures for railroad purposes to be erected [in streets] . . . which practically exclude the abutting owners, . . . without compensating them for the injury suffered." Again, referring to the power conferred in the city charter with respect to streets, he held that the city "cannot, under guise of exercising this power, appropriate a part of a street to the exclusive, or practically to the exclusive, use of a railroad company, or so as to cut off abutting owners, . . . without making compensation," etc. The opinion pointed out clearly the distinction between the case of a change of grade in the street, merely, and the case then at bar, where the object of the elevation of an embankment in the street was to subserve the railroad use, which was practically, if not wholly, exclusive. It was because of that distinction that I concurred with *Judge Andrews* in his opinion; conceiving that a property owner not abutting upon Water street had no right to complain of a change of the grade in his side street, which a new and lawfully authorized use of Water street had rendered necessary in the interests of the general public. The *Reining Case* has not modified any existing rule of law, as laid down in the *Uline*, *Conklin*, and *Ottenot Cases*. It did not hold that the embankment in Water street for the railroad accommodation was illegal, or that it constituted an invasion of the rights of any one, save as to those of property owners abutting on Water street. It distinctly recognized the existence of the railroad and of this embankment as being under lawful authority; but for injuries occasioned to the property rights, within the principle of the decision in the *Story Case*, 90 N. Y. 123, 43 Am. Rep. 146, an abutting owner could not legally be deprived of his right to compensation by the Legislature.

As the *Reining Case* in no sense overruled the *Ottenot Case*, the question is to-day the same as it was when we had decided the *Ottenot Case*; and I do not believe we could, with any appearance of consistency, sustain this plaintiff's right to recover compensation from the railroad company, when we denied it in the other case. Nor do I think we can overlook the fact that the *Conklin Case* is a controlling authority upon the case before us. The opinion in the *Conklin Case* was concurred in by all the members of the court. There the railroad company, in crossing a highway, constructed its road through a deep cutting, over which it built a bridge, to which, by embankments on either side of the cutting, the highway was graded up, so as to permit the continuance of the public travel as before. The plaintiff's property abutted on one of the embankments, and he also owned the fee to

the center of the highway so changed, but his right to compensation was, nevertheless, denied; the grounds for the decision, in substance, being that a change of grade invades no private right, and, whatever the inconvenience to the abutting owner, it takes from him no property right for which he has not been compensated. *Judge Finch*, who delivered the opinion, remarked that, if the highway "became such by dedication, compensation for the easement was expressly waived. If taken by eminent domain, the compensation paid covered all the damages sustained, among which were necessarily embraced such as might flow from a change of grade required for the public use or convenience." "The right of the Legislature," he said, "to permit a railroad company to cross a public highway, and either upon the same or a different grade, is, of course, conceded. In the latter case a corresponding change in the grade of the highway becomes necessary." The opinion proceeds to hold that the duty of making that change being imposed by statute upon the railroad company, instead of being left to the commissioners of highways, the company, in the work of restoration, stands in the place of the highway commissioners, without any responsibility to abutters, and having all the official rights of highway commissioners. The logical sequence of the opinion of the court in the *Conklin Case* is, obviously, to exempt a railroad company from liability for the consequences of a change of grade in city streets which is rendered necessary where intersected by the railroad structure, however great may be the inconvenience resulting to abutting property owners. The source of the authority of the railroad company in the *Conklin Case* was the same as that under which the company has acted in this case. In either case, under the provisions of the General Railroad Act, the power is conferred to construct the railroad across any street or highway "which the route of its road shall intersect, or touch; but the company shall restore the street or highway," etc., "thus intersected or touched, to its former state, or to such state as not unnecessarily to have impaired its usefulness." In the case of highways the consent of the commissioners, or an order of the supreme court, is required, while in cities the assent of the municipal authorities is to be had, and in the present case the giving of such assent was provided for in the city charter. It is thus evident that the source of the power to change the grade of the street, to permit of carrying it over the railroad crossing, is in the general or public law, which creates a duty in that respect which is transferred from the local authorities to the shoulders of the railroad company, in the performance of which it stands in the place of the local authorities, with all their immunity from responsibility for any consequential damages, not attributable, of course, to negligence in the manner of performance. If, however, in performing this work of restoring the intersected street to its former state of public usefulness, the company is invested with the immunity conferred upon the local authorities, how can the abutting owner have a legal cause of action for an alleged injury resulting from the change in

grade? In reference to the restriction upon the absolute nature of the right of abutting owners, in the case of a municipal control of streets in the public interest, even when privileges and benefits previously enjoyed from the original condition of the streets are curtailed or impaired by the changes, Judge Andrews cites (*Reining Case, supra*) "the cases of change of grade" as furnishing "apposite illustrations." In *Uline v. New York Cent. & H. R. Co.*, 101 N. Y. 98, 54 Am. Rep. 661, where the street and sidewalk in front of the plaintiff's premises were raised by the company so as to conform to the grade of the street to the grade of the railroad, it was said in the opinion: "So much it [the defendant] was bound by law to do under the General Railroad Act. If [the street] was not, in front of plaintiff's premises, by the act of the defendant, devoted to anything but street purposes, and, as the city could have raised the grade of the street without liability to abutting owners, so it could authorize the defendant to do so without such liability." It is apparent that the general term below, in the discussion as to the lawfulness of the defendant's railroad construction in Water street, failed to consider the distinction between a case where a statute confers authority upon a corporation to take the property of individuals for some public purpose without making a provision for compensation, and a case where the Legislature, exercising an undoubted right, subjects the public property to some new public use, by some extraordinary features of which, however, natural rights, or easements appurtenant to abutting property owners and constituting property rights, are interfered with, and consequential injuries ensue. In the first case the statute would be unconstitutional and void, and could confer no rights upon the legislative grantee, while in the latter case there could be no question as to the constitutionality of the Act, and as to the legality of an occupation in pursuance of the Act by the grantee; but for the damages which could be proved as directly consequential to the use, in its peculiar features, an injured abutting landowner could recover. That, I think, was the theory of the decision of the *Story Case*, 90 N. Y. 122, 48 Am. Rep. 146.

The two guiding principles to be deduced from the authorities are that the defendant, being lawfully in Water street, by authority of the public law, and with the assent of the municipality, was not a nuisance, and, except as to abutters, invaded no legal rights; and that, in building the embankment in Commercial street, to permit of unimpeded travel upon that street over the railroad in Water street, the defendant was performing a duty imposed by the public law, and prescribed by municipal ordinance, and hence could come under no responsibility to adjoining landowners. In this connection I may say that for such consequential damages as are sought to be recovered here from a railroad company which is lawfully in the occupation and use of a street, but which, incidentally, is the occasion of injury to property owners in an adjoining street, by reason of its performance of the statutory duty to conform its grade to the new use, the Legislature might very properly, under limita-

tions, grant a remedy. Without such remedial legislation, however, the case is one of *damnum absque injuria*. Nothing in the *Reining Case* is in contradiction of the views expressed; and in support of them we have much authority, running back from the *Uline Case, supra*, to that of *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 857. This construction in Commercial street was a change of grade made by the defendant under legal compulsion, and individual interests are as much subordinate to the requirements of public interests in such a case as, concededly, they would be if, as matter of fact, the city authorities had done the work themselves. As matter of law, its performance by the defendant was a performance by a constituted public authority. In the opinion in the *Reining Case* Judge Andrews defined the line of the limitation to public powers in the control over city streets to be reached when they invaded an abutter's rights. But, outside of that line, "provided that the change be made under lawful authority," the owner "has no legal redress for any injury to his property, however serious, caused by a change of grade." Bronson, *Ch. J.*, in *Radcliff v. Brooklyn, supra*, in illustrating the extent to which acts may go without rendering persons answerable for the consequences to others, speaks of those cases "which hold that persons acting under an authority conferred by the Legislature to grade, level, and improve streets and highways, if they exercise proper care and skill, are not answerable for the consequential damages which may be sustained by those who own lands bounded by the street or highway. And this is so," he adds, "whether the damage results from cutting down or raising the street, and although the grade of the street had been before established, and the adjoining landowners had erected buildings with reference to such grade." The principle seems applicable to this case, where the defendant, acting under the authority of the Legislature, has changed the grade of Commercial street. I am quite unable to see how we can sustain the order appealed from, whether we consider what was decided with respect to the question of the defendant's liability in the *Ottenot Case*, or whether we consider the rule laid down in the *Conklin Case*, and in prior decisions. I think the order of the general term, appealed from, should be reversed, and the judgment of nonsuit should be affirmed, with costs in both courts.

All concur, except O'Brien and Maynard, *JJ.*, dissenting, and Andrews, *Ch. J.*, not voting.

Josephine VANDEWATER, Admx., etc., of
William P. Vandewater, Deceased, *Respt.*,

NEW YORK & NEW ENGLAND R.
CO., *Appt.*

(.....N. Y.)

1. The failure of an engineer to give signals required by statute at a highway cross-

NOTE.—The above case construes a peculiar statute on the subject of signals by trains at highway

ing does not as matter of law make the railroad company liable for neglect of duty where the provisions of the statute impose the duty upon the engineer and make him liable for a misdemeanor if he fails to comply therewith.

2. No statute is necessary to make a railroad company liable for failure to run trains with care and caution at a highway crossing and the duty of the company may require due warning of the approach of the train by whistle or bell or in some other way.

(Maynard, J., *dissents*.)

(November 29, 1832.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the Dutchess County Circuit in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Reversed*.

The facts are stated in the opinion.

Mr. Walter C. Anthony, for appellant:

The learned justice erred in charging the jury that the provision of the Penal Code, § 421, which makes it a misdemeanor for any person acting as engineer on a locomotive to fail to ring the bell, or sound the whistle when approaching a highway crossing had the same effect, so far as the railway company is concerned, as the former statute.

N. Y. Laws 1854, chap. 283, § 7.

This would be making a master liable for the criminal nonfeasance of his servant, which is not the law.

14 Am. & Eng. Encyclop. Law, p. 826, § 13.

Even if the master was liable for the criminal omissions of his servants, such liability in a case like this would apply in favor of none but people on the highway at or near the crossing.

Harty v. Cent. R. Co. of N. J. 42 N. Y. 468;

Cordell v. New York Cent. & H. R. R. Co. 64 N. Y. 535; *Byrne v. New York Cent. & H. R. R. Co.* 94 N. Y. 12; *Patterson, Railway Accident Law*, § 160.

Messrs. Wood & Morschauer, for respondent:

When the company by its own conduct and its published regulations has led the public to believe trains will not be run upon its tracks at specified times and places, persons having occasion to cross them have the right to rely upon these assurances, and are not necessarily guilty of negligence when injured by prohibited trains while doing so.

Parsons v. New York Cent. & H. R. R. Co. 3 L. R. A. 683, 118 N. Y. 855.

Irrespective of an ordinance or law regulating the speed of railroad trains at crossings, the running at an excessive rate of speed is negligence, and if a collision is caused thereby the company is liable. As to whether the rate

of speed is excessive or dangerous in the locality, is a question of fact for the jury.

Massoth v. Delaware & H. Canal Co. 64 N. Y. 524.

Where the public have for a long time notoriously and constantly been in the habit of crossing a railroad at a point not in a traveled public highway, with the acquiescence of the railroad company, such acquiescence amounts to a license and imposes a duty upon the company as to all persons so crossing to exercise reasonable care in the running of its trains so as to protect them from injury.

Swift v. Staten Island Rapid Transit R. Co. 123 N. Y. 645; *Barry v. New York Cent. & H. R. R. Co.* 92 N. Y. 289, 44 Am. Rep. 377.

The mere fact of the existence of a farm crossing does not require a signal of the approach of a train or reduction of its speed; but the company owes to the public the duty, in running its trains, of continuous observance of the situation in advance, that no needless injury may be done.

Morris v. Lake Shore & M. S. R. Co. 24 N. Y. Week. Dig. 160; *Byrne v. New York Cent. & H. R. R. Co.* 28 Hun, 438, affirmed, 94 N. Y. 12.

The defendant, it was shown, had established a custom of sounding an alarm at the approach of an engine at the Fishkill depot. Where a railroad company has established the custom of sounding an alarm at certain places and it neglects to do it on any occasion, and such neglect causes an injury, it is negligence on the part of the company.

Sullivan v. Tioga R. Co. 44 Hun, 304; *McGrath v. New York Cent. & H. R. R. Co.* 63 N. Y. 522.

Where a private way crosses a railroad track and is used somewhat by the public and is near a public highway, such railroad, when approaching such private crossing, is bound to give the statutory signal.

Cranston v. New York Cent. & H. R. R. Co. 32 N. Y. S. R. 592, affirmed, 125 N. Y. 724.

And if a train runs through a crowded locality, where danger is to be apprehended, without ringing a bell or sounding a whistle, and does so at a high rate of speed, the latter fact is a proper circumstance bearing upon the question of negligence.

Salter v. Utica & B. R. Co. 14 N. Y. Week. Dig. 136.

Where a person is about to cross a farm crossing, and where the place is such that one lawfully using the crossing cannot see, or with ordinary care otherwise discover the approach of a train, the company is required to exercise such care as will be likely to warn of its approach, or to manage its trains so that it will not be likely to injure one so using the crossing.

Cordell v. New York Cent. & H. R. R. Co. 70 N. Y. 119, 26 Am. Rep. 550; *Remer v. Long Island R. Co.* 43 Hun, 352, affirmed, 113

crossings. The interpretation of the usual statutes on the subject has been the subject of several notes in this series. Thus for statutory signals as the measure of trainmen's duty at such crossings, see note to *New York, L. E. & W. R. Co. v. Leamon* (N. J.) 15 L. R. A. 423, 18 L. R. A.

As to what crossings require signals, see note to *Sanborn v. Detroit, B. C. & A. R. Co.* (Mich.) 16 L. R. A. 119.

For whose benefit such signals must be given, see note to *Loneragan v. Illinois Cent. R. Co.* 17 L. R. A. 254.

N. Y. 669; *Swift v. Staten Island Rapid Transit R. Co.* 123 N. Y. 648; *Chrystal v. Troy & B. R. Co.* 124 N. Y. 523.

Peckham, J., delivered the opinion of the court:

The plaintiff's intestate was killed at a farm crossing over the defendant's railroad near the village of Fishkill. He was in the act of driving across the track, when he was struck and instantly killed by one of the engines of the defendant, which was drawing its pay car. The general direction of defendant's road at this point is east and west. The engine attached to the pay car was coming from the east at the rate of 40 or 45 miles an hour, and at that speed passed a highway crossing called "Van Wyck's," and then, at a distance of a few hundred yards to the west of that crossing, it passed the Fishkill depot, and, continuing its very high speed, passed along, still towards the west, about 1,600 feet, when it reached the farm crossing in question, and where the engine came in collision with the horse and wagon belonging to the plaintiff's intestate, and threw him out of the wagon and killed him instantly. The plaintiff, upon the trial, gave evidence tending to show that no whistle was blown or bell sounded for the crossing of the highway east of the Fishkill depot or for the depot itself, and none for the farm crossing where the accident occurred. This highway crossing was somewhere in the neighborhood of 2,000 feet east of the farm crossing. Evidence was also given tending to show that it was customary for the engineers or firemen of the engines to blow the whistle or ring the bell when approaching the highway crossing, and also when coming to the depot of the defendant. The learned judge charged the jury that the company were bound to blow the whistle or sound the bell 80 rods before getting to the highway, and continue it at intervals until the crossing was passed. He also said the deceased had a right to assume the company would do its duty with respect to the highway crossing, and, if it did not sound the bell or blow the whistle at this crossing, and the accident at the farm crossing was occasioned by that omission, then the jury might find a verdict of negligence against the company. Proper exceptions to this charge were taken by counsel for defendant, who called the attention of the court to the fact that the statute imposing upon the company the duty of having the bell rung had been repealed. The court replied that it was in the Penal Code. Defendant's counsel said that the Penal Code did not apply in a civil action. The court then stated to the jury that it was just the same as if it were written in the law; that it was made a crime, instead of imposing a liability for damages; and that the jury might find a verdict just the same as they could before the repeal. To this direction the counsel for defendant took appropriate exception. The question of the omission to whistle or ring on approaching a highway crossing 2,000 feet east of the farm crossing at which the plaintiff's intestate was killed was thus made a most important factor in the case. The effect of this charge was to permit the jury to find negligence from the mere omission to ring a bell

or sound a whistle at the highway crossing, and the charge was based upon the assumption that the statute made it the duty of the company to make these signals at such crossing. In this, we think, the learned judge erred.

The statute imposing any duty upon the company to cause a bell to be rung or a whistle sounded upon approaching a highway crossing has been, in terms, repealed, and the provision in the Penal Code does not leave the law the same as it was before the repeal. By section 89 of the General Railroad Act (Laws 1850, chap. 140) provision was made for placing a bell on each locomotive, and direction was given that it should be rung as therein stated, or a steam whistle was to be attached to each locomotive, and to be sounded, instead. Penalties upon the company neglecting were placed, which could be collected by the district attorney, and the company was made liable for all damages sustained by any person by reason of such neglect. By section 7 of chapter 282 of the Laws of 1854 some additions were made to the provisions under the Act of 1850, and it was provided that, in addition to the penalties imposed upon the company, every engineer in charge of an engine, who neglected to obey the statute, was to be subject to a fine and imprisonment in the county jail. Subsequently the Penal Code was adopted, and it went into operation on the 1st of December, 1882. Section 421 provided that the engineer of a locomotive, who failed to ring the bell or sound the whistle upon it 80 rods, etc., should be guilty of a misdemeanor. Then the Legislature, by the Act, chapter 593, Laws 1886, repealed, in so many words, all the provisions in the General Railroad Act of 1850 and of the Act of 1854, above cited, which made it the duty of the railroad company to cause the bell to be rung or the whistle to be sounded, or provided any penalties against the company for its neglect. The only statute upon the subject which remained at the time of the happening of the accident in question is to be found in section 421 of the Penal Code, already cited. Whether it was really intended to repeal all the sections of the law by which the duty was imposed upon the railroad company to cause these signals to be given may perhaps be doubted, but the repeal is in such plain and peremptory language that courts cannot disregard it without a clear violation of a legislative enactment. The duty of giving the signals is placed by the Penal Code upon the engineer, and his failure is made a crime, and in that way the giving of the signals is still provided for. The statute, however, does not impose the duty upon the company, and, unless such duty is imposed by statute, the failure to give such signals cannot, as matter of law, be regarded as a neglect of duty. *Beinstegel v. New York Cent. R. Co.* 40 N. Y. 9, 14 Abb. Pr. N. S. 29; *Weber v. New York Cent. & H. R. R. Co.* 58 N. Y. 451-459; *Briggs v. New York Cent. & H. R. R. Co.* 72 N. Y. 26, 30.

Of course the companies still owe a duty to the public at such crossings as elsewhere. That duty is to run their trains with care and caution, and when they cross such roads it may well be that the failure to give due warning by whistle or bell, or in some other way,

would be held, under all the circumstances, to be a failure to manage and run their train with proper care and caution, for which they would be liable to a party injured, if otherwise entitled to recover. Even when compelled by statute to make such signals, it is not necessarily a defense, in all cases, to prove that they were made. The making of the signals is the least the company can do, and in a given case it might not be enough. *Harty v. Central R. Co. of N. J.* 43 N. Y. 468; *Thompson v. New York Cent. & H. R. R. Co.* 110 N. Y. 636.

When the duty to give signals at highway crossings was by statute imposed upon the railroad company, it was held that it did not apply in favor of one who was walking upon the track, but that it was intended for the benefit of those who were traveling the highway. *Harty v. Central R. Co. of N. J. supra*. It may be that evidence of the omission to give any signals for the highway crossing would not be admissible as bearing upon the question of defendant's negligence in running its train at the farm crossing 2,000 feet distant. There are cases where evidence has been admitted showing the absence of customary signals at the places where usually they had been given, for the purpose of proving negligence on the

part of the company. Whether this was a case where evidence of this nature should be admitted in favor of this plaintiff, and with regard to the highway crossing, is a question not now necessary to decide. If the defendant was guilty of negligence in the manner of running its train over the farm crossing, it would be liable to a plaintiff otherwise entitled to recover. Upon a new trial all the facts can be shown which would enable the court or the jury to determine the question.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur; *Maynard, J.*, in result.

Maynard, J., dissents from that part of the prevailing opinion which holds that the duty of the engineer to give a signal when approaching a highway crossing is not the duty of the company whose agent he is in running the engine, but concurs in the result, upon the ground that, as matter of law, it is not negligence in passing a farm crossing to omit to give the required signal at the highway crossing 2,000 feet away. It was a circumstance which the jury might consider in determining the degree of care to be exercised by the defendant in approaching the farm crossing.

INDIANA SUPREME COURT.

France HOBBS et al., Appts.,
v.

STATE of Indiana.

(.....Ind.....)

1. An unnecessary recital by the clerk of a charge to the grand jury does not make it a part of the record.
2. A verified plea in abatement is the only mode of raising the question that an information cannot be filed while the grand jury is in session.
3. An indictment for conspiracy to do an unlawful act in the night-time and also for conspiracy to do an unlawful act while wearing white caps, masks, or other disguises, each of which acts is made unlawful by the same section of the statute, is not bad for duplicity.
4. Statements by a witness out of court are admissible to corroborate him where he has been impeached by proof of other statements out of court.
5. A witness who has been impeached by statements out of court is not incompetent to prove his own corroborating statements.
6. The constitutional provision against cruel and unusual punishments is not violated by a statute authorizing imprisonment from two to ten years and a fine not exceeding \$2,000 for conspiracy to do an unlawful act in the night-time or to do such act while wearing white caps, masks, or other disguises.

(January 10, 1893.)

NOTE.—For note on prohibition of cruel and unusual punishments, see *Re Birdsong* (Ga.) 4 L. R. A. 828.

18 L. R. A.

See also 30 L. R. A. 734.

APPEAL by defendants from a judgment of the Circuit Court for Dubois County convicting them of violating the provisions of the White Cap Act. *Affirmed.*

The facts are stated in the opinion.

Messrs. Jerry L. Suddarth and Traylor & Hunter, for appellants:

It is provided by statute that if an indictment or information that cannot be amended without a new affidavit, be quashed, the defendant shall not be discharged, and the court is required to direct the case to be submitted to a grand jury; or may, in a proper case, direct the prosecuting attorney to prepare and file an information upon a proper affidavit against the defendant charging him with the offense in proper form.

Rev. Stat. 1881, § 1760.

But this section must be taken in connection with sections 1679 and 1761 which prescribe the contingencies under which one may be prosecuted by information, and with reference to other parts of the Criminal Code.

State v. Bonnell, 104 Ind. 541; *Hoover v. State*, 110 Ind. 849.

In *State v. Bonnell, supra*, the court said: "The provisions made by statute, authorizing prosecutions by information, were intended to secure speedy trials and prevent delays by enabling the prosecuting attorney to present charges upon which the grand jury had no opportunity to act, but they were not intended to permit the prosecuting attorney to proceed by information where there is ample opportunity to proceed by indictment."

It is expressly provided by statute: "In any case where the defendant is charged with a felony upon indictment and the indictment has been quashed and no grand jury in session, . . . he shall have the right to de-

mand that he be prosecuted by affidavit and information without delay; and if the prosecuting attorney fail to so prosecute the defendant shall be discharged from custody," etc.

Rev. Stat. 1881, § 1761.

The express mention of this right to demand a prosecution by information and affidavit excludes the theory that the prosecuting attorney can so prosecute over the objections of the defendant.

Lindsey v. State, 72 Ind. 89; *Hoover v. State*, *supra*.

The information does not state the offense with sufficient certainty.

The gist of the offense defined by the Act under which this prosecution was instituted, is the uniting or combining together of three or more persons to do an unlawful act, but there are two distinct states of facts connected with this purpose, either of which constitutes an offense under the law, one, if the purpose be to do the unlawful act in the night-time, and the other, if the purpose be to do an unlawful act while wearing white caps, masks, or being otherwise disguised. Both of these states of facts are alleged in the first count of the amended information as constituting the offense with which the appellants are charged, thus charging them with two states of facts in the same count, either of which would constitute the crime of vicious conspiracy under said Act. This mode of alleging the offense is too uncertain.

Ind. Const. § 13, art. 1; Rev. Stat. 1881, § 58; Moore, Crim. Law, 1st ed. p. 243; *Knopf v. State*, 84 Ind. 816; *State v. Weil*, 89 Ind. 286; 4 Am. & Eng. Encyclop. Law, p. 755, and *note 3*, and Indiana authorities therein cited.

The trial court below had no jurisdiction to try said cause for the reason, said enactment is void, being in violation of the constitutional provision of the state of Indiana, article 1, Rev. Stat. 1881, § 16, which is as follows:

"Excessive bail shall not be required."

"Excessive fines shall not be imposed."

"Cruel and unusual punishment shall not be inflicted."

"All penalties shall be proportional to the nature of the offense."

Where a witness has been impeached by proof of his having made statements out of court, inconsistent with his testimony in court, the rule does not authorize recalling the impeached witness himself to detail in evidence what he had stated the facts to be on other occasions than those to which his attention has been called.

Coffin v. Anderson, 4 Blackf. 398; 1 Greenl. Ev. §§ 462, 467; *McIntire v. Young*, 6 Blackf. 496.

Even if it be assumed that he might, under the rule, prove that he had, on former occasions said to other persons that "he did not know who the parties were that had assaulted him," his testimony would be confined to that one point, and he would not be permitted to testify as to who he had stated they were. The question is, Did the prosecuting witness make the particular statement indicated in the interrogatory?

1 Greenl. Ev. § 467, 12th ed. p. 518, *note 1*; *McIntire v. Young*, *supra*.

48 L. R. A.

Messrs. Thomas H. Dillon, R. M. Milburn and William E. Cox, for appellee:

Appeals are heard and determined upon the record made by the trial court and nothing is a part of the record which is not incorporated in it according to law.

Elliott's Appellate Procedure, § 280.

The impaneling of the grand jury was no part of the record made by the trial court in this cause, hence it is improperly embraced in the transcript and the mere copying of it into the record by the clerk does not make it a part of the record.

State v. Cooper, 103 Ind. 75; *Pattes v. State*, 109 Ind. 546; *Hollingsworth v. State*, 111 Ind. 289; *Brown v. State*, 111 Ind. 441; *Compton v. State*, 89 Ind. 838; *Pence v. State*, 110 Ind. 95.

The grand jury not being in session when the affidavit and information in this cause were filed, the court below immediately acquired jurisdiction of the charges made by them against the appellants and became entitled to proceed to trial upon them regardless of any subsequent or intervening meeting of the grand jury of the county.

Elder v. State, 96 Ind. 162, 164.

When the first counts of original affidavit and information were quashed the court had the right to, and did grant leave to the state to amend, which was done.

Rev. Stat. 1881, §§ 1735, 1760; *Kennegar v. State*, 120 Ind. 176.

The circuit court is a court of general jurisdiction and every presumption is in favor of its jurisdiction; the record is *prima facie* evidence of it and will be held conclusive until clearly disproved.

Pickering v. State, 106 Ind. 228; *Nichols v. State*, 127 Ind. 406, 413.

Whatever defeats or prevents a conviction on the indictment, but does not preclude the state from again indicting and convicting the defendant for the offense charged, should be pleaded in abatement.

Moore, Crim. Law, § 287; *Mathis v. State*, 94 Ind. 562; *Pointer v. State*, 89 Ind. 255; *Henning v. State*, 106 Ind. 887, 888, 55 Am. Rep. 756; 4 Am. & Eng. Encyclop. Law, 788.

When the defendant pleads to the merits of the case the court will not inquire whether the defendant was properly or improperly brought within its jurisdiction.

Abbott's Trial Brief, §§ 96, 573; *State v. Washington*, 33 La. Ann. 896; *State v. Hughes*, 1 Ala. 635.

An indictment is not bad for duplicity in charging abortion and also involuntary manslaughter in the same count.

Traylor v. State, 101 Ind. 65.

It is common for a statute to declare, that if a person does this, or this, or this, he shall be punished in a way pointed out. Now, if, in a single transaction, he does all the things, he violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore an indictment upon a statute of this kind may allege in a single count that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction and where the statute has "or" and it will not be double and it will

be established at the trial by proof of any one of them.

Bishop, *Crim. Proc.* § 436, and authorities therein cited; *Clifford v. State*, 29 Wis. 327; *Davis v. State*, 100 Ind. 154; *Keefer v. State*, 4 Ind. 246; *Byrne v. State*, 12 Wis. 519; 10 Am. & Eng. Encyclop. Law, 599c, 599, and authorities under note 6.

The punishment of death by electricity while unusual is not cruel within the meaning of the Constitution.

19 Am. & Eng. Encyclop. Law, 570, and authorities given in note 1.

Among crimes of different natures those should be most severely punished which are most destructive to public safety and happiness and the quantity of punishment must be such as is warranted by the laws of nature and society and such as appears to be best calculated to answer the ends of precaution against future offenses.

4 Am. & Eng. Encyclop. Law, 722; 4 Bl. Com. 12, 13.

Fine and imprisonment are not cruel and unusual punishment.

Lipan v. State, 3 Heisk. 159; 4 Am. & Eng. Encyclop. Law, 722.

If statements of a witness made out of court are introduced on the trial, which are in conflict with his testimony, to discredit him, he may prove his declarations made in harmony with his evidence.

Dailey v. State, 28 Ind. 285; *Brookbank v. State*, 55 Ind. 169; *Carter v. Carter*, 79 Ind. 466; *Thompson v. State*, 38 Ind. 39, 41; Moore, *Crim. Law*, § 864; *Coffin v. Anderson*, 4 Blackf. 808.

Hackney, J., delivered the opinion of the court:

At the January term, 1892, of the Dubois circuit court the appellee charged, by information, the appellants, France Hobbs, Daniel King, Samuel Spragins, and Thomas Smith and five others with the offense of riotous conspiracy as defined by what is known as the "White Cap Act." On the 26th day of April, 1892, the court sustained a motion to quash the first count of the information and upon leave of the court the prosecutor filed an amended first count charging that at, etc., on, etc., the defendants did "unlawfully and feloniously unite and combine together for the purpose of unlawfully and feloniously, in a rude, insolent, and angry manner, striking, beating, and bruising one Henry G. Berger in the night-time, and for said unlawful purpose said defendants did then and there disguise themselves by wearing masks and being otherwise disguised."

A motion to quash the amended count was overruled the defendants were tried by the court and the appellants were convicted of riotous conspiracy and fined five dollars each and sentenced to two years' imprisonment in the state's prison.

There are six assignments of error and they will be disposed of in their order. The first assignment seeks to present the question whether a prosecution may be maintained by information filed while the grand jury is in session. The transcript contains an order of court convening and charging the grand jury 18 L. R. A.

on the 26th day of April, 1892, and the contention is that the session of the grand jury must be presumed to have continued to include April 28, 1892, the day on which the motion to quash was sustained and the amended first count was filed. The action of the court in charging the grand jury was not in any manner connected with the action against the appellants and it finds way to this court only by an unnecessary recital of the clerk. It is not a part of the record of proceedings in this cause as made by the trial court and cannot be considered. *Elliott's Appellate Procedure*, § 280; *Pattee v. State*, 109 Ind. 546.

The question urged is not properly before us for another reason. Rev. Stat. 1881, § 1733, provides that the question can be raised only upon a verified plea in abatement. See also *Hoover v. State*, 110 Ind. 349.

The second assignment and the argument of counsel upon it raise the question as to whether the amended count is bad for duplicity. The language of the statute, *Elliott's Supp.* 362, is as follows: "If three or more persons shall unite or combine together for the purpose of doing any unlawful act in the night-time, or for the purpose of doing any unlawful act while wearing white caps, masks, or being otherwise disguised, shall be deemed guilty of riotous conspiracy, and upon conviction therefor shall be imprisoned in the state prison not more than ten years nor less than two years, and fined in any sum not exceeding two thousand dollars."

It is insisted that the statute defines two crimes, namely, one a *conspiracy to do an unlawful act in the night-time*, and another a *conspiracy to do an unlawful act while wearing white caps, masks, etc.*, and it is claimed that the information charges both these offenses in said amended count. We do not disagree with the proposition that an indictment or information may be had for duplicity, as is held in *Knoff v. State*, 84 Ind. 316, cited by the appellants, but we do disagree with the contention that this information is bad for such cause. Mr. Bishop, in his work on Criminal Procedure, § 436, vol. 1, speaking of statutes of the class under consideration here, says: "It is common for a statute to declare that if a person does this, or this, or this he shall be punished in a way pointed out. Now, if in a single transaction, he does all the things, he violates the statute but once and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore, an indictment upon a statute of this kind, may allege in a single count that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction 'and' where the statute has 'or' and it will not be double and it will be established at the trial by proof of any one of them." *Davis v. State*, 100 Ind. 154.

Fahnestock v. State, 103 Ind. 156, and *Mergenthim v. State*, 107 Ind. 568, follow the rule as announced by Mr. Bishop and its application to the statute under consideration and to the information in question is decisive of the point, and we must hold the count sufficient.

The third assignment of error and the argument of counsel under it raises the question of the correctness of the court's action in permitting the prosecuting witness and another to

testify to statements of the prosecuting witness made out of court in corroboration of his testimony concerning the identity of the defendants. Witnesses for the defense had testified to statements of the prosecuting witness made out of court, to the effect that he had not recognized the defendants on the night of the acts charged, and the testimony to which objection is made was in the state's rebuttal evidence. Appellant's counsel seem to have confused the rule as to the character of a re-examination and that as to proper rebuttal testimony, if we may judge from the cases cited in support of their contention. Indeed, the case of *Coffin v. Anderson*, 4 Blackf. 398, cited by them, holds "that if a witness has not been impeached by proof of his previously made statements inconsistent with his testimony, there seems to be no sufficient reason for the introduction of corroborating evidence. But it is otherwise, if the witness has been thus impeached; it appears to be then proper to give the party who called the witness an opportunity to support him, by proving that the witness had on other occasions stated the facts to be as he represents them in his testimony. There are several cases directly in favor of the admission, under these circumstances, of this corroborating evidence. *Cooke v. Curtis*, 6 Harr. & J. 93; *Packer v. Gonsalus*, 1 Serg. & R. 536; *Wright v. De-Klyne*, 1 Pet. C. C. 208; *People v. Vane*, 12 Wend. 78."

We may add to the citations of *Mr. Justice Blackford* the more recent cases of *Dailey v. State*, 28 Ind. 285; *Brookbank v. State*, 55 Ind. 169; *Hodges v. Bates*, 102 Ind. 494; *Dodd v. Moore*, 92 Ind. 397; *Carter v. Carter*, 79 Ind. 466.

Appellants further contend that if corroborative statements may be proven under such circumstances, the impeached witness should not be permitted to testify to such statements. We know of no statute or rule declaring such witness incompetent, and, under the practice prevailing, the trial court or jury being the judges of the credibility of the witnesses and being enabled to weigh his testimony, in the light of his impeachment, we can see no good reason for excluding him as a witness.

The fourth assignment of error is that the court erred in overruling the motion in arrest of judgment. Two questions are argued upon this assignment, first, that the charge was invalid in that it was by information filed when the grand jury was in session, and second, that the "White Cap" Act is unconstitutional as in violation of section 16, article 1, of the state Constitution. Rev. Stat. 1881, § 61.

The first point we have considered and passed upon in deciding upon the action of the court in overruling the motion to quash. The second point, that the Act is in violation of the Constitution that "cruel and unusual punishment shall not be inflicted," has the merit of possessing some originality, but the position assumed seems to be without authority to support it.

We have been unable to find but a single instance in which this provision of the Constitution has been in question before this court, and then the question was regarded as possessing no merit, and it was disposed of without serious consideration. This provision of the Constitution is found also in the Constitution of

the United States in the same words and *Mr. Story* in his work on the Constitution says it "is an exact transcript of a clause in the Bill of Rights framed at the Revolution of 1688." He says further that "the provision would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such government should authorize or justify such atrocious conduct. It was, however, adopted as an admonition to all departments, . . . to warn them against such violent proceedings as had taken place in England in the arbitrary reigns of the Stuarts."

From this author we learn that the excesses forbidden were of a time far from which our civilization has grown.

Looking to an analysis of the provision in question with reference to the causes of its origin, the weakness of the contention of the appellants will be apparent. The word "cruel" when considered in relation to the time when it found place in the Bill of Rights meant, not a fine or imprisonment, or both, but such as that inflicted at the whipping post, in the pillory, burning at the stake, breaking on the wheel, etc. The word, according to modern interpretation, does not affect legislation providing imprisonment for life or for years, or the death penalty by hanging or electrocution. If it did, our laws for the punishment of crime would give no security to the citizen. Neither is punishment by fine or imprisonment "unusual." *Judge Cooley* in his work on Constitutional Limitations, says that the provision has application to that class of punishments which never existed in the state, or that class which the public sentiment must be regarded as having condemned as "cruel," and any punishment which, if ever employed at all, has become altogether obsolete as "unusual."

It may well be considered whether in this country, at the close of the nineteenth century, and in this state where there are no common-law crimes, and where the legislative department of the government is entrusted with the duty of defining crimes and prescribing punishments, this provision of the Constitution is not obsolete, except so far as it may admonish the courts against the infliction of punishments so severe as not to "fit the crime." The provision in question is that, "cruel and unusual punishment shall not be inflicted." Our law-making power does not inflict punishment; it but prescribes the limits of punishment to be inflicted by other powers. We think the act is not unconstitutional, but that it is one supported by every principle underlying a free government. If complaint may be made against the degree of punishment inflicted by the court below, that complaint cannot, of right, be made by the appellants, for the punishment inflicted is not only the least provided by the law, but, for the outrage of which they were found guilty, it is highly tempered with mercy. The evidence for the state showed, and its sufficiency is not questioned in this court, that at the hour of midnight the appellants, while masked and otherwise disguised, violently broke into the residence of *Berger*, took him from his bed and in his night clothes bound him to a tree and with hickory switches one-half inch in diam-

cer, several twisted together, beat and lacerated his bare back and limbs. What more "cruel and unusual punishment?" As said by the court in *Ligan v. State*, 3 Heisk. 159, a case in many respects similar to this: "Every home in this state is entitled to be protected from intrusion and outrage, whether it be the mansion of the wealthy or the hovel of the poorest man in the land. It should be the pride and boast of every citizen to make the law so effective in its protective power, that we may be able to say of our country as Canning said

of the peasant homes of England 'that the winds and rains enter them, but without the warrant of law the king dare not do it.' We gladly adopt this language and approve its force and wisdom as applied to the case in hand."

The fifth assignment is not argued and the sixth is the same as the first.

Having disposed of all of the questions involved, we affirm the judgment of the lower court.

MINNESOTA SUPREME COURT.

Andrew J. FINNEGAN, *Appt.*,

v.

KNIGHTS OF LABOR BUILDING ASSOCIATION *et al.*, and Frederick D. NOERENBERG, *Resp.*

(.....Minn.....)

- *1. A *de facto* corporation exists where there is a law authorizing the creation of corporations, an attempt to organize a corporation pursuant to it, and user as a corporation under such attempted organization.
2. A substantial compliance with the law is not necessary to constitute the body a *de facto* corporation.
3. Chapter 29, Laws 1870, entitled "An Act in Relation to the Formation of Co-operative Associations," is not obnoxious to the objection that the title does not express its subject, as required by the Constitution.
4. Under that Act a corporation may be formed for the purpose of buying, owning, improving, selling and leasing of lands, tenements and hereditaments, real, personal and mixed estates and property, including the constructing and leasing of a building, etc.
5. The taking subscriptions to and issuing stock, electing managers and directors, adopting by-laws, buying a lot and constructing and leasing a building upon it, is a sufficient user to constitute a corporation attempted to be organized under that law a *de facto* one.

(January 13, 1893.)

APPEAL by plaintiff from a judgment of the District Court for Hennepin County in favor of defendant Noerenberg, in an action brought to enforce his personal liability for debts of the Building Association on the ground that the association had failed to become incorporated, and that therefore the promoters were liable as partners for its obligations. *Affirmed.*

The facts are stated in the opinion.

Messrs. Savage & Purdy, for appellant:

In the absence of legislation to the contrary, the members of a joint-stock company, like the members of a partnership, are liable for all the debts of the association.

*Headnotes by GILFILLAN, *Ch. J.*

11 Am. & Eng. Encyclop. Law, p. 1038; *Frost v. Walker*, 60 Me. 468; *Dennis v. Kennedy*, 19 Barb. 517; *Tappan v. Bailey*, 4 Met. 529; *Butterfield v. Beardley*, 28 Mich. 412, and cases cited.

Officers are authorized to bind members, and the ownership of stock constitutes membership.

Tyrell v. Washburn, 6 Allen, 466.

It follows that there is in this case obviously an individual liability of all the stockholders unless facts are shown affirmatively which relieve them from such liability.

Kaiser v. Lawrence Sav. Bank, 56 Iowa, 104, 41 Am. Rep. 85; *Abbott v. Omaha Smelt. & Ref. Co.* 4 Neb. 416; *Eaton v. Walker*, 76 Mich. 579; *Coleman v. Coleman*, 78 Ind. 844; *Richardson v. Pitts*, 71 Mo. 128; *Martin v. Powell*, 79 Mo. 401; *Fuller v. Rowe*, 57 N. Y. 28; *Garnett v. Richardson*, 35 Ark. 144; *Stafford Nat. Bank v. Palmer*, 47 Conn. 448; *Hill v. Beach*, 12 N. J. Eq. 31; *Hess v. Wertz*, 4 Serg. & R. 356; *Fild v. Cooke*, 16 La. Ann. 158; *Bigelow v. Gregory*, 73 Ill. 197; *Jessup v. Carnegie*, 13 Jones & S. 280; *Montgomery v. Forbes*, 143 Mass. 249.

No contract can kindle even a spark of corporate vitality without the aid of the Legislature.

2 Morawetz, *Priv. Corp.* § 746; 1 Morawetz, *Priv. Corp.* § 8.

The sounder view is one of partnership liability.

Cook, Stock & Stockholders, §§ 233, 234; 1 *Beach, Priv. Corp.* §§ 12, 13, 16; 4 Am. & Eng. Encyclop. Law, 200, note 1; *Empire Mills v. Cooke*, 16 La. Ann. 158; *Bigelow v. Gregory*, 73 Ill. 197; *Jessup v. Carnegie*, 13 Jones & S. 280; *Montgomery v. Forbes*, 143 Mass. 249.

There are only three ways in which respondent can escape individual liability: (1) by showing that the association was incorporated; (2) by showing that it was a corporation *de facto*; or (3) by establishing an estoppel on this point against the plaintiff. The Knights of Labor Building Association was never legally incorporated. The law under which its pretended incorporation was had is void under that provision of the Constitution which relates to the titles of bills.

Minn. Const. art. 4, § 27; *Johnson v. Harri-*

NOTE.—The above case supports the general doctrine followed in the majority of the cases as to partnership liability of stockholders in case of defective or illegal incorporation. See the note to *Rutherford v. Hill* (Or.) 17 L. R. A. 549, in which 18 L. R. A.

the subject is carefully examined and the great apparent conflict of courts and text-books in some degree explained by differences in the cases decided.

See also 26 L. R. A. 470; 39 L. R. A. 362.

son, 47 Minn. 575; *Union Pass. R. Co's App.* 81 Pa. 91; *Meuchter v. Price*, 11 Ind. 199; *People v. Allen*, 42 N. Y. 404; *State v. Kinsella*, 14 Minn. 524; *People v. Mahaney*, 18 Mich. 481; Cooley, Const. Lim. pp. 143, 144.

The association as organized is not within the scope of the statute.

The statute authorizes incorporation "for the purposes of trade, or for carrying on any lawful mechanical, manufacturing or agricultural business."

Minn. Gen. Laws 1870, chap. 29, § 1.

The purposes described in the articles of incorporation are neither of "trade" nor of "mechanical, manufacturing or agricultural business."

If the object for which this incorporation was made was only to erect and lease this one building, that is not a business authorized by the statute.

People v. Troy House Co. 44 Barb. 625.

The Knights of Labor Building Association was not a *de facto* corporation.

Two things are essential to the *de facto* existence of a corporation: (1) organization under color of law; and (2) user.

De Witt v. Hastings, 8 Jones & S. 463, affirmed 69 N. Y. 518; *Eaton v. Walker*, 76 Mich. 579; *Humphreys v. Mooney*, 5 Colo. 282; *Williamson v. Kokomo Bldg. & Loan Fund Assn.* 89 Ind. 389; *Abbott v. Omaha Smelt. & Ref. Co.* 4 Neb. 416.

If the Enabling Act is unconstitutional it is null and void; *i. e.*, no law at all. In such case it can afford "color of law" for nothing.

Eaton v. Walker, *supra*; *Henston v. Cincinnati & Ft. W. R. Co.* 16 Ind. 275, 79 Am. Dec. 430.

In order that there may be "color of law," the articles of incorporation must show that the objects or business of the association came within the terms of the Enabling Act.

Bank of California v. Collins, 7 Hun, 836; *Vredenburg v. Behan*, 83 La. Ann. 627; *Raccoon River Nav. Co. v. Eagle*, 29 Ohio St. 238; *West v. Bullsikin Prairie D. Co.* 82 Ind. 188; *O'Reiley v. Kankakee Valley Drain Co.* 82 Ind. 169; *Cook, Stock & Stockholders*, § 236; *Booth v. Wonderly*, 86 N. J. L. 250; *State v. Critchett*, 87 Minn. 13.

When, as here, the statutes require the place of business to be stated, and there is a failure to comply with that requirement, the attempted organization is without color of law, and there can be no *de facto* corporate existence.

Harris v. McGregor, 29 Cal. 125; *Clegg v. Hamilton & Wright County Grange Co.* 61 Iowa, 121.

The organization of a corporation under a general law must be scrutinized somewhat more closely than is necessary with a special charter, although after an organization has once been had in substantial compliance with the statute, the *de facto* corporation stands on the same footing as if it were specially chartered, and can no more be questioned collaterally than the one which has had the direct recognition of the sovereign power.

Mokelumne Hill Canal & Min. Co. v. Woodbury, 14 Cal. 424, 78 Am. Dec. 658; *Bigelow v. Gregory*, 73 Ill. 197; *De Witt v. Hastings*, 8 Jones & S. 463, affirmed, 69 N. Y. 518; *Jessup v. Carnegie*, 12 Jones & S. 260; *Field v. Cooks*, 18 L. R. A.

16 La. Ann. 153; *Eastern Ft. Road Co. v. Vaughan*, 14 N. Y. 546; *St. Paul Dio. No. 1 Sons of Temperance v. Brown*, 9 Minn. 157.

The user must be in the exercise of such powers as the corporation could have lawfully exercised if it had been incorporated; *i. e.*, must be within the scope of the Enabling Act. *De Witt v. Hastings*, *supra*; *People v. Troy House Co.* 44 Barb. 625.

There cannot be any estoppel unless as a precedent condition there is at least a *de facto* corporation.

Heaton v. Cincinnati & Ft. W. R. Co. 16 Ind. 275, 79 Am. Dec. 430; *Swartwout v. Michigan A. L. R. Co.* 24 Mich. 389.

The mere fact that one has dealt with an aggregation of individuals by a particular name, which may be either the title of a corporation or of a copartnership, cannot in any event constitute an estoppel.

Holloway v. Memphis, E. P. & P. R. Co. 23 Tex. 465, 76 Am. Dec. 68; *Williams v. Bank of Michigan*, 7 Wend. 540; *Welland Canal Co. v. Hathaway*, 8 Wend. 481; *United States Bank v. Stearns*, 15 Wend. 814; *Chaffe v. Ludeling*, 27 La. Ann. 607; *Holbrook v. St. Paul F. & M. Ins. Co.* 25 Minn. 229.

Messrs. Ankeny & Irwin, for respondent:

The matter of estoppel was fully considered by the court in *Masonic Temple Assn. v. Channell*, 43 Minn. 358. The court there said: "If the acts . . . are of such a character that either the corporation or subscribers may have been induced by them to act, and will be prejudiced . . . he shall be held to have waived or be estopped to assert the defense."

Applied to this case: If this corporation or any of its stockholders were induced to believe, or might have believed, as a result of plaintiff's contracting with the corporation, that the corporation only would be bound and not they as individuals, then plaintiff will be estopped from asserting the contrary.

Gartside Coal Co. v. Maxwell, 23 Fed. Rep. 197; *Whitney v. Wyman*, 101 U. S. 392, 25 L. ed. 1050; *Snider's Sons Co. v. Troy*, 11 L. R. A. 515, 91 Ala. 224; *Columbia Electric Co. v. Dixon*, 46 Minn. 463; *Minnesota Gas-Light Economizer Co. v. Denslow*, 46 Minn. 171; *Masonic Temple Assn. v. Channell*, 43 Minn. 358; *East Norway Lake Norwegian Evangelical Lutheran Church Trustees v. Froislee*, 37 Minn. 447; *Foster v. Moulton*, 35 Minn. 458; *French v. Donohue*, 29 Minn. 111; *Holbrook v. St. Paul F. & M. Ins. Co.* 25 Minn. 229; *Morawetz, Priv. Corp.* § 751; *Taylor, Priv. Corp.* § 148.

Cook, Stock & Stockholders, says: "The courts do not allow parties to suits on contracts to question the due incorporation of a company which it was possible to incorporate, which has attempted to incorporate and which has acted as a corporation."

See also 2 Beach, *Priv. Corp.* § 871; *Fay v. Noble*, 7 Cush. 188; *Troubridge v. Seudder*, 11 Cush. 83; *Salem First Nat. Bank v. Almy*, 117 Mass. 476; *Stout v. Zulick*, 48 N. J. L. 599; *Planters & Miners Bank v. Padgett*, 69 Ga. 164; *Thompson v. Candor*, 60 Ill. 244.

The objection that the Law of 1870 is unconstitutional because the subject of the law is not expressed in the title as required by section 27, art. 4, is not tenable.

Johnson v. Harrison, 47 Minn. 575.

It is in any event a *de facto* corporation, for there is both a colorable compliance with law and a user.

4 Am. & Eng. Encyclop. Law, p. 198.

Gillilan, C. J., delivered the opinion of the court:

Eight persons signed, acknowledged, and caused to be filed and recorded in the office of the city clerk in Minneapolis, articles assuming and purporting to form, under Laws 1870, chap. 29, a corporation, for the purpose, as specified in them, of "buying, owning, improving, selling, and leasing of lands, tenements, and hereditaments, real, personal, and mixed estates and property, including the construction and leasing of a building in the city of Minneapolis, Minn., as a hall to aid and carry out the general purposes of the organization known as the 'Knights of Labor.'" The association received subscriptions to its capital stock, elected directors and a board of managers, adopted by-laws, bought a lot, erected a building on it, and, when completed, rented different parts of it to different parties. The plaintiff furnished plumbing for the building during its construction, amounting to \$599.50, for which he brings this action against several subscribers to the stock, as copartners doing business under the firm name of the "K. of L. Building Association." The theory upon which the action is brought is that, the association having failed to become a corporation, it is in law a partnership, and the members liable as partners for the debts incurred by it.

It is claimed that the association was not an incorporation because—*First*, the Act under which it attempted to become incorporated, to wit, Laws 1870, chap. 29, is void, because its subject is not properly expressed in the title; *second*, the Act does not authorize the formation of corporations for the purpose or to transact the business stated in the articles; *third*, the place where the business was to be carried on was not distinctly stated in the articles, and they had, perhaps, some other minor defects.

It is unnecessary to consider whether this was a *de jure* corporation, so that it could defend against a quo warranto, or an action in the nature of quo warranto, in behalf of the state; for, although an association may not be able to justify itself when called on by the state to show by what authority it assumes to be, and act as, a corporation, it may be so far a corporation that, for reasons of public policy, no one but the state will be permitted to call in question the lawfulness of its organization. Such is what is termed a corporation *de facto*,—that is, a corporation from the fact of its acting as such, though not in law or of right a corporation. What is essential to constitute a body of men a *de facto* corporation is stated by Selden, J., in *Methodist Episcopal U. Church v. Pickett*, 19 N. Y. 482, as "(1) the existence of a charter or some law under which a corporation with the powers assumed might lawfully be created; and (2) a user by the party to the suit of the rights claimed to be confirmed by such charter or law." This statement was apparently adopted by this court in *East Norway* 18 L. R. A.

Lake Norwegian Evangelical Lutheran Church Trustees v. Froislie, 87 Minn. 447, but, as it leaves out of account any attempt to organize under the charter or law, we think the statement of what is essential defective. The definition in Taylor on Private Corporations (page 145) is more nearly accurate: "When a body of men are acting as a corporation, under color of apparent organization, in pursuance of some charter or enabling Act, their authority to act as a corporation cannot be questioned collaterally." To give to a body of men assuming to act as a corporation, where there has been no attempt to comply with the provisions of any law authorizing them to become such, the status of a *de facto* corporation might open the door to frauds upon the public. It would certainly be impolitic to permit a number of men to have the status of a corporation to any extent merely because there is a law under which they might have become incorporated, and they have agreed among themselves to act, and they have acted, as a corporation. That was the condition in *Johnson v. Corser*, 84 Minn. 855, in which it was held that what had been done was ineffectual to limit the individual liability of the associates. They had not gone far enough to become a *de facto* corporation. They had merely signed articles, but had not attempted to give them publicity by filing for record, which the statute required. "Color of apparent organization under some charter or enabling Act" does not mean that there shall have been a full compliance with what the law requires to be done, nor a substantial compliance. A substantial compliance will make a corporation *de jure*. But there must be an apparent attempt to perfect an organization under the law. There being such apparent attempt to perfect an organization, the failure as to some substantial requirement will prevent the body being a corporation *de jure*; but if there be user pursuant to such attempted organization, it will not prevent it being a corporation *de facto*.

The title to chapter 29 is "An Act in Relation to the Formation of Co-operative Associations." Appellant's counsel argues that the body of the Act does not contain a single element of "co-operation," as that term is generally understood. But how it is generally understood he does not inform us. In a broad sense, all associations, whether corporations or partnerships, are co-operative, for all the members, either by their labor or capital, or both, co-operate to a common purpose. There is undoubtedly, in popular use of the terms, a more limited sense, though the precise limits are not well defined. There is no legal, as distinguishable from their popular, signification. In the Century Dictionary the term "co-operative society" is defined, "A union of individuals, commonly laborers or small capitalists, formed . . . for the prosecution in common of a productive enterprise, the profits being shared in accordance with the amount of capital or labor contributed by each member." Taking the distinctive feature of a co-operative society to be that it is made up of laborers or small capitalists, it is manifest that the chapter intends to deal with just that sort of associations. Not only does it contemplate that the operations of the corporations shall be local,

but the capital stock is limited to \$50,000, the stock which one member may hold to \$1,000. No one can become a shareholder without the consent of the managers, and no one is entitled to more than one vote. The provisions in the body of the Act are in accord with the title, and it is therefore not open to the objection made against it. The purposes for which, under the Act, corporations may be formed, are "of trade, or of carrying on any lawful mechanical, manufacturing, or agricultural business." The main purpose of the Act being to enable men of small capital, or of no capital but their labor and their skill in trades, to form corporations, for the purpose of giving employment to such capital or labor and skill, the language expressing the purposes for which such corporations may be formed ought not to be narrowly construed. Giving a reasonably liberal meaning to the word "trade" in the Act, it would include the buying and selling of real estate, and, upon a similar construction, the word "mechanical" would include the erection of buildings. The doing of the mason, or brick, or carpenter or any other,

work upon a building is certainly mechanical. There can be little question that corporations might be formed to do either of those kinds of work on buildings, and, that being so, there is no reason why they may not be formed to do all of them. There is no reason to claim that such a corporation must do its work as a contractor for some other person. It may do it for itself, and, as the Act authorizes the corporation to "take, hold, and convey such real and personal estate as is necessary for the purposes of its organization," it may, instead of working for others as a contractor, make its profit by buying real estate, erecting buildings on it, and either selling or holding them for leasing. The omission to state distinctly in the articles the place within which the business is to be carried on, though that might be essential to make it a *de jure* corporation, would not prevent it becoming one *de facto*. The foundation for a *de facto* corporation having been laid by the attempt to organize under the law, the user shown was sufficient.

Judgment affirmed.

PENNSYLVANIA SUPREME COURT.

George W. HANCOCK, *Appt.*,

v.

Thomas B. McAVOY.

(.....Pa.....)

An interest in land which will support an action of ejectment is not created by a deed conveying "the exclusive and entire

right of interment or sepulture in" certain burial lots to be held "for the uses and purposes of sepulture only and for no other use, intent, or purpose whatsoever."

(October 3, 1892.)

A PPEAL by plaintiff from a judgment of the Common Pleas, No. 4, for Philadelphia

NOTE.—*What title or interest will support an action of ejectment.*

1. Plaintiff must prove title.

In ejectment the plaintiff must recover, if at all, on the strength of his own title. *Mather v. Walsh*, 107 Mo. 121; *Gregory v. Kenyon* (Neb.) May 13, 1892; *Coffin v. Freeman*, 82 Me. 577; *Buras v. O'Brien*, 42 La. Ann. 527; *Bonds v. Smith*, 106 N. C. 553; *Buck v. Gage*, 27 Neb. 303; *Weaver v. Whilden*, 33 S. C. 190; *Johnson v. Johnson*, 27 S. C. 309; *Sebastian v. Martin Brown Co.* 75 Tex. 291; *Low v. Little*, 39 W. Va. 400; *Nelson v. Triplett*, 81 Va. 238; *Walker v. Hill*, 111 Ind. 223; *Agnew v. Perry*, 120 Ill. 655; *Mitchell v. Lines*, 36 Kan. 373; *Riggs v. Riley*, 113 Ind. 208; *England v. Hatch*, 80 Ala. 247; *Stafford v. Cronkhite*, 114 Ind. 220; *Kelley v. McKeon*, 67 Wis. 551; *Apel v. Kelsey*, 47 Ark. 413; *Dawson v. Parham*, Id. 215; *Hawes v. Rucker* (Ala.) Nov. 3, 1891; *Gardiner v. Tisdale*, 2 Wis. 153, 60 Am. Dec. 407; *McNitt v. Turner*, 83 U. S. 16 Wall. 352, 21 L. ed. 341; *Rountree v. Denson*, 59 Wis. 522; *Watts v. Lindsey*, 20 U. S. 7 Wheat. 153, 5 L. ed. 423; *Huntington v. Jewett*, 25 Iowa, 249; *Marsh v. Brooks*, 49 U. S. 8 How. 223, 12 L. ed. 1056; *Wolfe v. Doe*, 13 Smedes & M. 103, 51 Am. Dec. 147; *Fussell v. Gregg*, 113 U. S. 550, 28 L. ed. 993; *Greve v. Coffin*, 14 Minn. 345; *Fussell v. Hughes*, 113 U. S. 553, 28 L. ed. 998; *Smith v. Hunt*, 13 Ohio, 260, 42 Am. Dec. 201; *Webber v. Pere Marquette Boom Co.* 62 Mich. 623.

Plaintiff in ejectment must recover on the strength of his own title, either as being good against all the world or as good against the defendant by estoppel. *Duncan v. Duncan*, 25 N. C. 317; *Clarke v. Diggs*, 28 N. C. 159, 44 Am. Dec. 73; *Taylor v. Gooch*, 48 N. C. 433, 43 L. R. A.

This rule must be limited and explained by the nature of each case as it arises. *Love v. Simms*, 22 U. S. 9 Wheat. 515, 6 L. ed. 149.

In *Coryell v. Cain*, 16 Cal. 597, *Field, Ch. J.*, delivering the opinion, said: "It is undoubtedly true, as a general rule, that the claimant in ejectment must recover upon the strength of his own title, and not upon the weakness of his adversary's. . . . But this general rule has in this state, from the anomalous condition of things arising from the peculiar character of the mining and landed interests of the country, been, to a certain extent, limited and qualified. . . . And with the public lands which are not mineral lands, the title as between citizens of the state, where neither connects himself with the government, is considered as vested in the first possessor."

2. Will equitable title support the action?

And the legal title only is recognized as the ground of the action. *Smith v. Hunt*, *supra*; *Casey v. Inloes*, 1 Gill, 430, 39 Am. Dec. 858; *Leonard v. Diamond*, 31 Md. 541; *Gillett v. Treganza*, 13 Wis. 472; *Eaton v. Smith*, 19 Wis. 537.

To authorize a recovery in ejectment, where the defendant is in possession the plaintiff must show a valid legal title. *Morehouse v. Phelps*, 63 U. S. 21 How. 294, 16 L. ed. 140.

In Federal courts recovery can be had only upon strict legal title. *Langdon v. Sherwood*, 124 U. S. 74, 31 L. ed. 344.

Ejectment cannot be maintained in a court of the United States upon an incipient equity but only upon a legal title even though the former would sustain an action under statutes of the state

County in favor of defendant in an action brought to recover possession of certain burial lots situated in the cemetery of the Philadelphia Cemetery Company. *Affirmed.*

The facts are stated in the opinion.

Messrs. Henry J. Hancock and John G. Johnson, for appellant:

The interest conveyed under the original deed of Tilford to Lisle is such an interest in land as will support an action of ejectment.

Ejectment is in its nature a possessory action and it was originally limited to that purpose.

Tyler, Ejectment, p. 33; *Cooper v. Smith*, 9 Serg. & R. 26, 11 Am. Dec. 658.

Ejectment will lie for a coal mine.

Comyn v. Kyneto, Cro. Jac. 150. See *Comyn*

v. Wheatly, Noy, 121; *Caldwell v. Fulton*, 81 Pa. 475, 72 Am. Dec. 760; *Scranton v. Phillips*, 94 Pa. 20; *Fairchild v. Dunbar Furnace Co.* 128 Pa. 497; *Thompson v. Matlern*, 115 Pa. 501; *Grotz v. Coal Company*, 1 Luzerne Legal Reg. (Kulp) 57; *Weakland v. Cunningham* (Pa.) Nov. 1, 1896.

In *Whittingham v. Andrews*, Salk, 255, ejectment was also maintained *de minimis car bonum*.

In *Cottingham v. King*, 1 Burr. 629, an ejectment was sustained for a quarter of land in T., with the town and tenements of B., a large deer park, and the parsonage of S.

So ejectment lies for a beast gate or a cattle gate.

in which the Federal court is sitting. *Swayze v. Burke*, 37 U. S. 12 Pet. 11, 9 L. ed. 980; *Sheirburn v. De Cordova*, 65 U. S. 24 How. 423, 16 L. ed. 741; *Fenn v. Holme*, 62 U. S. 21 How. 431, 16 L. ed. 198; *Hooper v. Scheimer*, 64 U. S. 23 How. 235, 16 L. ed. 452; *Smith v. McCann*, 65 U. S. 24 How. 398, 16 L. ed. 714; *Claggett v. Kilbourne*, 66 U. S. 1 Black, 344, 17 L. ed. 213; *Oaksmith v. Johnston*, 92 U. S. 343, 23 L. ed. 682.

The same rule prevails in a petitory action which is, in Louisiana an action in the nature of ejectment. *Gilmer v. Poindexter*, 51 U. S. 10 How. 257, 13 L. ed. 411.

If there are equities showing the right to be in another than the party having the strict legal title, these can be considered only on the equity side of the federal courts. *Foster v. Mora*, 98 U. S. 425, 25 L. ed. 191.

An equitable title will not support an action in ejectment. *Ruffners v. Lewis*, 7 Leigh, 720, 30 Am. Dec. 513.

In ejectment neither equitable titles nor equitable defenses can avail either as a basis of recovery or of defense. *McKay v. Williams*, 67 Mich. 547.

A party claiming under a Mexican grant of an imperfect or equitable title cannot maintain ejectment against another party claiming under the same grant by adverse derivative title, who has presented his claim and had it confirmed, whether he acted fraudulently or otherwise. *Bouldin v. Phelps*, 30 Fed. Rep. 547.

One who takes an assignment of a contract of sale as security for a debt cannot maintain ejectment against his assignor, since he has no legal title. *Campbell v. Swan*, 43 Barb. 114.

In *Dummer v. Den*, 20 N. J. L. 36, an action to recover the possession of land dedicated to the public use, it was said: "Ejectment is a possessory action, and if the lessors of the plaintiff are entitled to the possession,—and they must be if they are entitled to the use, for they are inseparable,—it is a legal and not a mere equitable right, and they may recover it against the legal owner of the fee.

Recovery cannot be had in ejectment upon a chain of title, a link of which consists of a deed from husband to wife, since in Wisconsin the effect of such deed on conveyances subsequent thereto is to convey only the equitable title leaving the legal title essential to the maintenance of ejectment in the husband and his subsequent grantees. *Kinney v. Dexter*, 81 Wis. 80.

But under the Codes the defendant may set forth as many defenses as he has, whether before the Code they were denominated legal or equitable. *Dobson v. Pearce*, 12 N. Y. 156, 63 Am. Dec. 158; *McBurney v. Wellman*, 42 Barb. 401; *Garrity v. Haynes*, 53 Barb. 599; *Phillips v. Gorham*, 17 N. Y. 275; *Cummings v. Morris*, 25 N. Y. 628; *Savage v. Allen*, 54 N. Y. 463; *Stevens v. New York*, 84 N. Y. 305; *Jackson v. Lodge*, 36 Cal. 46; *Rogers v. Gwinn*, 21 Iowa, 64; *Shawhan v. Long*, 26 Iowa, 428, 96 Am. 18 L. R. A.

Dec. 164; *Rosiers v. Van Dam*, 16 Iowa, 175; *Kramer v. Conger*, 16 Iowa, 434; *Penny v. Cook*, 19 Iowa, 588; *Meeker v. Dalton*, 76 Cal. 154; *Hurd v. Harvey County Comrs.* 40 Kan. 92; *Helm v. Wilson*, 76 Cal. 476; *Clay County Land & Cattle Co. v. Wood*, 71 Tex. 460; *Clayton v. School Dist. No. 1*, 20 Kan. 256; *Hall v. Dodge*, 18 Kan. 277; *Wicks v. Smith*, 18 Kan. 508.

The proposition that in an action of ejectment the legal title must control is not the law of California. *Willis v. Wozencraft*, 22 Cal. 615; *Central Pac. R. Co. v. Mudd*, 59 Cal. 583; *Whittier v. Stege*, 61 Cal. 238; *Hicks v. Lovell*, 64 Cal. 17, 49 Am. Rep. 679.

There being no court of chancery in Pennsylvania, an action of ejectment is sustained on an equitable title in that state. *Swayze v. Burke*, 37 U. S. 12 Pet. 11, 9 L. ed. 980.

The holder of a legal title to land in Pennsylvania cannot maintain ejectment against the holder of an equitable title thereto. *Wind v. Hass*, 8 Pa. Co. Ct. 645.

Under the statutes of Missouri ejectment may be maintained in land warrants and other titles not complete or legal in their character. *Strother v. Lucas*, 81 U. S. 6 Pet. 763, 8 L. ed. 573; *Fenn v. Holme*, 62 U. S. 21 How. 431, 16 L. ed. 198.

And in Georgia ejectment may be maintained in an equitable title when the same is perfect equity. *Dodge v. Spiers*, 35 Ga. 536.

Legal title cannot prevail until the equities interposed by the answer are determined unfavorably to the defense. *Allen v. Logan*, 96 Mo. 591.

The holders of the legal title to land may recover in trespass to try title against strangers who fail to show that they are holding under an equitable title. *Goode v. Jasper*, 71 Tex. 43.

Under Kan. Civ. Code, § 595, before plaintiff in ejectment can recover, he must show that he has a legal or equitable estate in the land and the right of possession thereof. *Hurd v. Harvey County Comrs.* 40 Kan. 92.

The equitable owner of land in Minnesota may maintain ejectment against the owner of the naked legal title or a stranger. *Merrill v. Dearing*, 47 Minn. 187.

However, to entitle one to recover under the Nebraska Code he must possess a legal title, and state in his petition that he is entitled to the possession. *Dale v. Hunneman*, 12 Neb. 221.

a. Patent confers a legal title.

In ejectment the legal title must prevail; but the patent of the United States confers a legal title (*Singleton v. Touchard*, 66 U. S. 1 Black, 342, 17 L. ed. 50; *Steel v. St. Louis Smelt. & Ref. Co.* 106 U. S. 447, 27 L. ed. 228; *Gibson v. Chouteau*, 80 U. S. 13 Wall. 92, 20 L. ed. 634); and when regular on its face is conclusive. *Gibson v. Chouteau*, *supra*.

A grant by Congress to a railroad company for railroad purposes, of a strip of public lands on each

Millington v. Goodtitle, 1 Andr. 107.
For titles.
Camell v. Clavering, 2 Ld. Raym. 789.
A common of pasture.
Newman v. Holdmyst, 1 Strange, 54.
For the first crop of hay or *primam tonsuram*.
Ward v. Petifer, Cro. Car. 362.
For herbage.
Wheeler v. Toulson, Hardres, 830.
A fishery may be recovered in ejectment.
King v. Alresford, 1 T. R. 361.
Ejectment will lie for the right to take hay, grass, and aftermath of the meadow.
King v. Stoke, 2 T. R. 452.
For a stable.

Rowan v. Kelsey, 18 Barb. 484.
For the soil of a road or highway.
Adams v. Emerson, 6 Pick. 57.
For a boiler, engine, and stack.
Hill v. Hill, 48 Pa. 521.
For a rent reserved with a clause of re-entry
Kenege v. Elliott, 9 Watts, 258; *Newman v. Rutter*, 8 Watts, 51.
Money charged upon land.
Gabraith v. Fenton, 8 Serg. & R. 859.
An exclusive grant of oil rights.
Brown v. Lane, 91 Pa. 153; *Brown v. Devitt*, 181 Pa. 455; *Buchanan v. Hazzard*, 95 Pa. 246.
For an undivided interest in land.
McMahan v. McMahan, 18 Pa. 376.
For a portion of space occupied by the over-

side of its road, entitles the company to maintain ejectment against one who for a long period before the grant had occupied the lands without title. *Southern Pac. R. Co. v. Burr*, 86 Cal. 279; *Southern Pac. R. Co. v. Meyer* (Cal.) Nov. 4, 1890; *Central Pac. R. Co. v. Benity*, 5 Sawy. 118.

A grant from the state will in general support an action of ejectment. *Blakalee Mfg. Co. v. Blakalee Iron Works*, 59 Hun, 200.

By the statute of Arkansas ejectment may be maintained by one claiming possession by virtue of an entry made with the register and receiver of the proper land office of the United States. Ark. Dig. 454.

A certificate of entry issued under the United States Homestead Law vests in the holder a sufficient title to support a petitory action to recover the land. *Broussard v. Broussard*, 43 La. Ann. 921; *Simien v. Perrodin*, 35 La. Ann. 981.

Ejectment may be maintained by the holder of a patent certificate or final cash entry receipt for pre-empted lands, so long as it remains unannounced, before he has received a patent for the lands. *Pierce v. Frazer*, 2 Wash. 81; *Orchard v. Alexander*, 2 Wash. 106.

But an entry under an application for pre-emption without a compliance with the law in respect to occupation of the land or payment of the purchase money, will not sustain an action of trespass to try title. *Conn v. Franklin* (Tex.) March 1, 1892.

And a purchaser from a pre-emptor who has obtained a final certificate has no legal estate upon which to maintain ejectment apart from possession. *American Mortg. Co. v. Hopper*, 48 Fed. Rep. 47.

No recovery can be had in ejectment upon a duplicate receipt of a receiver of a land office, under Neb. Code Civ. Proc., § 411, as in force in Oklahoma, providing that the usual duplicate of such receiver is proof of title equivalent to a patent against all but the holder of an actual title. *Adams v. Couch* (Oklahoma) April 4, 1891.

Under Acts of Congress confirming claims to lands under Spanish grants after a survey is duly made, approved and recorded at the surveyor general's office, an action of ejectment may be maintained. *Stoddard v. Chambers*, 43 U. S. 2 How. 284, 11 L. ed. 229; *Le Bois v. Bramell*, 45 U. S. 4 How. 442, 11 L. ed. 106; *Bissell v. Penrose*, 49 U. S. 8 How. 317, 12 L. ed. 1006; *McCall v. Carpenter*, 59 U. S. 13 How. 397, 15 L. ed. 899.

By the Act of 1807 Congress did not intend to give a final legal title to lands held under Spanish and French grants until the bounds were defined by survey; and until such survey, the holders of such lands have no title which will support ejectment. *West v. Cochran*, 58 U. S. 17 How. 408, 15 L. ed. 110.

Where plaintiff claimed title under a United States patent, granted under a survey where the commissioner of the general land office had no au-

thority to order the survey he cannot recover. *Webber v. Pere Marquette Boom Co.* 62 Mich. 626.

3. Right of possession and interest in the land are necessary to recovery.

A present right of possession is necessary to a recovery in ejectment. *Barco v. Fennell*, 24 Fla. 373.

Without it recovery cannot be had though the plaintiff may show title or right of property. *Jones v. Lofton*, 13 Fla. 189; *Asia v. Hiser*, 22 Fla. 378.

Every plaintiff in ejectment must show a right of possession as well as of property. *Taylor v. Horde*, 1 Burr. 112; *Love v. Simms*, 22 U. S. 9 Wheat. 515, 6 L. ed. 149; *Cincinnati v. White*, 31 U. S. 6 Pet. 431, 8 L. ed. 452; *Dickerson v. Colgrove*, 100 U. S. 573, 25 L. ed. 618; *Kirk v. Hamilton*, 102 U. S. 63, 26 L. ed. 79.

By How. Stat., § 7790, it is provided that no person can recover in ejectment unless he has, at the time of commencing the action, a valid, subsisting interest in the premises claimed, and a right to recover the possession thereof, or of some share, interest, or portion thereof, to be proved and established at the trial.

Similar statutes are in force in Illinois, Indiana, Iowa, Tennessee, Virginia, West Virginia, and Wisconsin.

Where an action of ejectment is brought by the vendor of land against the vendee, who has failed to meet the payments called for by the contract under which he has gone into possession, the plaintiff must at the commencement of the suit have both the legal and possessory right in himself. *Fears v. Merrill*, 9 Ark. 569.

In an action under Gen. Stat. 1873, chap. 78, § 2, to determine an adverse claim to vacant or unoccupied land, the plaintiff must show some title in the land. *Herrick v. Churchill*, 35 Minn. 318; *Myrick v. Coursaille*, 38 Minn. 153.

To maintain the action of ejectment a perfect legal title in the claimant is necessary, wherever the action depends upon the title and not upon some relation or agreement between the parties, affecting the right of possession. *Rogers v. Caewood*, 1 Swan, 142, 55 Am. Dec. 729; *Jackson v. Demont*, 9 Johns. 60, 6 Am. Dec. 259.

A deed which by reason of an imperfect description does not pass the title to land, will not sustain ejectment. *Prentice v. Stearns*, 113 U. S. 423, 28 L. ed. 1059.

In *Bonaffon v. Peters*, 184 Pa. 180, the plaintiff offered in evidence a deed to himself made by a third person who was not shown to have been in possession or to have had title; this was held insufficient to maintain the action.

A partition deed of all the right, title, and interest,—estimated at a certain number of acres—of heirs in a tract of land of which certain unidentified lots had been conveyed by their ancestor, confers a prima facie title upon the grantees sufficient

hanging of a wall over land belonging to the plaintiff.

Sherry v. Frecking, 4 Duer, 452.

The grantee of a right to herbage, although he has not the grant of the soil, has a sufficient interest to maintain ejectment.

Wheeler v. Toulson, Hardres, 880.

Ejectment has been repeatedly sustained against parties using the surface of a piece of ground.

Etz v. Daily, 20 Barb. 82; *Wheeling, P. & B. R. Co. v. Warrell*, 122 Pa. 618.

So ejectment may be maintained for an easement.

Pittsburgh & L. E. R. Co. v. Bruce, 102 Pa.

23; *Oliver v. Pittsburgh, V. & C. R. Co.* 131 Pa. 408; *Carpenter v. Onwego & S. R. Co.* 24 N. Y. 655; *Jackson v. May*, 16 Johns. 184; *Lozier v. New York Cent. R. Co.* 42 Barb. 405; *Sharpe v. St. Louis & S. E. R. Co.* 49 Ind. 296; *Wager v. Troy Union R. Co.* 25 N. Y. 526; *Wright v. Carter*, 27 N. J. L. 76.

In Pennsylvania ejectment is an equitable remedy.

Peebles v. Reading, 8 Serg. & R. 484.

This is not the case of a church corporation or a body with limited powers granting a right of burial as in *Kincaid's App.*, 86 Pa. 411.

See *Craig v. First Presby. Church of Pittsburgh*, 88 Pa. 42.

to support an action of trespass to try title for all the tract except such as can be shown to have been legally conveyed by the ancestor. *Hitchler v. Scanlan* (Tex.) March 1, 1892.

An action of ejectment can be maintained on a title by estoppel. *Stoddard v. Chambers*, 48 U. S. 2 How. 284, 11 L. ed. 209; *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. ed. 618; *Kirk v. Hamilton*, 108 U. S. 68, 25 L. ed. 79.

The holder of the legal title to land, although a trustee for a third person, is the real party in interest, and may sue in his own name to recover possession. *Anson v. Townsend*, 78 Cal. 415.

One who has conveyed land which is in the adverse possession of a third party under a claim of right, may after such conveyance maintain ejectment in his own name, the recovery inuring to the benefit of the grantee. *Davis v. Curry*, 85 Ala. 183; *Scranton v. Ballard*, 64 Ala. 402; *Bounson v. Morgan*, 86 Ala. 818.

Plaintiff in ejectment may recover if he shows that he has a claim to the property by color of title as against a defendant who claims only by his possession, unless at the time defendant entered into possession the plaintiff had abandoned his possession or right of property. *Douglass v. Ruffin*, 38 Kan. 530; *Gilmore v. Norton*, 10 Kan. 491; *Duffey v. Rafferty*, 15 Kan. 1; *Mooney v. Olsen*, 21 Kan. 697; *Hollenback v. Ess*, 31 Kan. 88.

But a person in whom the equitable title and the right of possession conjoin will not be denied relief at law merely because the naked legal title is held by a person not a party. *Bartlett v. Borden*, 18 Bush, 44.

One having a mere naked legal title to land in which he has no beneficial interest, and in respect to which he has no duty to perform, cannot maintain ejectment against the equitable owner, or any one having an equitable interest therein with a present right of possession. *Bassett v. Hinckley*, 124 Ill. 82.

To maintain ejectment or the statutory substitute for it in Alabama the plaintiff must have title and right of possession at the commencement of the suit, and that title must continue to the trial. This is the rule so far as the recovery of possession is concerned. *Scranton v. Ballard*, 64 Ala. 402; *Hairston v. Dobbs*, 80 Ala. 589; *Goodman v. Winter*, 64 Ala. 411; *Pollard v. Hanrick*, 74 Ala. 384; *Green v. Jordan*, 85 Ala. 230.

A plaintiff although having title at the commencement of the action, cannot recover if the title is terminated pending the action, either by voluntary conveyance or otherwise. *Brunson v. Morgan*, 86 Ala. 818.

And one who has only an equitable title at the time of bringing his action cannot maintain the action by acquiring the legal title. *Green v. Jordan*, *supra*; *Collins v. Ballow*, 72 Tex. 330.

In *Laurisini v. Doe*, 25 Miss. 177, it was held that in order to sustain an action of ejectment the plaintiff's lessor must have had legal title at time 18 L. R. A.

of demise laid and at time of the commencement of the action. See also *Adams, Ejectment*, 32.

4. But as against an intruder possession will suffice.

Recovery may be had in some cases on bare possession only, as where there has been an actual ouster of tenants, or against a trespasser without color of title. *Towke v. Darvall*, 5 Litt. 317; *Bagley v. Kennedy*, 85 Ga. 708.

Possession is prima facie evidence of title, and sufficient to maintain ejectment against a mere naked trespasser. *McLaurin v. Salmon*, 11 B. Mon. 96; *Plume v. Seward*, 4 Cal. 94; *Hutchinson v. Perley*, 4 Cal. 83, 60 Am. Dec. 578; *Winans v. Christy*, 4 Cal. 70; *Sacramento Valley R. Co. v. Moffatt*, 7 Cal. 579; *Nagle v. Macy*, 9 Cal. 427.

Even where title may be shown to exist in another. *Bequest v. Cauldfield*, 4 Cal. 278; *Turner v. Aldridge*, McAll. 232.

Recovery can be had in ejectment on proof of prior possession against one not showing a better right, or an intruder. *Dothard v. Denson*, 72 Ala. 541; *McCall v. Doe*, 17 Ala. 538; *Ashmead v. Wilson*, 22 Fla. 259; *Probst v. Domestic Missions Trustees*, 8 N. M. 287.

One who has been expelled from a part of the public domain which he had enclosed, by threats of others having no better title, after a proper demand for restoration of the possession, can maintain ejectment, under N. M. Comp. Laws, § 1570, allowing the action for a mining claim or any other real estate from which a party has been wrongfully ousted. *New Mexico, R. G. & P. R. Co. v. Crouch*, 4 N. M. 141.

Though a purchaser from an executor at private sale, with bond for titles and part of the purchase money paid, may have acquired no title to or interest in the land, yet, being told by the executor to go and take possession, he has a right to the possession as against an intruder, and can sue out the statutory process to expel him. *Bagley v. Stephens*, 78 Ga. 304.

Possession at time of defendant's entry is sufficient on which to recover against one showing no title in himself. *Sherin v. Brackett*, 86 Minn. 152.

For against such an one possession is title. *Wilder v. St. Paul*, 12 Minn. 192; *Hau v. Minnesota Valley R. Co.* 18 Minn. 442.

The plaintiff must recover on the strength of his own title. But actual prior possession is strong enough to enable recovery from a mere trespasser. A mere intruder cannot enter on a person actually seised and eject him and then question his title or set up an outstanding title in another. *Christy v. Scott*, 55 U. S. 14 How. 232, 14 L. ed. 422; *Wilson v. Fine*, 38 Fed. Rep. 739; *American Mortg. Co. v. Hopper*, 48 Fed. Rep. 47.

In *Smith v. Lorillard*, 10 Johns. 338, T. had entered into possession of land in New York in 1799 on which he had built a house, and continued in possession until his death in 1775. His family continued in possession until expelled by the British

Where a right is granted, such as the right here, a base fee is conveyed.

Mount Moriah Cemetery Assn. v. Com. 81 Pa. 235, 22 Am. Rep. 743.

In cases of church cemeteries or public burial grounds, the trustees or authorities have no power to sell the fee even if they attempt to do so.

Viele v. Osgood, 8 Barb. 180.

A different principle governs the case of independent cemeteries. Whether they be joint-stock companies or corporations, it seems that the holders of lots in them would possess fee-simple titles and could exercise rights of own-

ership and control over the same, consistent with the purpose for which the said lots were sold in as full a manner as over any other real property.

17 Am. L. Rev. 199; 19 Am. L. Reg. N. S. 69; *Re Brick Presby. Church*, 3 Edw. Ch. 165, 6 L. ed. 611; *Windt v. German Ref. Church*, 4 Sandf. Ch. 474, 7 L. ed. 1176.

In the case in hand the land was purchased for the purpose of creating a cemetery and selling the lots for private gain. Tilford owned the fee and had the unquestioned right to dispose of it. He granted certain lots for the entire and exclusive purpose of interment or

in 1776; and no possession was thereafter taken of the premises until 1795 when L. entered as a bona fide purchaser, and continued in possession until 1810, when the heirs of T. brought action to recover in ejectment. It was held that the prior possession of T. was prima facie evidence of right, and that it was not necessary that the plaintiff should show either a possession of 20 years, or a paper title, Kent, Ch. J., said: "That the first possession should in such cases be the better evidence of right, seems to be the just and necessary inference of law. The ejectment is a possessory action, and possession is always presumption of right, and it stands good until other and stronger evidence destroys that presumption. This presumption of right every possessor of land has, in the first instance; and after a continued possession for twenty years, under a pretense or claim of right, the actual possession ripens into a right of possession which will toll an entry. But until the possession of the tenant has become so matured, it would seem to follow, that if the plaintiff shows a prior possession and upon which the defendant entered without its having been formally abandoned, as default, the presumption which arose from the tenant's possession is transferred to the prior possession of the plaintiff, and the tenant to recall that presumption must show a still prior possession, and so the presumption may be removed from one side to the other, *toties quoties*, until one party or the other has shown a possession which cannot be over-reached, or put an end to the doctrine of presumptions founded on mere possessions, by showing a regular legal title, or right of possession."

This doctrine is sustained by the following cases: *Davis v. Easley*, 13 Ill. 192; *Brooks v. Bruyn*, 18 Ill. 541; *Barger v. Hobbs*, 67 Ill. 562; *Hubbard v. Little*, 9 Cush. 475; *Jones v. Easley*, 58 Ga. 454; *Christy v. Scott*, 55 U. S. 14 How. 232, 14 L. ed. 423; *Whitney v. Wright*, 15 Wend. 171; *Thompson v. Burhans*, 79 N. Y. 93; *Kinney v. Harrett*, 45 Mich. 87; *Bates v. Campbell*, 25 Wis. 613; *Yates v. Yates*, 76 N. C. 142; *Findley v. Johnson*, 84 Ga. 69; *McWhorter v. Heltzell*, 124 Ind. 129; *Wilson v. Palmer*, 18 Tex. 562; *Tapscott v. Cobbs*, 11 Gratt. 172; *Bird v. Lisbroe*, 9 Cal. 1; *Den v. Morris*, 7 N. J. L. 7, 11 Am. Dec. 503; *Doe v. Cooke*, 7 Bing. 346.

A person in possession of real property in Alaska may maintain ejectment therefor where ousted by a mere intruder. *Campbell v. Silver Bow Basin Minn. Co.* 49 Fed. Rep. 47, 7 U. S. App. 71.

Though plaintiff in ejectment must in Oregon have a legal estate, actual possession at the time of the ouster is a sufficient estate against a mere intruder. *American Mortg. Co. v. Hopper*, 48 Fed. Rep. 47.

The possessory right to land on which an ice-house was standing at the time Alaska was ceded to the United States, although it had not been granted, is sufficient to sustain an action for possession against a mere intruder, under the statutes of Oregon, which are applicable to Alaska, giving any person who has a legal estate and a present

right to possession the right to recover it. *Halter v. Emmons*, 46 Fed. Rep. 452.

As against a mere intruder, plaintiff in ejectment is entitled to recover on showing that his ancestor, under whom he claims as heir, died in possession. *Mobley v. Bonner*, 59 Pa. 481; *West v. Pine*, 4 Wash. C. C. 691.

Twelve or thirteen years' seisin of freehold and dying seized gives prima facie a right to maintain ejectment against a tortious holder. *Den v. McCann*, 8 N. J. L. 81, 4 Am. Dec. 334.

A possession of eight or ten years under claim and color of title is sufficient to entitle a plaintiff in ejectment to recover against a trespasser. *Jackson v. Harder*, 4 Johns. 202, 4 Am. Dec. 262.

Prior possession of unsurveyed government lands is sufficient to sustain ejectment against a mere trespasser although Act of Congress, Feb. 26, 1885, declares the inclosure of such lands to be unlawful. *Gonder v. Miller* (Nev.) July 27, 1891.

a. What constitutes possession.

On the subject of what constitutes actual possession, Field, Ch. J., in *Coryell v. Cain*, 16 Cal. 567, said: "By actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property."

Maintenance of fences around a vacant lot, and payment of taxes upon it, constitutes sufficient prior possession to sustain an action of ejectment. *Baum v. Reay* (Cal.) Feb. 6, 1892.

Mr. Justice Story in *Ellcott v. Pearl*, 35 U. S. 10 Pet. 441, 9 L. ed. 487, said that no authority was needed for so plain a proposition as that "to constitute actual possession it is not necessary that there should be any fence or inclosure of the land."

In order to enable one to recover on possession alone in an action of trespass to try title, the possession should be actual and corporeal, and not constructive. *Lea v. Hernandez*, 10 Tex. 137; *Conn. v. Franklin* (Tex.) March 1, 1892.

The making of one crop of land is not sufficient possession. *Conn. v. Franklin*, *supra*.

To constitute possession, mere assertion of title and the exercise of casual acts of ownership, are not sufficient; there must be bona fide occupation, a *possessio pedis*, a subjection to the will and control. *Plume v. Seward*, 4 Cal. 94.

A trustee in whom the fee of land is vested as a perpetual right of way for all railway companies doing business within the city has not the possession necessary to maintain ejectment against one of the companies for a misuser. *Elyton Land Co. v. South & North Ala. R. Co.* (Ala.) Nov. 24, 1891.

One who, having a deed to land which he knows does not confer title, has entered on the land and begun the erection of a shanty on two different occasions, but is driven off each time, and the shanty torn down, after which nothing is done for three years, when he brings an action of ejectment, has

sempulture. And the grant of the entire and exclusive use of anything is always held to be a grant of the thing itself.

Morris v. Phaler, 1 Watts, 389; *Sill's App.* 1 Grant, Cas. 285.

Trespass *quare clausum fregit* can also be maintained for burial lots by the heir, and possession is the gist of that action.

Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759.

It is difficult to conceive of any use of the surface of ground after that ground is granted for the entire and exclusive use of interment or sepulture.

Busard v. Capel, 8 Barn. & C. 150.

The devise of the rent, profit, and income of land is a devise of the land itself.

Anderson v. Greble, 1 Ashm. 138; *Claremont Bridge Proprietors v. Royce*, 42 Vt. 730; *Heveline v. Shippam*, 5 Barn. & C. 221; *Rex v. Chelsea Water Works Co.* 5 Barn. & Ad. 156.

In *Bennett v. Culver*, 27 Hun, 554, the plaintiff's father conveyed land to a cemetery association for burial purposes only. And it was provided that in case of the nonfulfillment of the contract by the cemetery company, the right to the soil in which no interments had been made, should revert to the grantor.

no such possession as will support the action. *Reay v. Butler* (Cal.) June 18, 1892.

Actual personal presence of defendants on the land at the time of the institution of the action is not necessary to the maintenance of ejectment, but any subjection of the property to their will and dominion is sufficient. *Bell v. Foxen*, 14 Sawy. 490, 42 Fed. Rep. 755; *Quicksilver Min. Co. v. Hicks*, 4 Sawy. 683; *Garner v. Marshall*, 9 Cal. 268.

It is sufficient if there is continuous dominion evidenced by continuous acts of ownership. *Coleman v. Billings*, 89 Ill. 139.

A purchaser of land has, for the purposes of ejectment, constructive possession of all the land described in his deed, which is not interfered with by a subsequent deed by the vendor covering part of the same territory. *White v. Ward*, 35 W. Va. 418.

5. Title acquired by limitation is sufficient.

Ejectment may be maintained upon a title acquired solely by limitation. *Roemer v. Meyer* (Tex.) Oct. 20, 1891.

One who has been dispossessed in an action of forcible entry and detainer of land which he has held adversely and continuously for more than twenty years may maintain ejectment therefor. *Murray v. Hoyle*, 92 Ala. 559; *Farmer v. Balava*, 11 Ala. 1028; *Barclay v. Smith*, 68 Ala. 230; *Wilson v. Glenn*, 68 Ala. 393.

Plaintiff in ejectment claiming title by adverse possession need not trace title back to the Commonwealth. *Taylor v. Arnold*, 13 Ky. L. Rep. 516.

Possession of land by plaintiff and his grantors under color of title, for more than forty years, gives him sufficient title to maintain ejectment therefor. *Spies v. Rome*, W. & O. R. Co. 39 N. Y. S. R. 764.

Plaintiffs in an action of ejectment are entitled to recover where they had been in open, notorious, and adverse possession of the premises for ten years before the defendant entered thereon, though they show no paper title. *Baker v. Ferguson* (Mo.) May 17, 1896.

Under the organic Act of the territory of Alaska of May 17, 1884, providing that persons should not be disturbed in possession of any lands actually in their use or occupation, the possession founded on use and occupation is a sufficient legal estate and right to present possession to sustain ejectment for lands taken by a deputy collector of customs under claim that they are part of a military reservation. *Miller v. Blackett*, 47 Fed. Rep. 547.

Prior possession unaccompanied with any title or right will not entitle plaintiff to recover in ejectment against a defendant in actual possession of Indian land properly patented to a member of the Shawnee tribe, since deceased, claiming color of title and possession under a deed from the chiefs of the tribe, approved by the secretary of the interior. *O'Brien v. Bugbee* (Kan.) April 11, 1891.

6. Ejectment will not lie to recover an easement.

Ejectment cannot be maintained to recover a 18 L. R. A.

mere easement. *Racine v. Crotzenberg*, 61 Wis. 481.

Ejectment cannot be maintained to recover a private right of way across lands of another. *Fritschle v. Fritschle*, 77 Wis. 270.

Ejectment will not lie in favor of, or against, a party, to try his right to enjoy an easement in land. *Childs v. Chappell*, 9 N. Y. 246; *Wood v. Truckee Turnp. Co.* 24 Cal. 488; *San Francisco v. Calderwood*, 81 Cal. 589, 91 Am. Dec. 542.

A corporation cannot recover in ejectment a right of way. *Racine v. Crotzenberg*, *supra*.

But *Visalia v. Jacob*, 65 Cal. 434, 52 Am. Rep. 308, was an action of ejectment to recover part of a public street. The court said: "An action of ejectment may be maintained by a municipal corporation for the recovery of the possession of a street wrongfully possessed by an individual, whether the corporation owns the fee, or the adjoining proprietor retains it."

Ejectment will not lie to recover the use of an alley. *Taylor v. Gladwin*, 40 Mich. 232.

Ejectment will not lie in favor of the public to keep a street clear of unauthorized impediments. *Bay County v. Bradley*, 39 Mich. 163.

But it has been held that ejectment would lie for titles. *Dean & C. of Windsor v. Gover*, 8 Wms. Saund. 304, note 12.

And for common appurtenant. *Mellington v. Goodtitle*, Andr. 106.

And by the grant of a bollery of salt the land passes. *Co. Litt. 4 b.*

And by the grant of growing trees. *Ive v. Sama*, 2 Cro. Eliz. 522.

A right reserved by the vendor of land to construct and use wharves extending from such land, is an incorporeal hereditament and cannot be recovered by an action in the nature of ejectment, since no possession can be given of such a species of property. *Parker v. West Coast Pack. Co.* 5 L. R. A. 61, 17 Or. 510.

a. Action by riparian owner.

In *Nichols v. Lewis*, 15 Conn. 143, where the plaintiff had built a wharf between high and low water mark it was held that he had such an interest in the soil as would sustain ejectment.

Ejectment is the proper form of remedy where the defendants have entered upon the land of a city, have put structures thereon, and are using the same mainly for their private purposes, and have erected a wharf and pier and are taking wharfage thereon. *New York v. Law*, 135 N. Y. 380.

The remedy, if any, in favor of a riparian owner against persons who have taken possession of and erected buildings on the shore land between high and low water mark, the title and right to dispose of which is vested in the state and reserved from sale by the Constitution, is in equity, and not by an action in the nature of ejectment. *Pierce v. Kennedy*, 2 Wash. 324.

The court held ejectment would lie to recover the land unsold against the purchaser of the rights of the cemetery association, on an execution against it, who had been put in possession of the cemetery by the sheriff.

In *Seymour v. Page*, 83 Conn. 61, the grant was for a burial place and no other purpose, and it was held the grantee took a qualified fee.

Where land has been devoted to burial purposes the city authorities cannot under a statutory authority devote the land to other purposes.

Stockton v. Newark, 42 N. J. Eq. 531; *Roussau v. Troy*, 49 How. Pr. 492; *Chatham v.*

Brainerd, 11 Conn. 66; *Evergreen Cemetery Assn. v. New Haven*, 43 Conn. 234, 21 Am. Rep. 643; *Lake View v. Lets*, 44 Ill. 81; *Re Egypt Street*, 2 Grant, Cas. 455; *Gumbert's App.* 110 Pa. 496; *Moreland v. Richardson*, 22 Beav. 596.

Messrs. John H. Read and Silas W. Pettit, for appellee:

The right to a lot of ground for burial purposes is a usufructory one only—a mere license—and not the subject of an action of ejectment.

Kincaid's App. 66 Pa. 411; affirmed in *Oraig v. First Presby. Church of Pittsburgh*, 88 Pa. 42.

Where the grant was of "the exclusive right and privilege of boring for salt, oil, or

b. Mining rights.

A privilege to dig, not amounting to an actual demise, is an incorporeal hereditament for which ejectment will not lie. *Beatty v. Gregory*, 17 Iowa, 116, 85 Am. Dec. 546.

A lessee of mining interest until he has taken actual possession of some part of the land, has only a floating and indefinite right, for the recovery of which he cannot maintain ejectment. *Harlow v. Lake Superior Iron Co.* 36 Mich. 106.

Under a deed reserving mining rights, and providing that if the owner of the reserved rights permanently occupies the surface he shall compensate the owner of the fee, ejectment will not lie for those parts of land necessarily occupied by shafts, or other mining excavations or erections used solely for mining purposes; their use is in the nature of an easement appurtenant to the mine. *Erickson v. Michigan Land & Iron Co.* 50 Mich. 610.

Where mines have not been opened and the lessee has never been in possession, there can be no recovery by ejectment of the interest acquired under a lease for ninety-nine years for a share of the profits, which obligates the lessee to test the lands. *Petroleum Co. v. Coal, Coke & Mfg. Co.* 89 Tenn. 381.

But a licensee who has taken possession of mining lands and expended money and labor, has such an interest in real estate as will enable him to maintain ejectment. *Beatty v. Gregory*, 17 Iowa, 116, 85 Am. Dec. 546; *Adams, Ejectment*, 20.

The ownership of a coal bed is a corporeal interest in land to recover which ejectment will lie. *Comyn v. Kyneto*, Cro. Jac. 150; *Caldwell v. Fulton*, 31 Pa. 433, 72 Am. Dec. 760.

In *Fenner v. Reynolds*, 23 Pa. 199, a plaintiff in ejectment was allowed to recover possession of a mine which he had described as land, though the conveyance to him was not of the tract of land, but of coal.

Possession taken under a lease of mineral rights for a specified period, is actual though qualified, and is essential to prosecute the purposes of the lease, and, though given to effectuate incorporeal rights, is still a substantial possession and the proper subject of ejectment. *Karns v. Tanner*, 66 Pa. 297.

The right to quarry and remove limestone is an incorporeal hereditament, and is an interest in, or a right arising out of, land, and as such constitutes, under the Virginia statute, a foundation for an action of ejectment. *Reynolds v. Cook*, 38 Va. 817.

7. Fixtures.

Where by agreement the right to occupy certain real estate for the purpose of erecting permanent fixtures is granted by the owner of the fee and likewise the right to use the fixtures in common, and one of the tenants is excluded from the possession, ejectment is his remedy. *Hill v. Hill*, 43 Pa. 521.

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See also 41 L. R. A. 335.

8. Action by owner of dominant estate.

The owner of the soil subject to an easement who has not only the freehold but the right to the possession as against a wrongdoer, may recover in ejectment subject to the easement. *Weisbrod v. Chicago & N. W. R. Co.* 21 Wis. 602; *Gardiner v. Tisdale*, 2 Wis. 153, 60 Am. Dec. 407.

Ejectment can be maintained for premises which are subject to an easement of the defendant, where plaintiff's rights in the land are denied. *The Edmondson Island Case*, 42 Fed. Rep. 15.

The existence of an easement is no bar to the right of the owner of the fee to recover. *Blake v. Ham*, 53 Me. 423; *Bradbury v. Cony*, 59 Me. 499.

Ejectment will lie to recover possession of the soil subject either to a public or private easement over it. *Tillmes v. Marsh*, 67 Pa. 507; *Cooper v. Smith*, 9 Serg. & R. 23, 11 Am. Dec. 658.

The sheriff may give possession subject to the easement. *Tillmes v. Marsh, supra*.

a. Land subject to the easement of a highway.

An action in ejectment will lie in case of ouster, where lands are held in fee subject to the right of the public to use as a highway. *Westlake v. Koch*, 29 N. Y. S. R. 233; *Wager v. Troy Union R. Co.* 25 Y. 526; *Reformed Church of Gallupville*, 65 N. Y. 150.

It is the settled law that the owner of the soil may maintain ejectment for a part of the highway illegally appropriated by a third party. *Wright v. Carter*, 27 N. J. L. 83.

In *Goodtitle v. Alker*, 1 Burr. 143, Lord Mansfield, announced the doctrine that ejectment will lie by the owner of the soil for land which is subject to a passage over it as the king's highway.

But in *Cincinnati v. White*, 31 U. S. 6 Pet. 431, 8 L. ed. 453, this doctrine was disapproved. And in Connecticut the contrary doctrine has been asserted. *Stiles v. Curtis*, 4 Day, 323; *Peck v. Smith*, 1 Conn. 103, 6 Am. Dec. 216.

One may recover his land covered by a highway, in ejectment. *Goodtitle v. Alker*, 1 Burr. 143; *Alden v. Murdock*, 13 Mass. 256; *Stackpole v. Healy*, 16 Mass. 33, 8 Am. Dec. 121.

One who has the freehold of the land over which a highway runs may maintain ejectment for encroachments upon the highway. *Etz v. Daily*, 20 Barb. 32.

In this case the plaintiff had conveyed a farm to the defendant excepting therefrom land within its boundaries which was included in a highway. The defendant thereafter dug up the road and ran a water pipe across it; set out trees, and piled stone, etc., within its limits.

Up to the time of this case the question here presented had not been adjudged in New York although the doctrine laid down herein had been on several occasions asserted from the bench. *Jackson v. Hathaway*, 16 Johns. 453, 8 Am. Dec. 263; *Saunders v. Wilson*, 15 Wend. 839; *Pearsall v. Post*

minerals," upon certain land, it was held that under the authority of *Funk v. Haldeman*, 58 Pa. 299, it was not a conveyance of the mineral, but only a right to sever and take it, and the only possession to which the grantee was entitled was such as was necessary to an exercise of that right, and therefore the remedy for the disturbance of the right was in case and that ejectment could not be maintained.

Union Pet. Co. v. Bliven Pet. Co. 72 Pa. 173.

In order to ascertain whether an instrument must be construed as a lease or a license, it is only necessary to determine whether the grantee had acquired by it any estate in the land, in respect of which he might bring ejectment.

If the land is still to be considered in the possession of the grantor the instrument will only amount to a license.

Funk v. Haldeman, *supra*.

Sterrett, J., delivered the opinion of the court:

As well stated by appellant in the opening sentence of his argument: "The question first presented for decision is whether the interest conveyed under the original deed of Tilford to Lisle is such an interest in land as will support an action of ejectment." The thing conveyed by the deed referred to, as the same is described therein, is "the exclusive and entire

20 Wend. 126; *Benedict v. Goff*, 3 Barb. 468; *Northen Turnp. Road Co. v. Smith*, 15 Barb. 355.

This doctrine was denied in the opinion delivered in *Adams v. Saratoga & W. R. Co.*, 11 Barb. 414, following the opinion in *Cincinnati v. White*, *supra*.

The objection urged against the right to maintain an ejectment is that exclusive possession of the premises in dispute cannot be given. "But," says Gray, *J.*, in *Etz v. Daily*, *supra*, "let this objection prevail and any erection short of a nuisance may be made on the roadside in front of the owner's domicile, and the owner would be without complete redress, and the lawless occupant would hold it until the use of the whole road as a highway should be discontinued, unless the public authorities should see fit to remove him."

But the action of ejectment can be maintained only to recover possession of land wrongfully withheld; and it will not lie against a railroad company in favor of an adjoining owner claiming the fee in the street subject to the public easement. *Judge v. New York Cent. & H. R. R. Co.* 56 Hun, 60.

Where a railroad is laid upon an established street within a city, in pursuance of power conferred upon the company by the city to occupy and use the street, and is constructed in a legal and proper manner, and the occupancy and use never abandoned, ejectment will not lie against the company in favor of a lotowner. *Atchison & N. R. Co. v. Manley*, 42 Kan. 577.

However an owner of land abutting on a public highway may recover against a railway company which without right, and without any legislative grant, either express or implied, has appropriated it to its own permanent use. *Louisville, St. L. & T. R. Co. v. Liebfried*, 18 Ky. L. Rep. 645, disapproving *Indiana, B. & W. R. Co. v. Allen*, 118 Ind. 581; *Carpenter v. Oswego & S. R. Co.* 24 N. Y. 655; *Wager v. Troy Union R. Co.* 25 N. Y. 526; *Lozier v. New York Cent. R. Co.* 42 Barb. 469.

An adjoining owner may maintain ejectment against a railway which has laid its track in a street without tendering compensation. *Terre Haute & S. R. Co. v. Rodel*, 87 Ind. 128.

An unlawful entry on the street is an entry on the land of the lotowner. *Ibid*.

9. Interest of a mortgagee.

In England and in many of the states the fee is held to pass by a mortgage to the mortgagee. The mortgagee may, where this view is held, be ousted immediately on the execution and delivery of the mortgage without waiting for the period fixed for the performance of the condition. *Carroll v. Ballance*, 26 Ill. 9, 79 Am. Dec. 254; *Blaney v. Pearce*, 2 Me. 132; *Brown v. Cram*, 1 N. H. 169; *Hobart v. Sanborn*, 18 N. H. 226; *Northampton Paper Mills Co. v. Ames*, 8 Met. 1.

In England the mortgagee had the double remedy of ejectment and a bill to foreclose and 18 L. R. A.

might maintain both at the same time. *Garforth v. Bradley*, 2 Ves. Sr. 678.

But he could not have his money and the estate too. *Booth v. Booth*, 2 Atk. 843.

A mortgagee may maintain ejectment to recover possession of the mortgaged premises, where default has been made in the payments of the installments of the mortgage. *Smith v. Shuler*, 12 Serg. & R. 240; *Simpson v. Ammons*, 1 Binn. 175, 2 Am. Dec. 425.

And the granting of *scire facias* did not take away ejectment. *Smith v. Shuler*, *supra*.

The assignee of a mortgage may, if he owns the indebtedness, maintain ejectment in his own name for his own use; or he may bring the action for the use of the party owning the indebtedness. *Kilgour v. Gookley*, 83 Ill. 109.

The mortgagee is owner of the fee as against the mortgagor and all claiming under him. *Oldham v. Pfeiffer*, 84 Ill. 102.

In this case it was held that ejectment could not be maintained by the heirs of the mortgagor against the grantee of the mortgage.

As announcing the same doctrine, see *Nelson v. Pinegar*, 30 Ill. 451; *Finlon v. Clark*, 118 Ill. 32; *Taylor v. Adams*, 115 Ill. 574.

At law the mortgagee is the owner of the estate and until the mortgage is satisfied the mortgagor cannot maintain ejectment against the mortgagee. *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519.

A mortgagor cannot recover in ejectment against a mortgagee who is in adverse possession after the law day of the mortgage; nor can one who claims under the mortgagor recover against one holding by privity of title with the mortgagee, unless the conveyance is void. *Jones v. Roper*, 36 Ala. 210.

But it is now settled law that the mortgagor or his assignee is the legal owner of the mortgaged estate as against all persons but the mortgagee or his assigns. *Hall v. Lance*, 25 Ill. 277; *Emory v. Keighan*, 88 Ill. 452; *Barrett v. Hinckley*, 124 Ill. 32.

Under the Code it is held that a mortgagee cannot maintain ejectment against the owner of the equity of redemption. *Murray v. Walker*, 81 N. Y. 399.

The grantee under a deed which is in fact a mortgage, never having been in possession, cannot recover in ejectment. *Rountree v. Denson*, 59 Wis. 522.

A grantor in a deed absolute on its face, but intended as a mortgage, being entitled to the possession of the lands until foreclosure, may reassume possession, even though he has abandoned it with no intention of returning or further claiming the land; and hence he or those claiming under him can maintain ejectment against a mere intruder who does not show any legal title. *McCormick v. Herndon*, 73 Wis. 661.

In Delaware it is held that the mortgagee,—who acquires only a chattel interest in the land,—cannot maintain ejectment for possession thereof even

right of interment or sepulture in all and every of those two hundred burial lots in the Philadelphia Cemetery, situate," etc., "marked in the map or plan of said cemetery with the numbers 5, 9," etc.; "together with all and singular the ways, avenues, passages, rights, liberties, privileges, improvements, hereditaments, and appurtenances whatsoever thereunto belonging or in any wise appertaining, and the reversions and remainders thereof; to have and to hold the same, with the appurtenances, unto the said John M. Lisle, his heirs and assigns, to and for the only proper use and behoof of the said John M. Lisle, his heirs and assigns, forever, for the uses and

purposes of sepulture only, and to and for no other use, intent, or purpose whatsoever, subject to all the rules, regulations, conditions, and restrictions contained and set forth in the articles of association made and adopted, or which may hereafter be made and adopted, by the corporators or managers of said cemetery for the government of lotowners or visitors to the cemetery, and the burial of the dead, and in and by any by-laws made and adopted, or which may hereafter be made and adopted, in pursuance of the said articles of association, or of the Act of Assembly incorporating said company." It thus appears by the deed that all the vendee acquired thereunder

after condition broken. *Fox v. Wharton*, 5 Del. Ch. 200; *Doe v. Tunnell*, 1 Houst. (Del.) 323.

A purchaser at a sale under foreclosure of a mortgage executed by a husband alone upon lands not allotted as a homestead at a time when he was not otherwise indebted, may sustain ejectment against the mortgagor. *Scott v. Lane*, 100 N. C. 154; *Hughes v. Hodges*, 102 N. C. 236.

The lienholder by purchase at a sale upon the bond secured by the mortgage acquired all the rights and estate of the mortgagor, and is entitled to recover in ejectment against mortgagor. *Gill v. Weston*, 110 Pa. 805; *Young v. Algeo*, 3 Watts, 223.

The vendor of lands by a title bond cannot maintain an action of ejectment against the purchaser, for default in payment of the purchase price, but his position is that of a mortgagee holding a lien only which he can enforce in equity. *Morton v. Dickson*, 12 Ky. L. Rep. 548.

One who is owner of the equitable estate of the obligee in a bond for title, and of a one fourth share of the legal title, can recover possession in an action of ejectment against persons claiming under such obligee. *Grubb v. Lookabill*, 100 N. C. 207.

In *Hicks v. Lovell*, 64 Cal. 14, a vendor was allowed to maintain ejectment, the vendee having refused to comply with his contract.

And so in *Snodgrass v. Parks*, 79 Cal. 55, where the vendee had not only ceased to pay but had expressly abandoned the contract.

10. Tenant in common may maintain the action.

A tenant in common claiming an undivided interest may recover the entire property against the wrongdoer or one without title. *Telfener v. Dillard*, 70 Tex. 139; *Wheeling, P. & B. R. Co. v. Warrell*, 123 Pa. 612; *Sowers v. Peterson*, 59 Tex. 217; *Pilcher v. Kirk*, 60 Tex. 162; *Contreras v. Haynes*, 61 Tex. 108.

One partner, whatever his rights against the other members of the firm, can maintain ejectment for the whole tract of land belonging to the partnership as against a mere intruder. *Smith v. Smith*, 80 Cal. 324.

A portion of the tenants in common may recover the entire tract of the land sued for in trespass to try title against mere trespassers. *Harber v. Dyches* (Tex.) Oct. 23, 1890.

One tenant in common may maintain an action of ejectment or trespass to try title against his co-tenant, when the latter has ousted him of possession of the property owned in common. *St. Louis, A. & T. R. Co. v. Prather*, 75 Tex. 58; *Moulton v. McDermott*, 80 Cal. 629; *Whiteman v. Hyland*, 40 N. Y. S. R. 573.

Where one co-tenant in actual possession disseises another, thereby making his possession adverse, ejectment will lie to restore to the ousted party his joint possession. *Jordan v. Surghor*, 107 Mo. 520; *Lambert v. Blumenthal*, 26 Mo. 471; *Wommack v. 18 L. R. A.*

Whitmore, 58 Mo. 451; *Warfield v. Lindell*, 30 Mo. 273, 77 Am. Dec. 614.

One of several tenants in common may maintain ejectment for his undivided interest. *Blanchard v. Floyd* (Ala.) June 9, 1891.

One of several tenants in common in whose favor an award has been made, but not paid, for the value of lands appropriated by a railroad company without obtaining title or making compensation, who has subsequently purchased the interests of his co-tenants, may maintain ejectment for the land. *Wheeling, P. & B. R. Co. v. Warrell*, *supra*.

A plaintiff in ejectment cannot rely upon a parol partition to establish his title to the co-tenant's share of the premises. *Sontag v. Bigelow* (Ill.) 18 L. R. A. 323.

11. Executors, administrators, and guardians.

An executor who, under the will, is required to rent and let the real estate, have and receive the rents, and pay them over, is entitled to recover the property by action. *McAlpine v. Daniel*, 101 N. C. 550.

But ejectment cannot be maintained by executors invested only with the simple power to carry into effect the provisions of a will which directs the sale of testator's real estate. *Reynolds v. Boyd* (Ky.) Nov. 14, 1891.

In *Reynolds v. Boyd*, *supra*, *Lewis, J.*, said that a distinction had been recognized in Kentucky "between the case where a testator not only authorized his executor to sell land but devised to him the land itself, giving to the devisee only the proceeds when sold, and the case of a mere naked power to sell. In the first the title vests in the executor, and he may maintain the action; in the second the action is in the heirs-at-law of the testator, and an action of ejectment cannot be maintained unless they are parties." See *Jennings v. Monk*, 4 Met. (Ky.) 108; *Warfield v. English*, 11 Ky. L. Rep. 268.

As against a trespasser, an administrator may maintain ejectment in his own name for real estate of his intestate. *Black v. Story*, 7 Mont. 233.

In Florida an administrator may sue in ejectment to recover possession of the real estate of his intestate. *Sanchez v. Hart*, 17 Fla. 507.

Under Neb. Comp. Stat., chap. 23, § 202, an administrator may maintain ejectment for the recovery and possession of real property for the necessary purposes of administration. *Dundas v. Carson*, 27 Neb. 634.

And in Michigan the statutory right of the administrator before final settlement to the possession and rents of the real property may be enforced by ejectment. *Kline v. Moulton*, 11 Mich. 370.

In *Marvin v. Schilling*, 12 Mich. 381, the court, commenting on section 2904 of Comp. Stat., which is similar in its provisions to Neb. Comp. Stat., chap. 23, § 202, *supra*, said, citing *Streeter v. Payton*, 7 Mich. 341, that the statute did not interfere with the descent of the real estate to the heir, and his right to take possession, or bring ejectment there-

was "the right of interment or sepulture" in the lots described therein, and declared to be held "for the uses and purposes of sepulture only, and to and for no other use, intent, or purpose whatsoever." The right thus sharply defined and limited is also subject to all the rules, regulations, conditions, and restrictions contained and set forth in the articles of association made and adopted, or which might

thereafter be adopted, by the incorporators or managers of the incorporated cemetery company. The language of the deed evidently contemplates possession and general control of the cemetery grounds, etc., by the company. The grantee in the deed acquired no such interest in the lots, nor such right of possession, as will support an action of ejectment. That action will not lie for a mere

for against any one, except the administrator or some one in possession under him, and that the object of the statute was to permit the personal representative of the deceased to take possession of the real estate and hold it until it should be sold by him under a license of the probate court, on the final settlement of the estate, if he thought proper to do so, unless ordered to deliver it over to the heir by the probate court."

In *Campau v. Campau*, 19 Mich. 116, it was said that this power given to the administrator was for the benefit of creditors only.

In *Miller v. Hoberg*, 22 Minn. 249, it was held that the plaintiff's capacity to sue depended on his character as administrator. "His right to the possession, if he has any, is sole, and exclusive of the right of the heirs, and is not a joint right. . . . The heirs have the right to the possession as against every one but the administrator or his tenants. He has the right to the possession as against the heirs or any other persons until the estate is settled, or until delivered over by order of the probate court, and the right to sue follows as a necessary consequence."

In Alabama the administrator has such a right to the possession of the land of his intestate that he may bring ejectment without reference to the solvency of the estate. *McKee v. McDonald*, 57 Ala. 423; *Agee v. Williams*, 30 Ala. 686.

In Wisconsin, under statute, it is held that an administrator may maintain ejectment for lands of the estate he represents. *Edwards v. Evans*, 16 Wis. 181; *Jones v. Billstein*, 28 Wis. 227.

Prior to the Code, it was not settled whether or not an administrator could recover in ejectment against an heir-at-law without first obtaining an order of sale from the court of ordinary. *Caruthers v. Bailey*, 3 Ga. 111; *Jordan v. Pollock*, 14 Ga. 145; *Bond v. Watson*, 20 Ga. 141.

Under the Code it is the better practice, if not indispensable in most cases, to obtain such an order. *Davis v. Howard*, 56 Ga. 433; *Head v. Driver*, 79 Ga. 179.

Wash. Code of Proc., § 956, provides that "every executor or administrator shall, after having qualified, etc., have a right to the immediate possession of all the real as well as the personal estate of the deceased, and may receive the rents and profits of the real estate until the estate shall be settled or delivered over by order of the court to the heirs or devisees." In *Duan v. Peterson* (Wash.) April 18, 1892, it was held that, under this provision, a sole devisee under a foreign will not exempting the estate from the control of the probate court, could not maintain ejectment, there being no allegation that letters testamentary or of administration with will annexed were not issued.

In California, where the law is substantially the same on this subject, it has been uniformly held that, pending administration, the personal representatives alone could maintain ejectment. *Meeks v. Hahn*, 20 Cal. 621; *Chapman v. Hollister*, 42 Cal. 463; *Meeks v. Kirby*, 47 Cal. 168.

And during the administration of an estate, and until distribution, the executor or administrator is entitled to the possession of real property and may recover it from the heir or devisee. *Page v. Tucker*, 54 Cal. 121.

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Under Cal. Civ. Code, § 1452, the heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or to quiet title to the same. *Miller v. Lucio*, 80 Cal. 257.

A lessee's interest in land descends to his administrator; but is for that reason none the less a valid and subsisting interest in real property within the meaning of Ind. Rev. Stat., § 1050. The fact that the action for the recovery of the lessee's interest must be prosecuted after his death, by the administrator, does not change the character of the proceeding, which is an action in the nature of an action in ejectment.

The right to possession conferred by a lease is as effectual to support an action under section 1050, *supra*, as if conferred by title in fee simple. *Campbell v. Hunt*, 1104 Ind. 210; *Butler University v. Conard*, 94 Ind. 353.

An administrator may recover upon the possession of his intestate. *Buckner v. Chambliss*, 30 Ga. 652.

A general guardian can maintain ejectment to recover possession of his ward's lands. *Re Hynes*, 105 N. Y. 560; *Jackson v. De Waits*, 7 Johns. 158.

12. Widow may recover dower.

By statute in Michigan it is provided that a widow may bring ejectment to recover her dower of any lands after six months from the time when the right accrued. *How. Stat.* § 7739.

The authority to recover dower by ejectment rests entirely upon statute; and in Michigan dower can be recovered only by statutory ejectment. *Proctor v. Bigelow*, 38 Mich. 282.

By *How. Stat.*, § 7845, a widow is authorized to bring ejectment before assignment of dower. And see *Snyder v. Snyder*, 6 Mich. 473; *Burrall v. Bender*, 61 Mich. 622.

But ejectment may not be brought by one purchasing the right of dower before assignment, either in the name of the purchaser or the widow. *Galbraith v. Fleming*, 60 Mich. 413.

Ejectment will lie by a widow to recover one room in a house, the right of possession of which she has under her husband's will as part of the provision in lieu of dower. *White v. White*, 16 N. J. L. 214.

13. Remaindermen.

Remaindermen cannot maintain ejectment against the grantees of a life tenant who in his lifetime purchased the fee at a sale under a mortgage made by the common source of title which it was not his duty to pay, where they have made no offer to redeem from the mortgage. *Allen v. De Groodt*, 105 Mo. 442.

A remainderman cannot maintain trespass to try title during the life of the life tenant. *Cook v. Caswell*, 81 Tex. 673.

For the plaintiff must show that he had a possessory title at the time of the demise laid in the petition. 2 Greenl. Ev. 303.

In *Chicago & A. R. Co. v. Smith*, 73 Ill. 98, the owner of a life estate had been notified of the appointment of commissioners to assess damages, but the notice was not sufficient as to the remainderman, and it was held that the latter might, after

license, an incorporeal hereditament, nor for a mere right of way, nor an easement. 6 Am. & Eng. Encyclop. Law, 282; Adams, Ejectment, 16. As was said in *Black v. Hepburne*, 2 Yeates, 338: "Ejectment will only lie for things whereof possession may be delivered by the sheriff." If a recovery in ejectment, founded on a mere right or license such as that acquired by the grantee in the deed above referred to, were permitted, how could the sheriff, under a writ of *habere facias*, put the

plaintiff in possession, without interfering with the rights, powers, and duties of the cemetery corporation? In *Kincaid's App.*, 66 Pa. 411, one of the plaintiffs held a paper certifying that he was "entitled to two lots in the burying ground, . . . to have and to hold the said lots for the use and purpose and subject to the conditions and regulations in the deed of trust to the trustees of said church." It was held that this was not a grant of any interest in the soil; that it was the grant of a

the expiration of the life estate, and after notice given, maintain ejectment.

14. Miscellaneous instances.

The holder of a tax deed which, in an action of ejectment against him, has been declared void, may nevertheless maintain ejectment against his tenant holding over after expiration of the term, where possession has never been taken under the judgment against him, and a sum thereby directed to be paid him before possession could be taken has not been paid. *Rose v. Newman*, 47 Kan. 18.

A male fide trustee of the legal title cannot harass one who is in actual possession, by proceedings in ejectment. *Loomis v. Roberts*, 57 Mich. 234.

When the owner of an estate for life acquires by purchase the remainder or reversion, the less estate becomes merged in the greater, and his title is an absolute fee on which he may recover in ejectment, or the statutory action in the nature of ejectment commenced before he acquired the fee. *Hairston v. Dobbs*, 80 Ala. 589.

Trespass to try title is the proper remedy to recover from heirs a half interest in lands located by plaintiff under an agreement with defendant's deceased ancestor that plaintiff should receive half as compensation. *Hardy v. Beatty* (Tex.) May 10, 1892.

An action cannot be maintained to eject defendant from the land covered by a brick wall standing wholly on the plaintiff's land, where such wall had been made a party-wall by a written agreement unperformed and unrescinded between grantors of the parties under a mutual mistake of fact as to the true boundary. *Houghton v. Mendenhall* (Minn.) May 23, 1892.

A widow who is insane and incapable of making a selection of a homestead out of a tract which is in excess of the constitutional limit of a homestead has not such a homestead right as will sustain an action of ejectment for any part of the land. *Clancy v. Stephens*, 92 Ala. 577.

A married woman in Indiana may maintain an action of ejectment against her husband to recover the possession of her separate real estate. *Crater v. Crater*, 118 Ind. 521.

And so in New York. *Wood v. Wood*, 83 N. Y. 575, overruling *Minier v. Minier*, 4 Lans. 421; *Gould v. Gould*, 29 How. Pr. 461.

So in Pennsylvania under the Acts of 1848 and 1854. *McKendry v. McKendry*, 6 L. R. A. 500, 131 Pa. 24.

Also in Michigan where the husband after separation occupies the wife's homestead. *Buckingham v. Buckingham*, 81 Mich. 89.

An equitable action of ejectment cannot be maintained on a covenant made by a vendee for the support of a third person wherever she saw fit to reside, as it creates no right in or charge upon the land. *Harkins v. Doran* (Pa.) Oct. 29, 1888.

A tenant cannot maintain ejectment for the recovery of the possession of premises from which he has been wrongfully ejected in landlord and tenant proceedings, where his suit is brought after the expiration of the term. *Horner v. Marietta*, 135 Pa. 418.

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The purchaser of attached property held by a third person under fraudulent conveyance from the debtor may recover it from him in ejectment. *McClellan v. Solomon*, 23 Fla. 437, 11 Am. St. Rep. 381.

Ejectment, and not an action to have the deed set aside as a cloud on their title, is the proper form of action in favor of disseised heirs against an heir taking exclusive possession of land claiming it under a deed from the ancestor, which deed the other heirs claim was never delivered. *Lundy v. Lundy*, 131 Ill. 128.

Tenants who are in possession under a lease sufficient, except for the omission of the name of one of the lessors in its granting clause and the want of acknowledgment, and who have paid the rent and complied with the agreement on their part and made valuable improvements upon the premises, cannot be ejected at the suit of a subsequent vendee of the lessors with knowledge of the facts. *Schulte v. Schering*, 3 Wash. 127; *Schulte v. Littlejohn*, Id. 129.

The purchaser of a contract for the sale of lands, which was assigned by the vendee solely as security for a debt, cannot maintain ejectment against such vendee, who were in possession when he bought the contract and are not in default, although he has paid the purchase money and received a deed for the land,—especially where the debt which the contract was assigned to secure was not assigned to him. *Hyde v. Mangan*, 88 Cal. 319.

Ejectment will lie at the suit of a judgment creditor who has bought in the land of his debtor at execution sale, to recover the land from a subsequent purchaser from the debtor. *Dehart v. Lewis*, 13 Ky. L. Rep. 473.

Where a wife owned property in her own right and signed a deed which purported to be the deed of her husband alone, conveying the land to a railroad company, she may after his death maintain ejectment. *Bradley v. Missouri Pac. R. Co.* 91 Mo. 498.

Ejectment does not lie in behalf of an heir against an administrator to recover possession of land to which the latter is entitled as assets of the estate. *Barco v. Fennell*, 24 Fla. 378.

A railroad company may maintain ejectment for lands condemned under the General Railroad Act. *New York, S. & W. R. Co. v. Trimmer*, 53 N. J. L. 1.

In *Ezzard v. Findley Gold Min. Co.*, 74 Ga. 520, it was held that one owning a mining right could not maintain ejectment against an adjacent proprietor who had erected a dam which flooded the upper lands.

But in this case the question did not arise whether the owner of land covered with water or of the mineral interest in such land, when either is held adversely, may maintain ejectment for the recovery thereof.

On the question what disseisin will support ejectment, see note to *Harrington v. Port Huron* (Mich.) 13 L. R. A. 664.

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license or privilege to make interments in the lots described, exclusive of others, so long as the ground should remain the burying ground of the church; that while the license continued he could perhaps maintain trespass or case for any invasion or disturbance of it, whether by the grantors or by strangers, etc. That case was cited approvingly in *Orwig v. First Presby. Church of Pittsburgh*, 88 Pa. 42, in which it was also held that the right of sepulture in the burying ground of a church is not an absolute right in the soil, but a mere license or privilege. In *Union Petroleum Co. v. Bliven Petroleum Co.*, 72 Pa. 178, the grant to the defendant was of the exclusive right and privilege of boring for oil, etc., upon a farm. Subsequently, by partition, the title became vested in another, who conveyed to plaintiff. It was held that the grant was a mere incorporeal hereditament, and consequently ejectment could not be maintained. Referring to the grant, which was of "the exclusive right and privilege of boring for salt, oil, or minerals" upon the McClintock farm, *Mr. Justice Shars-*

wood says: "It was, therefore, as in *Funk v. Haldeman*, 53 Pa. 229, the grant of a mere incorporeal hereditament. Indeed, we do not understand this to have been controverted in the court below, nor has it been made a question in this court. It follows that the only remedy which the plaintiffs had for the disturbance of their right was an action on the case. Ejectment they certainly could not have maintained." *Funk v. Haldeman*, 53 Pa. 229, above cited, is substantially to the same effect. It follows from what has been said that the right of sepulture, etc., was not an interest in the land, such as will support an action of ejectment. It is therefore unnecessary to consider whether the court erred in directing a verdict for defendant, and in other respects, or not. If, on the case presented by the plaintiff, he had no right to recover in an action of ejectment, he was not injured by any of the alleged errors of which he complains.

Judgment affirmed.

MISSOURI SUPREME COURT (In Banc).

MISSOURI FELLOW SERVANT CASES.¹

Katie DIXON, *Appt.*,

v.

CHICAGO & ALTON R. CO., *Resp.*

(.....Mo.....)

***1. A laborer, working in defendant's quarry,** under direction of a foreman having no connection with the train service is not a fellow servant of employes operating a passenger train on defendant's line.

2. The rule of exemption on account of fellow service discussed.

3. Employees of independent contractors, engaged in separate branches of labor

*Headnotes by BAROLAY, J.,

upon a common enterprise, are not fellow servants.

4. Contributory negligence; question for jury. A quarry hand was working about a railway track, near a curve at which locomotives were required, by defendant's rules, to whistle. His duties compelled him to frequently stand on the track with his back towards the curve, and to attend to the movement of small cars carrying rock across the main track to an inclined plane leading to a rock crusher. He was hit and killed by an engine coming rapidly around the curve without the required signal. *Held*, in the circumstances stated in the opinion, that the question whether he used ordinary care to avoid danger was one of fact for the jury.

5. The omission of the warning signal was evidence of negligence in running the train.

6. The court is authorized to pronounce certain conduct negligent, only when no

¹These five Missouri cases have been grouped and annotated by one of the ablest and most prominent members of the legal profession in that state for the purpose of illustrating and aiding in unifying the modern law of fellow servants. [Ed.]

NOTE.—[On the general subject of this note, see also the four cases next following.

In the illustrations the party injured is usually indicated by italics.

With a few exceptions, these notes will embody the results of decisions in recent cases only. Earlier 18 L. R. A.

rulings can be readily found in McKinney's Fellow Servants, Whittaker's Smith's Negligence, 1st Am. ed. p. 139, note d; and Am. & Eng. Encyclop. Law, *Fellow Servants*, and in Beven, Wharton, Cooley, Addison, and other writers on Torts and Negligence generally.]

General principles.

It is now settled law that the negligence of a fellow servant is no bar to an action by another servant where negligence of the master has also contributed to the injury of the latter. *Coppins v.*

other construction may reasonably be placed upon it in the circumstances.

(Sherwood, Ch. J., and Gantt, J., dissent.)

(November 9, 1891.)

APPEAL by plaintiff from a judgment of the Circuit Court for Lafayette County in favor of defendant in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by actionable negligence on the part of defendant's servants. *Reversed.*

Statement by Barclay, J.:

Plaintiff has appealed from a judgment for defendant in an action for the negligent killing of her husband. No point arises on the pleadings.

These are the main facts:

Defendant operated a quarry and a rock-crusher in Jackson county, Mo., for preparing rock to ballast its road. The quarry lay a short distance south, and extended 200 or 300 feet alongside of defendant's line. From different parts of the quarry narrow tracks ran, converging at a turntable, 7 or 8 feet in diameter, the north edge of which was 9 feet south of defendant's main track. The rock-crusher stood 40 or 50 feet north of the track.

From the turntable, a small track, called by witnesses a "strap track," crossed the main line at a right angle, and ran up an inclined plane to the crushing machine, 80 or 40 feet from the ground. Small cars carried the rock to the crusher. They were first drawn along the quarry tracks by a mule to the turntable, and shifted by it into position to strike the strap track. Then a wire cable (fastened at one end to a drum in the crushing machinery) was made fast to one car at a time, which was pulled across the railroad track, up the inclined plane, to the crusher, by means of the steam power used to operate that machine. The rock was unloaded, and the empty car let down to the turntable again by the same wire cable. The latter had a ring or clevis at the end, by which it was attached (as occasion required) to a large iron hook on each car.

A number of hands were engaged in operating this quarry under the superintendence of a foreman who had power to employ and discharge subordinates without consulting any one, but had no control whatever over trains or the trainmen.

Plaintiff's husband had been at work at the quarry a long time. About a month before his death he had been assigned the duty of attaching the cable to the little cars between the turntable and the crusher, and detaching it again when the cars returned, as has been

New York & H. R. R. Co. (1890), 122 N. Y. 557, 19 Am. St. Rep. 523; McMahon v. Henning (1890), 1 McCrary, 516; Sutton v. New York, L. E. & W. R. Co. (1892), 50 N. Y. S. R. 514.

The question of the liability of the master (a corporation) "to one of its servants for the act of another person in its employment is a question, not of local law, but of general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several states" (U. S. Sup. Ct. 1893), in Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 37 L. ed. 97. To the same effect, Newport News & M. V. R. Co. v. Howe (1892), 52 Fed. Rep. 322, per Brown, Justice, Jackson and Taft, JJ.

It seems, however, that where a state court is called upon to deal with this subject in a case arising in another state, the general law of the latter will be applied. Hovis v. Richmond & D. R. Co. (Ga.) Oct. 17, 1892; Alexander v. Pennsylvania Co. (1891), 48 Ohio St. 623; Alabama & G. S. R. Co. v. Carroll (Ala.) 1892, 18 L. R. A. 433.

Where the employé is not a free agent the rule of exemption of the master from liability for the carelessness of his co-employés does not apply; so held where the employé was a slave. Scudder v. Woodbridge (1848), 1 Ga. 195.

In Anderson v. The Ashebrooke (1890), 44 Fed. Rep. 124, it is said by Judge Pardee that in admiralty the negligence of co-employés is no bar to a recovery where defendant is also guilty of actionable fault; but where both parties are negligent, the personal damages ensuing will be apportioned.

Though workmen may be engaged in the same general business, and at work upon the same premises, they are not fellow servants if employed by different masters, even though one of the latter may be acting as agent for the other. This was ruled by the United States Circuit Court of Appeals, Second Circuit, in a case where a brakeman on cars of a coal company was injured by the negligence 18 L. R. A.

of an engineer in suddenly starting a train of coal cars without notice to the brakeman, engaged at the time in coupling; the engineer was in the service of a railway company which was employed by the coal company for the delivery of its coal. Central R. Co. of New Jersey v. Stoermer (1892), 51 Fed. Rep. 518.

The same principle is applied to servants of different independent contractors at work upon the same general "job," but under separate directions. Johnson v. Lindsay, L. R. (1891), App. Cas. 571; Williams and Denniston, JJ., in Nystrom v. Cameron, 9 New Zeal. L. R. 413. Compare Spisak v. Baltimore & O. R. Co. (Pa.) Nov. 1, 1892.

So where certain sewer contractors sublet the brick work for the sewer, a bricklayer, employed by the sub-contractors was allowed to recover for injuries caused by negligence of employés of the chief contractors in excavating the trench for the sewer. Johnston v. Ott (Pa.) Jan. 3, 1893.

And where two companies were in joint use of certain tracks, a repairman of one company, injured in consequence of insufficient operating rules was held not a fellow servant with train men of the other company working upon the common premises. Vose v. Lancashire & Y. R. Co. (1858), 27 L. J. Exch. 243, 2 Hurlst. & N. 723.

Even where the two servants were working together at the time, the same principle was applied in Sanford v. Standard Oil Co. (1890), 118 N. Y. 571, and in Johnson v. Netherlands A. Steam Nav. Co. (1892), 132 N. Y. 576 (Follett, Parker and Landon, dissenting). Feeney v. Minisicongo Tow Co. (1892), 50 N. Y. S. R. 222.

What constitutes "common employment."

L

In the following cases certain employés have been held not fellow servants:

A common laborer about a lumber yard, injured

described. He was also required to assist in turning the table to get the cars into proper position.

Defendant's line approaches the crusher from the east for some 2,000 feet, on an ascending grade of about 48 feet to the mile. A short distance (variously stated at from 100 to 400 feet) east of the crusher a "forty minute" curve begins, and extends thence eastward about 1,900 feet, bearing towards the south. While plaintiff's husband had been there at work, about a dozen trains passed daily, including two regular passenger trains each morning, one about 8 o'clock and the other about 80 minutes later.

A rule of the company required a signal by sounding the whistle to be given at all obscure curves. An obscure curve is one in which a train at one end cannot be seen from the other end of the curve. It is conceded that the curve in question was an obscure one, and that it was usual for locomotive engines to whistle before reaching the quarry.

On the morning of December 20, 1886, about 8 o'clock, one of defendant's passenger trains from the east, within 2 or 8 minutes of its regular time, running at the rate of twenty-five or twenty-eight miles an hour, approached the crusher. Plaintiff's evidence strongly tends to prove that no whistle was sounded from it.

When the train reached the "strap track"

by falling into an uncovered ditch, which had been excavated by other employes under direction of the superintendent, the court saying, "The relationship of fellow servants did not exist between the plaintiff, who was employed in handling lumber, and McGregor and his men, who were engaged in a distinct labor affecting the safety of the yard as a place to work in." *Sadowski v. Michigan Car Co.* (1890), 84 Mich. 100.

A transfer agent of a railway company and the operatives of a train on which he was riding. *Mefford v. Louisville & N. R. Co.* (Ky.) Oct. 1, 1892.

Car inspector and a section hand, riding on a hand-car and hurt by a runaway freight car. *Cowan v. Chicago, M. & St. P. R. Co.* (1891), 80 Wis. 284.

Brakeman and the conductor and engineer of the same train whose management thereof, in disregard of the train dispatcher's orders, caused the injury. *Northern Pac. R. Co. v. Cavanaugh* (1892), 51 Fed. Rep. 517 (Caldwell, Sanborn, and Shiras, JJ.).

Car inspector and brakeman, injured by reason of a defective car wheel. *Daniels v. Union Pac. R. Co.* (1890), 6 Utah, 387.

A fireman belonging to the fire department, and the city's agents, having control of the department of street repairs, where the former was injured while on duty by reason of defects in the highway. *Coots v. Detroit* (1889), 75 Mich. 628.

The conductor of a freight train and the section men charged with the duty to clear away accumulated snow from the track (*Fisher v. Oregon S. L. & N. R. Co.* (1892), 16 L. R. A. 519, 22 Or. 539); but where, instead of snow, there was coal or coke upon the track, and it was the duty of the section men to remove it, and by neglect of that duty a yard switchman was injured, the court held those employes fellow servants. *Cincinnati, N. O. & T. P. R. Co. v. Mealer* (1892), 50 Fed. Rep. 725, 6 U. S. App. 86.

But precisely the contrary was held in Texas (before the Act of 1891), where a switchman was injured by stepping from an engine upon a pile of cinders, 13 L. R. A.

crossing it struck and killed Dixon, who was working there. Both wheels of the engine passed over the cable at that place.

There was proof of plaintiff's relationship to the deceased, and of all other formal matters; but the trial court declared the law to be that, on the facts above outlined, plaintiff could not recover "because the said engineer and Dixon were fellow servants." Accordingly the jury returned a verdict for defendant. After saving exceptions, and taking the usual steps for a review, plaintiff appealed.

All other necessary facts are stated in the opinion of the court.

Messrs. Graves & Aull, for appellant:

It is a settled fact that Dixon and the engineer were not fellow servants.

Sullivan v. Missouri Pac. R. Co., 97 Mo. 118, which decides that a track walker on a railroad is not a fellow servant with a locomotive engineer or fireman of a passenger train; *Sobieski v. St. Paul & D. R. Co.* 41 Minn. 169; *Hough v. Texas & P. R. Co.* 100 U. S. 222, 25 L. ed. 616; *Marshall v. Schricker*, 68 Mo. 812; *Hall v. Missouri Pac. R. Co.* 74 Mo. 293; *Proctor v. Hannibal & St. J. R. Co.* 64 Mo. 112; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787.

The following authorities show who are fellow servants:

left near the track by negligence of the yard men, the court holding that these men were not fellow servants. *Missouri Pac. R. Co. v. Bond* (Tex. Civ. App.), Jan. 3, 1893.

Brakeman and employes who loaded a flat car with iron rails so that the latter projected over the end of the car, in consequence of which the brakeman was hurt. *Jacksonville, T. & K. W. R. Co. v. Galvin* (1892), 16 L. R. A. 387, 29 Fla. 636.

Railroad hand and bridge builders, where a defective bridge caused the injury. *Galveston, H. & S. A. R. Co. v. Daniels* (Tex. Civ. App.) Dec. 14, 1892.

A track repairer and employes in a steel mill, who placed a large iron mould, filled with steel, in an insecure position, from which it fell upon the plaintiff. *Joliet Steel Co. v. Shields* (1890), 134 Ill. 209.

It was held in *Lake Erie & W. R. Co. v. Middleton* (Ill. Sup.) Nov. 2, 1892, that whether an "hostler's assistant" (or "wiper"), employed about a roundhouse, whose duty was also to assist in making up trains in the depot yards, and the operatives of a freight train on the main line, were fellow servants, was a question of fact; and where the jury had found that they were not that finding was affirmed.

Car repairer belonging to the working force of the repair shop is not a fellow servant of a switchman, who, under orders of the yard master, directs the movement of cars in a railway yard. *Pool v. Southern Pac. R. Co.* (1891), 7 Utah, 306 (Blackburn, J., dissenting).

Nor are—a yard switchman and locomotive engineer. *Louisville & N. R. Co. v. Sheets* (1890), (Ky.) 11 Ky. L. Rep. 751.

A car repairer and the employes who kept the tools in order for use by the former, although another car repairer selected the particular tool, which caused the injury, from a number of tools designed for the repair service. *Williams v. New York, L. E. & W. R. Co.* (1892), 49 N. Y. S. R. 568.

Postal clerk in United States mail service, injured by negligence of train operatives of a railroad, carrying the mail under contract with the govern-

Union Pac. R. Co. v. Fort, 84 U. S. 17 Wall. 553, 21 L. ed. 789; *Re Peeriess*, 1 Q. B. 149; *Lavler v. Androsceggin R. Co.* 63 Me. 463, 16 Am. Rep. 492; *Columbus & I. C. R. Co. v. Arnold*, 81 Ind. 174; 23 Cent. L. J. 816, and cases cited; *Chicago & A. R. Co. v. Hoyt*, 123 Ill. 369; *North Chicago Roll. Mill Co. v. Johnson*, 114 Ill. 57; *Wabash, St. L. & P. R. Co. v. Hawk*, 10 West. Rep. 137, 121 Ill. 259; *Krueger v. Louisville, N. A. & O. R. Co.* 9 West. Rep. 347, 111 Ind. 51; *East Tennessee, V. & G. R. Co. v. DeArmo*, 86 Tenn. 78, 6 Am. St. Rep. 816, and cases cited; *Van Winkle v. Manhattan R. Co.* 82 Fed. Rep. 278, and note; *Palmer v. Utah & N. R. Co.* (Idaho) Feb. 23, 1887; *Slater v. Chapman*, 12 West. Rep. 60, 87 Mich. 523; *Tabler v. Hannibal & St. J. R. Co.* 11 West. Rep. 458, 93 Mo. 79; *Reddon v. Union Pac. R. Co.* 5 Utah, 344; *Richmond & D. R. Co. v. Norment*, 84 Va. 167; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 648, 29 L. ed. 758; *Northern Pac. R. Co. v. O'Brien*, 1 Wash. 599; *Kentucky Cent. R. Co. v. Ackley*, 87 Ky. 278, and cases cited; *O'Hare v. Chicago & A. R. Co.* 95 Mo. 662; *Murray v. St. Louis, C. & W. R. Co.* 5 L. R. A. 735, 98 Mo. 573; *Ridings v. Hannibal & St. J. R. Co.* 38 Mo. App. 537; *Chicago, B. & Q. R. Co. v. Sullivan*, 27 Neb. 673, and cases cited; *Daniels v. Union Pac. R. Co.* 6 Utah, 357; *Ragsdale v. Northern Pac. R. Co.* 42 Fed. Rep. 338; *Pike v. Chicago & A. R. Co.* 41 Fed. Rep. 95; *Howard v. Delaware &*

H. Canal Co. 40 Fed. Rep. 195; *Louisville & N. R. Co. v. Sheets*, 11 Ky. L. Rep. 781.

The court clearly erred in refusing to permit the jury to pass upon the question of fact as to the contributory negligence of Dixon.

Buesching v. St. Louis Gas Light Co. 78 Mo. 219, 39 Am. Rep. 503; *Flynn v. Kansas City, St. J. & C. B. R. Co.* 78 Mo. 195, 47 Am. Rep. 99; *Fink v. Missouri Furnace Co.* 82 Mo. 276, 52 Am. Rep. 876; *Petty v. Hannibal & St. J. R. Co.* 8 West. Rep. 297, 88 Mo. 306; *O'Hare v. Chicago & A. R. Co.* 95 Mo. 662; *Stephens v. Hannibal & St. J. R. Co.* 96 Mo. 213; *Barry v. Hannibal & St. J. R. Co.* 98 Mo. 62; *Tetherow v. St. Joseph & D. M. R. Co.* 98 Mo. 74; *King v. Missouri Pac. R. Co.* 98 Mo. 235; *Murray v. St. Louis, C. & W. R. Co.* 5 L. R. A. 735, 98 Mo. 573.

As to the responsibility of the defendant for the failure of Hill to discharge his duty in sounding the whistle whereby Dixon came to his death,—

See *Gormly v. Vulcan Iron Works*, 61 Mo. 492; *Whalen v. Centenary Church*, 62 Mo. 826; *Cook v. Hannibal & St. J. R. Co.* 68 Mo. 397; *Stephens v. Hannibal & St. J. R. Co.* 86 Mo. 221; *Orans v. Missouri Pac. R. Co.* 87 Mo. 588; *Stoddard v. St. Louis, K. C. & N. R. Co.* 65 Mo. 514; *Bromley v. Smith B. & R. Mach. Co.* 12 Mo. App. 594; *Northern Pac. R. Co. v. O'Brien*, 1 Wash. 599.

The evidence shows that Dixon must have

seen. *Mellor v. Missouri Pac. R. Co.* (1891), 10 L. R. A. 36, 105 Mo. 455; *Cleveland, C. & St. L. R. Co. v. Ketcham* (Ind. Sup.) Jan. 26, 1893.

Laborer in rolling-mill, unloading bricks from a car, and the yard master in charge of a train which negligently backed along the same track and hit the car. *North Chicago Roll. Mill Co. v. Johnson* (1885), 114 Ill. 57.

Car inspector and brakeman. *International & G. N. R. Co. v. Keenan* (1890), 9 L. R. A. 708, 78 Tex. 264, followed in *St. Louis A. & T. R. Co. v. Putnam* (Tex. App.) Oct. 25, 1892.

Workman, pushing ice into an ice house, and employes who constructed the slide along which the ice was moved. *Fink v. Des Moines Ice Co.* (Iowa) Jan. 26, 1892.

Brakeman and track-walker or inspector. *Bean v. Western North Carolina R. Co.* (1890), 107 N. C. 731.

All servants employed "to provide and to keep in repair the place, or to supply the machinery and tools, for labor, are engaged in a different employment from those who are to use the place or appliances when provided, and they are not, therefore, as to each other, fellow servants." So held where a mechanic employed about a "band-saw" in a mill was injured by negligence of the mill foreman in omitting to keep the machinery in reasonably safe condition. *Roux v. Blodgett & D. Lumber Co.* (Mich.) Feb. 17, 1893.

In *O'Neill v. Chicago & N. W. R. Co.* (1881), 50 Fed. Rep. 180, it was assumed by Judge McCrary, without discussion, that a carpenter at work in repairing a car could sustain an action based on the negligence of a fireman of a locomotive engine that collided with the car being repaired.

In *Richmond & D. R. Co. v. Pannill* (1893), 17 Va. L. J. 99, a brakeman while uncoupling cars, lost his arm on account of a negligent movement of the locomotive of the same train; he was denied a recovery because of his own negligence, the question of fellow service not being alluded to.

Where a stableman was put in charge of a stationary engine, and a laborer, engaged in unloading a barge was injured by a wrong movement of 18 L. R. A.

the engine, it was held that the rule of exemption of the master did not apply. *Moylan v. Davids* (1892), 40 N. Y. S. R. 327.

2.

The following are instances of holdings that the employes were fellow servants:

Engineer of passenger train and switchman by whose negligence a switch was out of place and the locomotive derailed. *Miller v. Southern Pac. R. Co.* (1891), 20 Or. 285.

Car inspector and a brakeman under direction of a railroad yard master, in the New York yard. *Potter v. New York Cent. & H. R. R. Co.* 48 N. Y. S. R. 843.

Engineer of switch engine an *car numberer* (i. e., a man to take and record numbers, etc., of cars in depot yards). *Beuhring v. Chesapeake & O. R. Co.* (W. Va.) Dec. 22, 1892.

A *section laborer* while riding on a hand-car, injured by negligence of the "boss" of another section, operating another hand-car on the same track. *Clarke v. Pennsylvania Co.* (Ind. Sup.) Sept. 15, 1892.

Brakeman on coal train and other employes of the train in respect of discovering the dangerous condition of a bolt. *Mensch v. Pennsylvania R. Co.* (1892), 150 Pa. 596.

Car repairer and train operatives, who moved other cars against the one he was repairing. *Latreuille v. Bennington & R. R. Co.* (1891), 63 Vt. 336.

Blacksmith injured by fragment of sledge hammer defective from long use in hands of another servant working on the same job. *Rawley v. Colliou* (1892), 90 Mich. 81.

Brakeman on logging-train and locomotive engineer of same train. *McLaren v. Williston* (1892), 43 Minn. 299. In this case it was not claimed that it was governed by the Minnesota Act of 1887 (Laws 1887, chap. 13) "to define the liabilities of railroad companies in relation to damages sustained by their employes."

Conductor of freight train and a section foreman.

relied upon the sounding of the whistle to notify him of the approach of the train. The railroad company therefore owed this duty to Dixon, and no negligence of a fellow servant would exempt the defendant from liability.

Hulehan v. Green Bay, W. & St. P. R. Co. 58 Wis. 319, and cases cited.

Employees are not fellow servants if engaged in distinct and independent departments of service.

Marshall v. Schricker, 63 Mo. 312; *Vautrain v. St. Louis, I. M. & S. R. Co.* 8 Mo. App. 538; *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302, 84 Am. Rep. 168; *Ryan v. Chicago & N. W. R. Co.* 60 Ill. 171, 14 Am. Rep. 82.

Meara, James G. Trimble, George Robertson (and, at the first hearing, *George B. Macfarlane*) for respondent:

If the deceased husband was a fellow servant with the engineer, then the exemption of defendant from liability to the plaintiff follows. All who are directly engaged in accomplishing the ultimate purpose in view, that is, the running of the road, must be regarded as engaged in the same general business within the meaning of the rule.

Hard v. Vermont & C. R. Co. 32 Vt. 478.

Neither is it necessary in order to bring a case within the general rule of exemption that the servants, the one that suffers and the one that causes the injury, should be at the time

engaged in the same operation or particular work.

Wright v. New York Cent. R. Co. 25 N. Y. 562.

The true rule for determining who are fellow servants is to be determined by the character of the act being performed by the offending servant. If it is an act that the law implies a contract duty upon the part of the employer to perform, then the offending employé is not a servant but an agent; but as to all other acts they are fellow servants.

7 Am. & Eng. Encyclop. Law, p. 384.

The implied contract on the part of the master is that he will furnish proper and adequate machinery and appliances and will employ skillful and competent fellow servants.

Laning v. New York Cent. R. Co. 49 N. Y. 521, 10 Am. Rep. 417.

The following have been held fellow servants:

Engineer and shoveler on gravel train.

Ohio & M. R. Co. v. Tindall, 13 Ind. 366, 74 Am. Dec. 259.

Engineer and section hand.

Houston & T. C. R. Co. v. Rider, 63 Tex. 267.

Engineer and roadmaster.

Walker v. Boston & M. R. Co. 128 Mass. 8.

Engineer and laborers on gravel train.

Ryan v. Cumberland Valley R. Co. 23 Pa. 384.

injured by negligence of the former, in effecting a "flying switch." *Elliott v. Chicago, M. & St. P. R. Co.* (1899), 5 Dak. 523, 38 Am. & Eng. R. R. Cas. 62, with note.

Foreman of a bridge gang (while asleep in a car provided by his employer), and the operatives of a freight train which collided with the sleeping car; though these servants were in different departments of service. *St. Louis, A. & T. R. Co. v. Weloh* (1888), 72 Tex. 293, and 38 Am. & Eng. R. R. Cas. 61, with note.

Section laborer, handing poles upon an open car, and the engineer and fireman of locomotive backing against the car; all of these employes being, at the time, under directions of an assistant roadmaster, present. *Harrison v. Detroit, L. & N. R. Co.* (1890), 7 L. R. A. 623, 79 Mich. 409.

Miner and blacksmith employed to sharpen tools for the miners, both at work in same mine operated by the mine owner. *Snyder v. Viola Min. & Smelt. Co.* (Idaho), Feb. Term, 1891.

Superintendent of an iron furnace, and locomotive engineer of a train hauling coal, etc., to be used at the furnace. *Adams v. Iron Cliffs Co.* (1889), 73 Mich. 271, 41 Am. & Eng. R. R. Cas. 414, with note.

Worker at cutting machine in a factory and engineer, who negligently set the machinery in motion while former was oiling a cutter. *Henshaw v. Pond's Extract Co.* (1892), 50 N. Y. S. R. 293.

Two laborers engaged in removing slag pots from smelting furnace. *Dunmead v. American Min. & Smelt. Co.* (1892), 12 Fed. Rep. 847.

Two workers about a spinning machine. *Sullivan v. Wamsutta Mills (Mass.)* Jan. 6, 1892.

Laborers engaged in taking down a condenser by order of a foreman. *Kiegl v. Weisel & V. Mfg. Co.* (Wis.) Jun. 10, 1893.

Two laborers engaged with others in lifting a weight by means of a crane, one of whom was injured by negligence of the other in permitting the crane to slip from slow to fast gear. *Barlow v. Standard Steel & Cast. Co.* (1893) Pa.

Where a scaffold was constructed by the men who were to use it, one of whom was hurt because

of negligent construction of it, but not because of defective material supplied, the court held all the employes who put it up and worked upon it fellow servants. *Marsh v. Herman* (1891), 47 Minn. 587.

A lumber piler and employes moving timber along rollers from a sawmill. *Weeklund v. Southern Oregon Co.* (1891), 20 Or. 591.

A longshoreman loading iron upon skids in the hold of a vessel discharging cargo, hurt by negligence of the guy-tender or of the engineer, both of whom were held his fellow servants. *Miles v. The Servia* (1891), 44 Fed. Rep. 943.

Ship carpenter and other members of boat crew. *Baron v. Detroit & C. S. Nav. Co.* (1892), 91 Mich. 555.

A group of workmen ("lumpers"), who erected a staging around a vessel in a dry dock to be used by another group ("caulkers"), are fellow servants with the latter, one of whom was injured by the breaking of a defective plank in the staging. *Butler v. Townsend* (1891), 126 N. Y. 105 (Ruger, Andrews, and O'Brien, dissenting).

Where a longshoreman was injured by reason of defective construction of a staging, erected by his collaborators for their own convenience, the court held they were all fellow servants. *Hogan v. Henderson* (N. Y.) Feb. 24, 1891.

A lumber measurer, engaged in assorting and scaling lumber, and other workmen employed in piling lumber, both "acting together under the same general control." *Fraser v. Red River Lumber Co.* (1891), 45 Minn. 235.

A man on duty at a hatchway to give warning of falling cotton bales while the latter were being loaded between decks of a ship, and a laborer in the hold engaged in stowing the bales away, where the latter was injured by failure to give the required warning. *Ocean S. S. Co. v. Cheeney* (1890), 86 Ga. 273. In *Smith v. Baker, L. R.* (1891), App. Cas. 825, a majority of the house of lords held that the absence of some person to give warning of the slinging of heavy stones over the head of plaintiff, who was a quarry laborer, was evidence of a defective system of conducting the business and

Engineer and telegraph operator.

Stater v. Jewett, 85 N. Y. 61, 29 Am. Rep. 637.

Engineer and switch tender.

Farwell v. Boston & W. R. Corp. 4 Met. 49, 38 Am. Dec. 839; *Slattery v. Morgan*, 85 La. Ann. 1166.

Engineer and track repairer.

Ohio & M. R. Co. v. Collarn, 78 Ind. 261, 38 Am. Rep. 184.

Engineer and station agent.

Brown v. Minneapolis & St. L. R. Co. 81 Minn. 553.

Engineer and brakeman working ground switch.

Randall v. Baltimore & O. R. Co. 109 U. S. 478, 27 L. ed. 1008, 15 Am. & Eng. R. R. Cas. 243.

Engineer and employé in tunnel.

Capper v. Louisville, E. & St. L. R. Co. 1 West. Rep. 287, 103 Ind. 805, 21 Am. & Eng. R. R. Cas. 525.

The following cases of this state are in harmony with the foregoing cases:

McDermott v. Pacific R. Co. 30 Mo. 115; *Rohbach v. Pacific R. Co.* 43 Mo. 192; *Harper v. Indianapolis & St. L. R. Co.* 47 Mo. 576, 4 Am. Rep. 353; *McGowan v. St. Louis & I. M. R. Co.* 61 Mo. 532; *Williams Bros. v. Cartter*, 53 Mo. 375, 14 Am. Rep. 424; *Evans v. Atlantic & P. R. Co.* 62 Mo. 52; *Connor v. Chicago, R.*

might form the basis for a recovery where injury resulted therefrom.

Servants not on duty.

Where a day laborer on a railroad has been out of service one day and is killed that night by negligence, he is not to be considered as a fellow servant with the employes in charge of a train on the same railroad. *Cincinnati, N. O. & T. P. R. Co. v. Conley* (Ky.) Dec. 17, 1892.

Some earlier cases are also to the effect that when the servant is entirely off duty, he is not to be regarded as a fellow of employes on duty at the time, irrespective of any question of departments of service. *Baird v. Pettit* (1872), 70 Pa. 477; *State v. Western Maryland R. R. Co.* (1886), 63 Md. 433; *Washburn v. Nashville & C. R. Co.* (1859), 3 Head, 688. But in Texas (before the Fellow Servant Act of 1891), a carpenter belonging to a building gang sitting in a car writing a letter after his day's work was done, was hurt by a collision with a switch engine by reason of negligence of the employé in charge, and was denied a recovery on the ground of the fellow service of the two men. *International & G. N. R. Co. v. Ryan* (1891), 82 Tex. 565; and to same general effect, are *Adams v. Iron Cliffs Co.* (1899), 78 Mich. 271; and *St. Louis, A. & T. R. Co. v. Welsh* (1893), 72 Tex. 298; and in *McGregor v. Auld* (Wis.) Dec. 6, 1892, it was held that employes going to and from work are in service within the rule of exemption.

Legislation.

The law on this topic has undergone much change by statutes in recent years.

Some of these statutes, and a few cases under them will be noted:

England: Employer's Liability Act (1890), 43 & 44 Vict. chap. 42.

Under this Act it is held that the superior servant whose negligence will entitle an injured employé, under his orders, to recover, must be one whose sole or principal duty is superintendence, and not one ordinarily engaged in manual labor. *Kellard v. Rooke* (1888), L. R. 21 Q. B. Div. 387.

18 L. R. A.

I. & P. R. Co. 59 Mo. 299; *Blesing v. St. Louis, K. O. & N. R. Co.* 77 Mo. 410; *Moore v. Wabash, St. L. & P. R. Co.* 85 Mo. 588; *Murray v. St. Louis, O. & W. R. Co.* 5 L. R. A. 785, 98 Mo. 573; *Higgins v. Missouri Pac. R. Co.* 104 Mo. 413.

It was the duty of the husband of plaintiff to keep the cable off the track. He had left it there and observing the approaching train undertook to remove it, and while so engaged was struck.

His effort to lift the cable from the track was done in the face of seen danger and was the immediate and proximate cause of his death.

Yancey v. Wabash, St. L. & P. R. Co. 13 West. Rep. 250, 98 Mo. 483; *Fletcher v. Atlantic & P. R. Co.* 64 Mo. 484.

If the undisputed facts show that notwithstanding the defendant's negligence the plaintiff would not have sustained the injuries complained of but for his own negligence directly tending to produce them, it is the duty of the court to direct the jury to find for the defendant.

Powell v. Missouri Pac. R. Co. 76 Mo. 80; *Leniz v. Missouri Pac. R. Co.* 76 Mo. 86; *Taylor v. Missouri Pac. R. Co.* 86 Mo. 457; *Cagney v. Hannibal & St. J. R. Co.* 69 Mo. 416.

When the evidence fails to connect the neg-

Alabama: Acts, 1885, p. 115; same as §§ 2590-2592, Code of 1886, resembles the English Act. See *Richmond & D. R. Co. v. Jones* (1890), 92 Ala. 218; *Louisville & N. R. Co. v. Hawkins* (1890), 92 Ala. 241; *Birmingham M. R. Co. v. Wilmer* (Ala.) Nov. 23, 1892; *Mary Lee C. & R. Co. v. Chambliss* (1892), Ala. In *Alabama & G. S. R. Co. v. Carroll*, (Ala.) 1892, 18 L. R. A. 433, it was held that this legislation had no extraterritorial force to reach the case of a citizen of Alabama injured in Mississippi, though the contract of employment was made in Alabama between him and an Alabama company.

Arkansas: The substance of the Act of Feb. 28, 1893, is that those are not fellow servants who are in different departments of service of a railway corporation, or those who have superintendence or control, as to persons under their command, in employ of such corporations; and that "no contract made between the employer and employé based upon the contingency of the injury or death of the employé, limiting the liability of the employer under this Act or fixing damages to be recovered, shall be valid and binding."

California: Under the Civil Code, § 1607, the rule of exemption of the master applies where the co-employes are in the "same general business," where proper care is used in their selection. A miner and an engineer running the hoisting apparatus of the mine are held fellow servants thereunder. *Tre-watha v. Buchanan G. Min. & Mill Co.* (Cal.) Dec. 16, 1891, and so also were a brakeman and the conductor of the same train. *Congrave v. Southern Pac. R. Co.* (1891), 88 Cal. 360.

The language of the California Code is the same as that used in *Lanier v. New York Cent. R. Co.* (1872), 49 N. Y. 528, 10 Am. Rep. 417, in expressing the general American common-law rule on this point.

Florida: Laws 1887, p. 117, chap. 3744, § 2, abolishes the exemption of the master, because of fellow service, entirely so far as it concerns railroads.

Georgia: The exemption of the master from liability by reason of the doctrine of fellow service does not apply in Georgia to railroad companies (Acts 1855-56, p. 155; Ga. Code 1882, § 3096; Duulap

ligence with the accident, the court should direct a verdict for the defendant.

Holman v. Chicago, R. I. & P. R. Co. 62 Mo. 562; *Thompson, Trials*, § 1678.

When it appears from the plaintiff's case alone that he is guilty of contributory negligence, the court should direct a nonsuit.

Prideaux v. Mineral Point, 48 Wis. 513, 28 Am. Rep. 558; *Beusching v. St. Louis Gas Light Co.* 78 Mo. 219, 39 Am. Rep. 503; *Stephens v. Macon*, 83 Mo. 355; *Milburn v. Kansas City, St. J. & C. B. Co.* 86 Mo. 109; *Thompson, Trials*, § 1680.

The deceased assumed the risk of being injured by a train while keeping the cable out of the way of passing trains.

Smith, Neg., Whittaker's ed. p. 127, note m, p. 133; *Wood, Mast. & S.* 678; *Price v. Hannibal & St. J. R. Co.* 77 Mo. 503; *Aldridge v.*

Midland Blast Furnace Co. 73 Mo. 559; *Kegan v. Kavanaugh*, 62 Mo. 232.

Barclay, J., delivered the opinion of the court:

Plaintiff, as the widow of the deceased Mr. Dixon, sues under the Damage Act, (now chapter 49, Rev. Stat. 1889,) claiming the statutory recovery for his death, caused, as is charged, by negligence in the operation of one of defendant's passenger trains. The deceased was a quarry laborer, under orders of a foreman who had entire control of the quarry, represented the defendant there, hired, discharged, and directed the men, and had no connection with the train service, so far as appears, in any way.

The first decisive question is whether deceased and the passenger train men are to be

v. Northeastern R. Co. (1889), 180 U. S. 649, 32 L. ed. 1058; *Georgia R. & Bkg. Co. v. Brown* (1890), 85 Ga. 320; but the statute abolishing the master's exemption applies to all servants of a railway company whether the injury befalling one of them is or is not connected with the running of trains. *Georgia R. & Bkg. Co. v. Miller* (1892), Ga.

Iowa: Acts 1862, chap. 169; Code 1880, § 1807, abolishes the master's exemption as to every corporation operating a railway where the injury is "in any manner connected with the use and operation of" the railway. Under this statute it is held that a workman, engaged in a railroad yard to remove ashes, etc., from locomotives and to supply them with water, is "connected with the operation of a railway" within the purview of the section above quoted, abolishing the rule of exemption as to servants so engaged. *Butler v. Chicago, R. & Q. R. Co.* (1893), Iowa.

Kansas: Since 1874 railroad companies doing business in the state are by statute liable for injuries to employes from negligence of co-employes (Laws 1874, chap. 93, § 1; Gen. Stat. 1889, § 1251). Compare *Kansas Pac. R. Co. v. Peavey* (1886), 34 Kan. 472; *Missouri Pac. R. Co. v. Dwyer* (1896), 36 Kan. 53.

Kentucky: The rule of exemption of the master does not apply where one servant is killed by the "willful neglect" of other servants: but a right of action exists in such case for punitive damages in favor of his surviving spouse or children. *Louisville & N. R. Co. v. Coniff* (1890), 90 Ky. 560; *Cincinnati, N. O. & T. P. R. Co. v. Adams* (1890), 11 Ky. L. Rep. 833; *McLeod v. Ginther* (1892), 80 Ky. 399; *Jordan v. Cincinnati, N. O. & T. P. R. Co.* (1899), 89 Ky. 40.

Massachusetts: Laws 1887, chap. 270, resembles the English statute, and has taken away the defense that the injury was caused by the act of a fellow servant of plaintiff, in the cases mentioned in it. *O'Malley v. South Boston Gas Light Co.* (1893), Mass.; *Dacey v. Old Colony R. Co.* (1891), 153 Mass. 112. But where an action is not brought under the Employer's Liability Act, but is at common law, the ordinary rules as to the negligence of fellow servants apply. *Dodge v. Boston & A. R. Co.* (1892), Mass.

In *Fitzgerald v. Boston & A. R. Co.* (Mass.) May 9, 1892, men stowing away bales of hay were held fellow servants, and the fact that the superintendent directed the laborer, who was injured, to work in the group was held to constitute no negligence under the Employer's Liability Act.

In *Trask v. Old Colony R. Co.* (Mass.) May 9, 1892, the master was held not liable under that Act, for defects in the "ways, works," etc., "used in the business" where its employe was hurt by a defective track of another railway company whose

tracks it occasionally used in the prosecution of its business.

Minnesota: The exemption of the master from liability for negligence between co-employes is abolished by statute as to railroad corporations, operating finished roads; but not "while engaged in the construction of a new road or any part thereof, not open to public travel or use" (Minn. Gen. Laws, 1887, chap. 13, p. 69). *Schneider v. Chicago, B. & N. R. Co.* (1889), 42 Minn. 68; *Moran v. Eastern R. Co.* (1892), 43 Minn. 46. Some cases where the new statute has been applied: *Steffenson v. Chicago, M. & St. P. R. Co.* (1892), 43 Minn. 235, where a section hand was pushed from a hand-car which was overcrowded. *Lorimer v. St. Paul C. R. Co.* (1892), 43 Minn. 391, where the statute was held not to change the burden of proof.

Mississippi: Code 1880, p. 806, § 1054, and Constitution 1890, § 198. The latter provision establishes what may be generally described as the "department" rule. But it does not apply to cases which arose before its adoption, though brought after. *Illinois Cent. R. Co. v. Cathy* (1893), Miss.

Montana: "That in every case the liability of the corporation to a servant or employe acting under the orders of his superior shall be the same, in case of injury sustained by default or wrongful act of his superior, or to an employe not appointed or controlled by him, as if such servant or employe were a passenger." Rev. Stat. 1879, p. 471, § 313, *Railroad Corporations*.

Texas: Gen. Laws 1891, chap. 24, p. 25. The substance of the Act is that employes of railway corporations are not fellow servants where one is placed under command of the other, or where they are "engaged in any other department" of service of such corporation.

Wisconsin: "Every railroad corporation, doing business in this state, shall be liable for damages sustained by any employe thereof within this state without contributory negligence on his part, when such damage is caused by the negligence of any train dispatcher, telegraph operator, superintendent, yard master, conductor, or engineer, or of any other employe who has charge or control of any stationary signal, target point, block or switch." (Laws 1889, chap. 433, p. 613.)

A case under the statute where a brakeman was injured by negligence of an engineer. *Baltzer v. Chicago, M. & N. R. Co.* (Wis.) Nov. 15, 1892.

Wyoming: "Any person in the employ of" any railroad company, "who may be injured by any locomotive, car," etc., "shall have his action for damages against said company the same as if he were not in the employ of said company and no agreement to the contrary shall be admitted as testimony in behalf of said company." (Comp. Laws 1876, chap. 87, p. 512.)

regarded as fellow servants, within the meaning of the rule exempting the master from liability for injuries negligently inflicted upon one employé by another in a common employment. This rule has long been acknowledged as part of the general common law, but efforts to apply it in particular cases have led to expressions of wholly irreconcilable views among eminent jurists. These differences seem to spring from the difficulty experienced in assigning the reasons for the rule itself to serve as solid premises in applying it. "Public policy" (*McDermott v. Pacific R. Co.* [1860,] 80 Mo. 116), "implied contract" (*Hutchinson v. York, N. & B. R. Co.* [1850,] 5 Exch. 348; *Lovell v. Howell*, [1876,] 1 O. P. Div. 161), "general convenience" and "expediency" (*Farwell v. Boston & W. R. Corp.* [1842,] 4 Met. 49, 38 Am. Dec. 339), have been severally mentioned and enlarged upon by learned judges as grounds on which it should stand; but, whatever strength those grounds may have, a stronger reason for its existence to-day is *stare decisis*, itself, however, a maxim of cogent force in determining judicial action in countries tracing their systems of law to the English source.

The doctrine of exemption is of comparatively recent origin. Its history has been frequently written, and is too familiar to the legal profession to justify repetition here. It sprang into life suddenly, with remarkable vitality and power, and, as originally formulated, was supposed to control many states of facts to which it would not now be applied anywhere. It was at first thought to exempt the master from liability for injury to one servant by reason of the neglect of another to furnish or maintain a reasonably safe plant and machinery for the master's work, of whose defects the injured servant was ignorant (*Waller v. South Eastern R. Co.* [1863,] 2 Hurlst. & C. 102; *McDermott v. Pacific R. Co.* [1860,] 80 Mo. 116); but such an application of it is now universally discarded, either because of statutory declarations on the subject, (for example, the "Gladstone Bill," in England, 43 & 44 Vict. [1880,] chap. 42, § 1; Mass. Act, [1887,] chap. 270, etc.), or of decisions by the courts without the aid of legislation, (*Lewis v. St. Louis & I. M. R. Co.* [1875,] 59 Mo. 495, 21 Am. Rep. 385; *King v. Ohio etc. R. Co.* [1882,] 14 Fed. Rep. 277; *Northern Pac. R. Co. v. Herbert*, [1886,] 116 U. S. 642, 29 L. ed. 755).

Again, the scope of the rule was long supposed to relieve the master of responsibility for negligence of a servant under whose direction another was working and by whose neglect the latter was injured, though the negligence of the former may have involved the exercise of the supervising control delegated to the superior servant. [*Albro v. Agawan Canal Co.* (1850,) 6 Cush. 75, and *Hovells v. Landore Steel Co.*, (1874,) 82 L. T. N. S. 19, will illustrate that line of decisions sufficiently.] And, although that view is still approved in some quarters, the weight of authority at this time in this country is to the contrary. *Pantzar v. Tilly Foster L. Min. Co.* (1885,) 99 N. Y. 868; *Louisville & N. R. Co. v. Bowler*, (1872,) 9 Heisk. 866; *Darrigan* 18 L. R. A.

v. New York & N. E. R. Co. (1884,) 52 Conn. 285, 52 Am. Rep. 590; *Chicago, M. & St. P. R. Co. v. Ross*, (1884,) 112 U. S. 877, 28 L. ed. 787; *Moore v. Wabash, St. L. & P. R. Co.* (1885,) 85 Mo. 588.

But the demands of the case at bar do not make it necessary to enter upon any general discussion of the changes that have taken place in the law on this topic since it began to engage the attention of the courts. Suffice it, for the present, to say that maturer consideration by the judiciary, and the emphatic commands of legislation in some localities, have greatly modified the rigor and narrowed the rule of exemption as originally put forth. [Besides the statutes already mentioned, note Alabama Acts, 1885, p. 115, also Code 1886, § 2590; Florida Laws, 1887, chap. 3741, 3744; Georgia Acts, 1885, p. 115, also Code 1873, § 3036; Iowa Laws, 1882, chap. 169, also Code 1880, § 1307; Kansas Laws, 1874, chap. 98; Minnesota Laws, 1887, chap. 13; Mississippi Code 1880, p. 309, § 1054, and Const. 1890, § 193; Montana Rev. Stat., 1879, p. 471, § 818; Texas Laws, 1891, chap. 24; Wisconsin Acts, 1889, chap. 438; Wyoming Laws, 1876, chap. 97, § 1.] These modifications no doubt conform to more humane conceptions, now prevailing, of the demands of justice with regard to the existing relations of master and servant.

To-day some enterprises reach across a continent. Often they extend beyond the limits of a single state. Many contemplate the performance of several kinds of business, requiring the employment of thousands, and the organization of several departments of service, separate in their operations, but tending to the general advantage of the common employer. To what extent employes in different lines or departments of business followed or established by such a master are coservants is a question constantly recurring, and one of its phases is presented by this case.

The circuit court held that the deceased and the train men were fellow servants. In reviewing that ruling we will not essay to establish any definition of fellow service to enlighten (or increase) the difficulties of this branch of the law, but shall merely deal with the facts before us as shortly as possible.

We think it clear that where a common employer carries on two enterprises, as variant in character as those here considered, each under a separate superintendence, the employes at work in each cannot justly be regarded as fellow servants of the employes in the other, within the meaning of the rule of exemption. In the case in hand the master had seen fit to place the deceased quarryman and the train men under supervision and management totally apart from each other. They were not "acting under the same immediate direction." *Missouri Pac. R. Co. v. Mackey*, (1887,) 127 U. S. 208, 32 L. ed. 108. Each looked to a different individual as the master's representative for directions in his work, and had no practical connection with the superior who guided and supervised the acts and conduct of the other.

If Dixon, instead of being killed, had merely

noticed repeated acts of negligence by the train men in omitting to signal its approach, what could he have done to correct such course of conduct, and insure his own safety? Complain to his foreman? The foreman directing his work had no power to discharge or to control the train men referred to.

The theory that a servant entering employment may fairly be considered to assume the risks (among others) of possible injury from the negligence of his fellow workmen (now most frequently mentioned as the ground work of the exemption) can have no just or logical application where the supposed fellow servants are so widely severed by the division of the employer's business that neither can have a ready appeal to any common superior, having power to require (and, if need be, to enforce) correct and careful conduct on the part of the other. Such an appeal furnishes to the servant the means to avert, or at least to diminish, the dangers arising from incompetency or carelessness on the part of his fellows. But when that appeal is impossible, by reason of the total severance of their fields of labor and of the control to which they severally are subject, we apprehend there is little left of recognizable principle upon which servants so situated can be supposed to have mutually assumed the risks of each other's negligence.

Workmen so distantly related to each other in the master's service as the quarrymen and the train operatives here are scarcely more nearly allied, for all practical purposes of mutual observation, vigilance, and protection, than are the servants of different independent contractors, engaged in separate branches of labor upon a common enterprise, (though we do not mean to imply that the legal relations between them are identical.) Employés of the latter class are universally held not fellow servants within the rule under discussion. *Abraham v. Reynolds*, (1860,) 5 Hurlst. & N. 143; *Turner v. Great Eastern R. Co.* (1875,) 88 L. T. N. S. 431; *Johnson v. Lindsay*, [1891,] L. R. App. Cas. 371; *Seenson v. Atlantic Mail S. S. Co.* (1874,) 57 N. Y. 108; *Louisville, N. O. & T. R. Co. v. Conroy*, (1886,) 63 Miss. 562, 56 Am. Rep. 835.

Quarrying and operating passenger trains upon a railway are essentially different sorts of work. The risks incident to each are unlike those encountered in the other. Nor were the operatives in these departments thrown into any sort of habitual business association under a common superior. Each line of service appears to have been conducted as independently, in every respect, as though controlled by a stranger to the other, with this exception: the servants in each employment drew compensation from the same source. But we do not regard that fact (standing alone) as furnishing the touchstone of fellow service.

Without going further, however, into the general subject, or attempting to express an opinion on any other facts than those here in judgment, we believe the considerations above suggested (in the light of recent decisions in this state and elsewhere) lead directly

to the conclusion that the trial court was in error in ruling as a matter of law that deceased was a fellow servant with the engineer of the train that struck him.

In the following cases the rule of exemption from liability, because of the relation of fellow service, was held inapplicable: *Sullivan v. Missouri Pac. R. Co.* (1889,) 97 Mo. 113, where a track walker was killed by negligence of train operatives.

In *Connolly v. Davidson*, (1870,) 15 Minn. 519, (Gil. 428,) 2 Am. Rep. 154, a deck hand on a steamboat was hurt by an explosion, caused by the negligent management of the boiler of another boat, the boat owners being partners.

Nashville & O. R. Co. v. Carroll, (1871,) 6 Helsk. 347, presents the case of an injury to a track man by the negligence of train men.

In *Baird v. Pettit*, (1872,) 70 Pa. 477, a draughtsman in an establishment for the manufacture of locomotives sustained injuries by falling into an unguarded excavation made on the premises by carpenters in defendant's employ.

In *Pool v. Chicago, M. & St. P. R. Co.*, (1881) 53 Wis. 657, a detective, while riding on a hand-car, was injured by negligence of the servants operating the car.

Garraty v. Kansas City, St. J. & C. B. R. Co., (1885,) 25 Fed. Rep. 258, arose in Kansas City, Mo., as the record therein shows, (though the printed report does not,) and was decided by the late Mr. Justice Miller. The plaintiff, a common laborer, one of a gang distributing rails along the track, was hurt by the negligence of the operatives of a switch engine, used in the railway yard where plaintiff was working, and a recovery by plaintiff was sustained. *Hobson v. New Mexico & A. R. Co.*, (1886, Ariz.) 11 Pac. Rep. 545, was the case of a teamster, hired to haul ties, who was injured by the negligence of an engine driver of a train.

In *Northern Pac. R. Co. v. O'Brien*, (1889,) 1 Wash. 599, a track laborer, while being carried on a gravel train to his place for work, was injured by a collision with another train, resulting from the neglect of the operatives of the latter to "flag" the former as ordered.

In *Chicago & A. R. Co. v. Kelly*, (1889,) 127 Ill. 637, a section hand had sustained damage from the negligent action of employés upon a construction train.

In *Howard v. Delaware & H. Canal Co.*, (1889,) 40 Fed. Rep. 195, which arose in Vermont, a track man on a hand-car was killed by the carelessness of train hands.

Pike v. Chicago & A. R. Co., (1890,) 41 Fed. Rep. 95, is a Missouri case, decided by Judge Thayer, whose learning and long experience in the administration of law in this state entitle his opinions to great weight. In it he held that a watchman of a railroad bridge, who was hurt by negligence of the driver of a locomotive of a passing train, was not a fellow servant of the latter.

In *Evans v. Carbon Hill Coal Co.*, (1891,) 47 Fed. Rep. 437, in Washington, a laborer employed by defendant in the work of constructing a railway to haul coal from a mine

received an injury by reason of the negligence of one of defendant's miners, engaged in the same locality in handling lumber.

2. Whether the quarryman, Dixon, was properly chargeable with contributory negligence in the premises, is the next question raised on this appeal.

The court is authorized to pronounce certain conduct negligent only when no other construction may fairly and reasonably be placed upon it in the circumstances; but where the facts are such as would warrant a reasonable inference that ordinary care has been taken by the person in question, the issue whether or not such care was really exercised by him is for triers of the fact to decide. The rule on this point has been so often stated that it is not necessary to dwell upon it.

Dixon's general duties have been already indicated. The following further facts, bearing on the particular issue now under consideration, should be noted:

Defendant's foreman testified that Dixon, in the performance of his work, "would stand about the center of the main track on the east side of the strap-track, with his back to the east, facing the west;" that, as he "was right handed, it came handier to him to stand in the center of the main track, on the east side of the strap-track, in detaching the cable;" that he had had but one other man besides Dixon at that post, and they both handled the cable in the same way; that it was the duty of Dixon to keep the cable off the main track when it was not attached to a car; and that, when running regularly, "those cars go up and down between the quarry and crusher about every three minutes."

He also said that the steam crusher while at work made considerable noise as the rock passed through it. It was running that morning. He was on top of the quarry when the accident happened, 150 feet from the turn-table. He did not hear the train that hit Dixon.

Another employé, standing within 18 or 14 feet of the track, and 40 or 45 feet from Dixon, did not hear the train till it was passing him. Dixon was last seen by this witness, about the center of the main track, at the junction with the strap-track, facing towards the northwest, looking down. When struck he was in the act of stooping, and seemed to be reaching for the cable. From the point where Dixon then was, an engine could ordinarily be seen, by one looking eastward, for a distance of 1,035 feet; but from the crossing track, near the turn-table, the range of view in that direction was reduced by intervening objects to 250 or 300 feet. It also appeared in evidence that the atmosphere was "right smart" foggy that morning.

Can it be justly said, in view of these facts, that the deceased was negligent as a matter of law? The noise of the steam rock crusher, not 50 feet distant, obscured, if it did not obliterate, that of the coming train, as is shown by the fact that even the

foreman and the workman nearest Dixon did not hear its approach. The work at which Dixon was engaged demanded close attention, and necessitated his frequently taking a position in which his back was towards the engine that hit him. From the main track at the strap-track crossing, the locomotive (at the rate of speed it had) could not have been seen 80 seconds before it passed there; and, from points nearer the turntable, where Dixon's duties required him frequently to go, it could not have been discovered within seven seconds of its arrival, because of obstacles reducing the range of view eastward. He was bound to use common prudence to avoid danger, but that prudence should be measured after giving due weight to all his surroundings. His immediate work involved some risks of its own, and called for constant vigilance; and, without further comment, we hold that the question whether or not he came up to the standard of ordinary care in the circumstances of his situation is very clearly one for the jury.

This branch of the case, moreover, seems to have given no difficulty in the trial court. The learned circuit judge evidently coincided with the view we have taken of it. The result there was definitely placed by him on the single ground that the deceased was a fellow servant of the train employes.

3. There was abundant direct evidence of the omission of the engine men to sound the whistle signal as the train came around this obscure curve. Defendant's rule and custom required such a signal, and the failure to give it was evidence of negligence on defendant's part in managing the locomotive. If that omission should be found, as a fact, to have caused the death of Dixon, we cannot properly say that such finding would be an unreasonable inference from the evidence.

We consider the showing by the plaintiff sufficient to justify the submission of the cause to the jury for findings upon the disputed issues of fact raised by the pleadings, and that the trial court was in error in directing a verdict for the defendant.

The judgment will be reversed, and the cause remanded.

Black and Brace, JJ., concur; **Sherwood, Ch. J.**, dissents.

The case was subsequently reheard before the court *in banc*, after which, on May 9, 1892, the following opinion was handed down:

Per Curiam, (Black, Brace, Barclay, and Thomas, JJ.):

The foregoing statement and opinion of the majority of division No. 1 are adopted and approved by the court *in banc* after a full reargument.

Macfarlane, J., did not participate having been of counsel in the cause.

Sherwood, Ch. J., and **Gantt, J.**, dissent.

Nannie J. PARKER, *Resp't.*,
v.
HANNIBAL & ST. JOSEPH R. CO., *Appt.*

(100 Mo. —.)

***1. Plaintiff, a track repairer under direction of a foreman, in defendant's employ, was injured by alleged negligence of the operatives of a passing construction train of defendant, under different management from the section gang to which plaintiff belonged. Held, that plaintiff and the trainmen were not fellow servants.**

2. Where persons are engaged in distinct departments of service, and have no such association in their work as that they can observe and influence each other's conduct and report delinquencies to a common correcting power, they are not in a common employment within the meaning of the law.

3. The limitations of the master's exemption from liability to one employé for negligence of a fellow servant discussed.

(*Sherwood, Ch. J., Gantt and Macfarlane, JJ., dissent from propositions 1 and 2; Black, J., considers the facts assumed in proposition 1 insufficiently established.*)

(March 23, 1892.)

APPEAL by defendant from a judgment of the Circuit Court for Jackson County in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death, and alleged to have been caused by the actionable negligence of defendant's servants. *Reversed.*

The facts are stated in the opinions.

Statement by **Gantt, J.:**

The plaintiff, as the widow of William O. Parker, commenced this action December 2, 1886, against the defendant, to recover damages sustained by her by reason of the death of her husband, who was killed by a construction train on defendant's track, near Randolph Bluff, on the 26th day of October, 1886. Plaintiff's husband had been engaged as a section hand or track laborer for the defendant for about two years prior to his death. On the 26th of October, 1886, he was engaged at work on defendant's track at a place called "Randolph Bluff," with the rest of the section men, and had been working at that point every day for about two weeks prior to his death. The train which struck him was a construction train engaged in carrying rock from the rock crusher at Minarville, five miles east of Randolph Bluff, to a point near the bluff, and west of where the section men were working, for the purpose of ballasting the track, and had been thus engaged daily for three months.

*Headnotes by BARCLAY, J.

NOTE—[See notes to the next preceding case and to the three following cases.]

The opinions in these cases refer to nearly all the Missouri cases on the law of fellow servants.

Since the decision of the principal case, the principle declared in the first headnote has been followed in *Schlereth v. Missouri Pac. R. Co.* (March, 1893, 18 L. R. A.

The engine of the construction train pulled the cars after it going west, and, returning east, pushed the cars in front of it. It made the round trips past the place where the section men were at work upon the track daily, the last trip being about 5 o'clock in the afternoon, each day. It was while this train was running eastward, on the 26th of October, 1886, at 5 o'clock P. M., that it struck William Parker, plaintiff's husband, and killed him. From the evidence, there were about twenty-five passenger and freight trains running daily over that part of the track where Parker was killed, during the day-time.

The evidence discloses that, at the time of the accident which resulted in Parker's death, the train had discharged its stone, and was being run, caboose in front, eastward, to Minarville. Parker was working on defendant's track, tamping some rock under the track, with his face to the east and back to the west. On the part of the plaintiff several witnesses testified, in a negative way, that the train made no signals either by blowing the whistle or ringing the bell; that, some 150 yards west of the point where plaintiff's husband was at work, there was a curve in defendant's track; that parallel with defendant's track was the Wabash Railroad track, and distant at this point about 9 feet, one from the other. On the part of defendant there was much positive affirmative evidence that, at a point some 2,000 feet west of where Parker was killed, the engineer blew three blasts of the whistle, as a signal that he was going to back over this track with his train. There was also evidence that, just at the time plaintiff's husband was struck and killed, a freight train of forty-eight cars, on the Wabash, was running eastward by this place, making much noise. A number of witnesses were allowed, without being qualified as experts or showing any familiarity with the speed of trains, to testify that, in their opinion the train was running 30 to 35 miles an hour, and was racing with the Wabash train. On the part of defendant, there was positive testimony that, just west of the point where Parker was killed, there was a curve in the track, and that while going round this curve the engine blew four blasts of the whistle, two long and two short. It appears from the evidence that on the east or front end of the construction train, as it backed east two men were stationed, one with a flag. The train was running backwards, at a rate variously estimated from 15 to 35 miles per hour, at the time it struck Parker. From the point where Parker was at work the track could be seen westward a distance variously estimated by plaintiff's witnesses as being from 150 yards to a quarter of a mile. That all

Mo., (Sup.) by Black, Ch. J., Brace, Barclay, Macfarlane and Burgess, JJ.,—*Sherwood and Gantt, JJ., dissenting.*

In *Foster v. Missouri Pac. R. Co.* (March, 1893) the Missouri Supreme Court, *in banc*, unanimously approved the principle declared in the cases of *Russ* and *Schroeder*, reported in this volume.

of the other men composing the gang of section men were west, and within 60 feet, of the point where Parker was working, being between him and the approaching train, scattered along the track at work. That the section foreman, Hudgens, noticed the approach of the train and called out to his men to get off the track. Seeing that Parker was standing over the north rail of the track, busy at work, with his back to the approaching train, without heeding the warning, the foreman, Joseph Dawson, and Prince L. Hudgens all three started and ran towards him, yelling as loud as they could for him to get off the track; one of them (Dawson) running some 40 or 45 feet towards Parker before he was struck. In addition to this, the men on the front end of the leading car of the train hallooed with all their might, but failed to attract his attention in time to prevent the train striking him. It seems very probable that the noise made by the Wabash train, passing at the time, prevented the deceased hearing these warnings.

The negligence complained of is the excessive speed of the train; the fact that it was backing over the track; the failure of the train men to give signals to the track men at work on the track; and the racing with the Wabash. The defense is that there was no negligence; that as to track men, the company did not owe them the duty of whistling and ringing the bell; that this work had been going on daily for three months over this same track, and this same train passed daily at the very hour plaintiff's husband was struck; that Parker and the other section men had been for two weeks at this point ballasting the track and repairing it, and had every reason to expect this train at that time; that while it was an irregular train in one sense, yet at this time it made quite regular trips twice a day; that the speed made was necessary to permit this train to clear the track for the regular passenger train; and that it was the negligence of fellow servants in charge of the construction train, who were engaged in the same common employment, for the same common master, at that time, and the contributory negligence of plaintiff's husband.

Upon request of plaintiff, the court gave the jury the following instructions to the giving of which the defendant objected at the time, and excepted: "(1) The plaintiff in this action seeks to recover of defendant \$5,000 damages for the killing of her husband while he was at work as a section hand upon the defendant's railroad, by one of defendant's construction trains; and her right to recover is based upon alleged negligence of the servants and agents of defendant in the running and management of the train in question. The defendant railroad company, by its answer, admits that plaintiff's husband was killed while in its employ, but denies the negligence charged by plaintiff, and, in substance, alleges that the death of plaintiff's husband was occasioned solely by his own carelessness and recklessness, and without any fault or neglect of defendant's agents or servants contributing thereto. The questions for you to determine under 18 L. R. A.

the issues thus made and the evidence and the instructions of the court, are—(1) Did the agents and servants of defendant in charge of the train in question run and manage said train in a negligent, careless manner? If so, was the injury to and death of plaintiff's husband caused thereby? If the plaintiff has satisfied you, by a preponderance of the evidence, that these questions should be answered in the affirmative, then you will find a verdict in her favor, unless the defendant railroad company has satisfied you, by a preponderance of the evidence, that the plaintiff's husband was at the time guilty of carelessness, recklessness, or negligence, and that such want of due and proper care upon his part directly contributed to his death. These questions it is your duty to determine, under all the facts and circumstances in proof. (2) The degree of necessity, usual, and proper precautions to secure his own safety, to which plaintiff's husband was held, as a section hand upon defendant's railroad, was such care, caution, and diligence only as a man of ordinary prudence should have exercised in the same situation, under the facts and circumstances in proof. (3) If the jury find from the evidence that there was a sharp curve in defendant's track a short distance west of the point at which plaintiff's husband was killed; that it was the custom of defendant's railroad, known to its employes, to give notice of the approach of its trains by ringing the bell or sounding the whistle when running its trains around its curve on its track,—then it was the duty of the agents and servants of defendant, in charge of said train, to give such signals in this instance. (4) If the jury find from the evidence that the agents and servants of defendant, in charge of the construction train in question, were running said train backward; that they were engaged in a race with a train of cars on the Wabash, St. Louis & Pacific Railway which at that point runs parallel with and near to defendant's track; that they were running said construction train at such a high rate of speed, and in such a manner, as to endanger the lives of employes upon its track; that they knew, or by the exercise of ordinary care upon their part might have known, that plaintiff's husband and his collaborators upon the track were at or near the point where the accident occurred, and did not ring the bell or sound the whistle as they came around the curve, or approached the same, so as to give warning of their approach, and failed to use the ordinary means within their power to prevent the injury to and death of plaintiff's husband,—then the defendant was guilty of negligence in so running and operating its train; and if the jury find that plaintiff's husband was without fault or negligence upon his part, and that such negligence on the part of the servants and agents of defendant in running and managing said train caused his death, then you should find a verdict for the plaintiff. (5) Although the jury may believe from the evidence that the noise made by the running of the train upon the track of the Wabash, St. Louis & Pacific Railway was so great as to render it difficult

for plaintiff's husband, while engaged in his work upon defendant's track, to hear the approach of defendant's train, yet that fact alone did not absolve the defendant from its obligation to use the usual and proper precautions to warn plaintiff's husband of his danger; and if the jury find that plaintiff's husband was standing with his back towards the approaching construction train; that it was necessary for him to stand in that position in order for him to do the work upon which he was at that moment engaged; that the servants and agents of defendant in charge of their train and the deceased had the same means of knowing that the noise made by the other train rendered it difficult for plaintiff's husband to hear the approach of the train that struck and killed him; that plaintiff's husband had no notice or warning of the approach of said train; and that, without fault or neglect on his part, he was struck and killed by said train, on account of the negligence of defendant's agents and servants having the charge thereof, in failing to ring the bell or sound the whistle, or give other warning likely to be seen or heard by an ordinarily prudent person there engaged, and in running said train backward at a high rate of speed without notice or warning, which they might have given by the exercise of ordinary care upon their part,—the jury should find for the plaintiff. (6) If the jury find for the plaintiff, they will assess her damages at the sum of \$5,000."

The court, on its own motion, gave the following instructions, viz.: "(1) The defendant's servants engaged in running and operating the construction train mentioned in evidence were not guilty of negligence in failing to anticipate that the section men engaged at work on the track would fail to be reasonably watchful, and upon the alert to ascertain that said train was approaching. In other words, the defendant's servants running said train had the right to assume that the said section men would be in the exercise of that degree of care which would be exercised by ordinarily prudent persons, under the same or similar circumstances. (2) Defendant had a lawful right to run its trains upon the track at the place the injury occurred, either forward or backwards, and the fact that said train was being run at said time with the engine in the rear of the flat cars does not, of itself, constitute any negligence on the part of the defendant, or on the part of those in charge of said construction train,—to the giving of which instructions the defendant then objected and excepted, and still excepts.

The court gave the following instructions at the instance and request of defendant: "(7) The court instructs the jury that in the transaction of its business, and in the operation of its railroad, the defendant has a lawful right to run its trains at any rate of speed it may deem convenient and necessary; and, although the jury may believe from the evidence that the defendant's train was at the time and place mentioned running at a rapid rate of speed, yet that fact alone did not constitute negligence on the part of defendant." "(10) The jury are

instructed that, if they find from the evidence that the accident to the said William Parker was the result of the combined negligence of both the said Parker and of the men in charge of the construction train, the verdict must be for the defendant." "(12) Plaintiff does not charge that the servants of the defendant running the rock train were guilty of any negligence—*First*, in respect to the effort made by them to stop said train after discovering the position and danger of William Parker; or, *second*, that said servants failed to discover the position and danger of the said William Parker as soon as they should; or, *third*, that said servants were negligent in any respect after they became aware of his position and danger. And in the consideration of your verdict you will disregard all evidence, if any there be, on these points, as plaintiff must recover on the case made in the pleadings." "(b) Although the jury may believe that in some regards the defendant was negligent, yet if they further believe from the evidence that deceased, by the exercise of ordinary prudence and caution, could have avoided the accident, they must find for the defendant."

The defendant prayed, and the court refused, the following instructions, and defendant at the time excepted to the action of the court in refusing the same: "(1) The defendant moves the court to instruct the jury that, under the pleadings and the evidence in this case, your verdict must be for the defendant—*First*, because the deceased was a fellow servant of the men engaged in running the train by whose negligence it is alleged he was injured; *second*, because the said William Parker was guilty of negligence directly contributing to the injury. (2) The court instructs the jury that there is no evidence that the train was being run at an improper or dangerous rate of speed at the time and place of the accident. (3) The court instructs the jury that there is no evidence that the defendant's servants were guilty of any negligence in running the construction train backwards over defendant's track. (4) There is no evidence tending to show that defendant's servants in charge of said train failed and neglected to sound the whistle upon said engine before starting around the curve near the point of the accident. (5) The jury are instructed that if they believe from the evidence that the deceased, William Parker, came to his death by reason of negligence of the employees of defendant in charge of the rock or construction train, in the running and management of the same, they will find for defendant. (6) The defendant's servants engaged in running and operating the construction train mentioned in evidence were not guilty of negligence in failing to anticipate that the section men engaged at work on the track would fail to be watchful and upon the alert to ascertain that said train was approaching." "(8) The court instructs the jury that it was the duty of William Parker, while upon the defendant's track at work, to be constantly on the alert and watchful that he might ascertain whether trains were approaching over the same, in time to avoid danger from the

same. He had no right to rely upon being notified by the men in charge of the train of his danger, but was in duty bound, while thus upon the track at work, to use every precaution to learn of the approach of trains, and avoid danger, that a careful, prudent man would have used under similar circumstances. (9) The court instructs the jury that, under the evidence in this case, the section men, including the deceased, engaged at work on defendant's tracks, were bound to expect an irregular train from the west at any moment; and if you believe from the evidence in this case that the curve in defendant's track, and the high bluff on the north side, rendered it impossible to see any considerable distance westward along said track from the point where the deceased stood; and that, by reason of the noise made by the freight train on the Wabash track, it was impossible or difficult to hear an approaching train on defendant's track, or signals made by such train; and that the said William Parker, with a knowledge of these facts, placed himself astride of one of the rails of defendant's track, with his face to the east, and continued in this position, and engaged himself in the work of tamping stone under a tie, without keeping a watch to the west, or taking any precautions to ascertain whether any train was approaching him from that direction,—your verdict must be for the defendant." "(11) Defendant had the lawful right to run its trains upon the track at the place the injury occurred, either forward or backward; and the fact that said train was being run at said time with the engine in the rear of the flat cars does not constitute any negligence on the part of the defendant, or on the part of those in charge of said construction train. (a) If the jury believe from the evidence that, in consequence of the curve in the defendant's track, it was impossible for a person to see any considerable distance along the same; that the noise and roar of the freight train running on the Wabash track made it difficult or impossible to hear the noise or the signals of a train approaching upon the defendant's road at the time of the accident; and you further find that the section men, including the said Parker, knew, or had reasonable grounds to expect, that the construction train would come along over the track going east at about the time said train did in fact come along, and that the said William Parker, with a knowledge of all these facts, went between the rails of defendant's track, and continued to work with his back to the approaching train, and without taking any precautions to ascertain the approach of the same,—your verdict must be for the defendant." "(c) If the jury find from the evidence that the servants of the defendant, running the train in proof, sounded the signal whistle just before starting their train around said curve, then the court instructs you that the defendant's servants in charge of the train had the right to believe that the section men would hear and heed said warning; and if you find from the evidence that a man was stationed on the front end of the train as it moved east, to

warn persons off the track, then such servants so in charge of said train were not negligent in respect to the rate of speed at which said train ran, and the finding should be for the defendant."

The court at the request of plaintiff, and against the objection of the defendant, allowed the jury to take to the jury room with them, after the case was submitted to their consideration of their verdict, and while considering of the same, the plat or picture spoken of in the evidence, and shown in evidence by plaintiff. To this ruling and action of the court the defendant then excepted, and still excepts. The jury returned a verdict for plaintiff in the sum of \$5,000, and judgment was rendered thereon by the court, to which action of the court the defendant then excepted and still excepts.

Messrs. Strong & Mosman, for appellant:

A servant accepting employment knowing as well as his employer its perils, or continuing in service after he acquires such knowledge, has no claim for damages against his employer for an injury occasioned by such perils.

Price v. Hannibal & St. J. R. Co. 77 Mo. 508; *Steffen v. Mayer*, 96 Mo. 420; *Waldheir v. Hannibal & St. J. R. Co.* 3 West. Rep. 245, 87 Mo. 87; *Benfro v. Chicago, R. I. & P. R. Co.* 86 Mo. 802; *Gleason v. Excelsior Mfg. Co.* 13 West. Rep. 246, 94 Mo. 205.

If William Parker came to his death by reason of the negligence of the employes of defendant in charge of the rock or construction train in the running and management of the same, the law presumes that under such circumstances these men were fellow servants, and the burden is on him who would seek to avail himself of the absence or non-existence of such relation. No such testimony was offered on the trial of this cause, and the failure on the part of the plaintiff's testimony to show that the men composing the construction gang and the section hands were not fellow servants warranted an instruction to find for defendant.

Blessing v. St. Louis, K. C. & N. R. Co. 77 Mo. 412.

The evidence clearly showed that these men were fellow servants within the strictest rule of decision.

Shearm. & Redf. Neg. §§ 225, 234; *Bishop, Non-cont. Law*, § 662.

Fellow servants are engaged in a common employment when each of them is occupied in service of such a kind that all the others in the exercise of ordinary sagacity ought to be able to foresee, when accepting their employment, that it may probably expose them to the risk of injury in case he is negligent.

Shearm. & Redf. Neg. § 236. See *Bishop, Non-cont. Law*, § 673.

The question must be decided by reference to the fact whether a person having experience in a certain employment would, when engaging in that employment, know that the negligence of a servant engaged in the employment of the same master might be productive of harm to him.

Gibson v. Pacific R. Co. 46 Mo. 169, 2 Am. Rep. 497.

It would be carrying the rule to an absurd extreme to hold that those only are fellow servants who are employed in doing precisely the same thing.

Marshall v. Schricker, 68 Mo. 811.

A station agent whose duties were connected with the trains was held to be a fellow servant in the same common employment with the men engaged in running and managing the train.

Evans v. Atlantic & P. R. Co. 62 Mo. 49.

A brakeman on the road is a fellow servant of the men whose duty it is to see that the bridges are kept in repair.

McDermott v. Pacific R. Co. 80 Mo. 115.

This court has passed upon the precise point involved here.

Rohback v. Pacific R. Co. 48 Mo. 187.

Messrs. John F. Waters, and Crittenden, McDougal & Stiles, for respondent:

Plaintiff's husband was a trackman. He was in no sense a fellow servant with defendant's employes in charge of the train. His death resulted solely from their negligence "whilst running, conducting (or) and managing" the "train of cars." His widow was and is therefore entitled to recover \$5,000 damages.

Sullivan v. Missouri Pac. R. Co. 97 Mo. 118, and cases cited.

Plaintiff's husband, a section hand, was not a fellow servant, within the rule, with the engineer of the train which killed him, for the reason that they were in different departments of the service.

St. Louis & S. F. R. Co. v. Weaver, 35 Kan. 413; *Garrahy v. Kansas City, St. J. & C. R. Co.* 25 Fed. Rep. 258; *Calco v. Charlotte, O. & A. R. Co.* 28 S. C. 536.

A conductor of one train is not a fellow servant with the brakeman of another train.

Au v. New York, L. E. & W. R. Co. 29 Fed. Rep. 72.

A conductor of a material train is not a fellow servant with a laborer on the train, even in adjusting the switch.

Coleman v. Wilmington, O. & A. R. Co. 25 S. C. 446, 60 Am. Rep. 516.

The conductor of a freight train is not a co-servant, within the rule, with the engineer of another train, and the defendant is liable where the accident was caused by the negligence of those in charge of the freight train.

Kentucky Cent. R. Co. v. Ackley, 87 Ky. 278, 13 Am. St. Rep. 480.

The engineer of one freight train is not a co-servant, within the rule, with the conductor of another freight train through whose negligence a collision occurs, killing the engineer of the other train.

Louisville, O. & L. R. Co. v. Caven, 9 Bush, 559.

The brakeman and section foreman are not co-servants within the rule.

Lewis v. St. Louis & I. M. R. Co. 59 Mo. 495.

Track laborer and fireman are not such fellow servants.

Cowles v. Richmond & D. R. Co. 84 N. C. 309.

Car inspector and brakeman are not.

Condon v. Missouri Pac. R. Co. 78 Mo. 567;

Long v. Pacific R. Co. 65 Mo. 225.

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Gantt, J., delivered the following opinion:

Plaintiff's husband was a section hand in the service of the defendant at the time he was killed. He had been in this same employment for about two years prior to his death. At the time of his death, he was tamping rock under the head block at the switch, near Randolph Bluff, stooping, with his back towards the west. He was struck by a car, in a construction train coming from the west, on defendant's track, in charge of defendant's train men, who were and had been, for some three months, engaged in hauling and unloading crushed rock for ballast for this section. The train had discharged its load of rock, and was backing, caboose in front, to Minarville, some five miles distant, in order to clear the track for the afternoon passenger train. Just at the time plaintiff's husband, William C. Parker, was struck, a freight train of forty-eight cars was passing on the track of the Wabash Railroad, about 9 feet distant, and at this point parallel to defendant's road. The Wabash train was making a great noise. The evidence for the plaintiff was that Parker and his associate section men did not hear any signals, by way of bell ringing or whistle blowing, on the part of those in charge of the construction train. On the part of the train men, there was much positive evidence that, just prior to starting the train back on the main track, the engineer sounded his whistle. About 150 yards west of the point where Parker was struck there was a curve in defendant's road. The engineer and other train men testify that, when nearing this curve, the engineer gave four signals, two long and two short blasts of the whistle. All the section men except Parker saw the train in time to avoid it, and did so. Three of them, seeing that Parker was apparently wholly unconscious of its approach, ran towards him, and attempted to attract his attention by calling to him in loud voice, but it seems clear now that the noise on the Wabash train prevented his hearing them. Plaintiff bases the right to recover on the grounds that defendant's train men on the construction train were running it at a high, unusual, dangerous, and reckless rate of speed; that her husband was stooping with his back to the west, when this train, suddenly and without warning or signal by whistle or bell, was run over him; that it was racing with the Wabash train at the time.

There are a number of specific exceptions saved in the record, but it is plain that one question of controlling importance arises on this record,—were the train men operating the construction train that killed plaintiff fellow servants of his, working for a common master in a common service, and, if so, is defendant liable for the injury? Learned counsel for defendant, in his argument of this cause, urged us to lay down some definite principle or rule by which employers could govern themselves. After a careful examination of this subject, in its varied aspects, we think the attempt would be futile and unsatisfactory. The judge or court who

would deal in general observations outside of the record under consideration, would be treading on dangerous ground, and in a very short time would probably find himself "hoisted by his own petard." It is unnecessary to go over the learning and history of the rule that the master is not liable to his servant for the injury resulting from the negligence of a fellow servant in the same common service. See *Ell v. Northern Pac. R. Co.* 1 N. Dak. 336. An examination of the cases in this court will show that this court has never denied the rule. *McDermott v. Pacific R. Co.* 30 Mo. 115; *Rohback v. Pacific R. Co.* 43 Mo. 187; *McGowan v. St. Louis & I. M. R. Co.* 61 Mo. 528; *William Bros. v. Carriter*, 52 Mo. 372; *Gibson v. Pacific R. Co.* 46 Mo. 163, 2 Am. Rep. 497; *Marshall v. Schricker*, 63 Mo. 308; *Smith v. Wabash, St. L. & P. R. Co.* 92 Mo. 359, 8 West. Rep. 729; *Sherrin v. St. Joseph & St. L. R. Co.* 103 Mo. 378; *Murray v. St. Louis, O. & W. R. Co.* 98 Mo. 578, 5 L. R. A. 735; *Relyea v. Kansas City, Ft. S. & G. R. Co.* (Mo.) 19 S. W. Rep. 1116; *Higgins v. Missouri Pac. R. Co.* 104 Mo. 413; *Schaub v. Hannibal & St. J. R. Co.* 106 Mo. 74.

The main and only difficulty has been to satisfactorily determine, at all times, whether the employment was a common service, and the employes fellow servants, within the meaning of the rule; and, after due consideration, we are of the opinion that, unsatisfactory as it may seem, the rule itself must remain general; its application specific, as the cases arise. This rule, to exempt the master, requires the servants shall be employed by a common master, and the servants must be employed in the same common employment. In this case we have the first essential. The petition and evidence all show that plaintiff's husband and the train men on the construction train were employed by the same master, the defendant. Were they fellow servants in a common employment?

The record shows plaintiff's husband was and had been for two years a section hand in defendant's employ, working on this section of defendant's railroad, repairing and keeping the track in a safe condition for trains. He was at this work, tamping rock under the block of the switch, at the time he was killed. The train men were in charge of a construction train, which for three months had daily hauled rock from a crusher at Minarville, five miles east of the point where Parker was killed, and unloaded it on this same section, for the purpose, also, of ballasting the track to insure safety of trains passing over it. It is in evidence that this train made two trips daily over this section; that plaintiff's husband had been engaged for two weeks near the place where he was killed; that this train passed the point where he was killed about the same time, every afternoon, about 5 o'clock. These construction trains can only work between the schedule time of regular trains. It was in evidence that track men or section men were expected to look out for trains and clear the track. It was a rule of the defendant that whistles should be sounded in going around curves. That the work of deceased and the

construction train crew tended to one common end, to wit, the repairing, and, in this instance, the ballasting, of a common track on a common section, is unquestionable. One set of the employes were managing the train, hauling and unloading the crushed rock; and the other, the regular section men, were carefully disposing of this rock, and tamping it under the rails and switches. Neither had the least control of the other. While they were working in harmony to accomplish a common purpose, the repairing and improvement of their employer's track on this section, neither could command or direct the other. Again, they bore the same general relation to the master. That is to say, in repairing this track they were both engaged in doing a work that the law devolved upon the defendant, and they were both engaged in assisting their common master in discharging a duty to the public and its train men who traveled in regular trains over this track. This train passed every day about the hour of this unfortunate accident. Plaintiff's husband was familiar with the track and the curves. He had worked there two years. He also knew of the proximity of the Wabash road. We believe it is conceded by all the courts, not those who follow the rule in the *Farrell Case*, 4 Met. 49, but those who deny it, that the servant assumes the natural risks incident to the common course of the business, including the negligence of his fellow servants. When plaintiff's husband went to work on the track that afternoon, he was certainly aware that this train would pull by him about the usual time to clear the track for the afternoon passenger train. In so doing, it would be following a regular, or natural course. His work brought him to work on the same track, at the same time the work of the train men brought them there, serving a common master; and both understood the risk from this necessary contact; and the negligence of the one in doing his work might injure the other in doing his work. Hence we conclude that, applying these facts to the general rule, they make a case of fellow servants in a common employment.

In *Rohback v. Pacific R. Co.*, 43 Mo. 187, the facts were the plaintiff was a section man at work on the defendant's railroad at a place near the foot of Jefferson street, in Jefferson City, where the railroad crossed a street. While so employed, the train men in charge of a locomotive and train of cars, without ringing a bell or sounding a whistle, ran the train over plaintiff. This court then held that the section man and the train men were fellow servants, and the plaintiff could not recover, though it was assumed the negligence of the train men was clearly shown, and the majority of this court still approve that case. We are not aware that this court has ever repudiated that case. In *Whealan v. Mad River & L. E. R. Co.*, 8 Ohio St. 249, the facts were as follows: Plaintiff was a section hand or track man working in repairing the track. He alleged there was a man employed on one of defendant's trains whose duty it was to pass firewood from the tender to the engine, and, on finding sticks

unsuitable, he cast the same from the train. That this train was passing where plaintiff was at work on the track. He retired from the track, and, as the train passed, this fireman improperly threw a stick of wood from the tender; it struck plaintiff, and put out his eye. That court said: "This case, it will be perceived, is not one in which the injured party is placed by their common employer in a position subordinate to and subject to orders of the fellow servant, through whose negligence and misconduct the injury occurs," so as to come within the principle decided in *Little Miami R. Co. v. Stevens*, 20 Ohio, 415, and *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201, "but presents the simple question whether the master or employer is liable to one servant for injuries received from the negligence of a fellow servant, where no relation of subordination or subjection exists between them while engaged in the business of their common employer." That court answered the question in the negative, holding the track man and the fireman fellow servants. This case is the more significant, because it came from a court that first denied the rule in the *Farwell Case*, in the cases cited by Judge Napton in *McDermott v. Pacific R. Co.* 80 Mo. 115.

In 1842, *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 88 Am. Dec. 839, was decided. In that case an engineer was injured by the negligence of a switchman who left the switch open, and the engine was thereby run off the track. It was shown that the switchman was a careful and trustworthy servant. Farwell sued the company, and the supreme court of Massachusetts held he could not recover. That decision was subsequently followed by the Supreme Court of the United States in *Randall v. Baltimore & O. R. Co.* 109 U. S. 484, 27 L. ed. 1005, (1883.) In that case, the evidence showed the injury occurred at night, at a place where there was a network of tracks, in the defendant's railroad yard, near the junction of a branch road with the main road, and about 10 rods from a highway crossing. Plaintiff had previously been employed on another part of the road. On the night in question, in the performance of his duty as a brakeman on a freight train, he unlocked a switch, which enabled his train to pass from one track to another, and he was stooping down, with his lantern on the ground beside him, to unlock the ball of a second switch, to let the engine of his train pass to a third track, when he was struck and injured by the tender of another freight engine, in no way connected with his train, backing down on the second track. From the evidence it appeared the switch could be worked safely by a man standing midway between the two tracks, using reasonable care. It could not be safely worked by standing at the end of the handle, while an engine was coming on the track next that end. The engine that struck plaintiff was being driven at a speed of about 12 miles an hour by an engineer in defendant's employ, and there was evidence that it had no light except the headlight, and no bell, and its whistle was not sounded. A demurrer to the evidence was sustained. *Mr. Justice*

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Gray, in delivering the opinion of the court, said: "The general rule of law is now firmly established that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment. This court has not hitherto had occasion to decide who are fellow servants, within the rule." "Nor is it necessary, for the purposes of this case, to undertake to lay down a precise and exhaustive definition of the general rule in this respect, or to weigh conflicting views which have prevailed in the courts of the several states; because persons standing in such a relation to one another as did this plaintiff and the engineer of the other train are fellow servants, according to the very great preponderance of judicial authority in this country, as well as the uniform course of decision in the house of lords and in the English and Irish courts." "They are employed and paid by the same master. The duties of the two bring them to work at the same place at the same time, so that the negligence of the one in doing his work may injure the other in doing his work. Their separate services have an immediate common object, the moving of the trains. Neither works under the orders or control of the other. Each, by entering into his contract of service, takes the risk of the negligence of the other in performing his service, and neither maintains an action for an injury caused by such negligence against the corporation, their common master. The only cases cited which have any tendency to support the opposite conclusion are the decisions . . . in *Chamberlain v. Milwaukee & M. R. Co.*, 11 Wis. 248, and . . . *Haynes v. East Tennessee & G. R. Co.*, 3 Coldw. 222, each of which wholly rejects the doctrine of the master's exemption from liability to one servant for negligence of another. The first of these has been overruled in the same state. The action cannot, therefore, be maintained for the negligence of the engineer in running his engine too fast, or in not giving due notice of its approach." This decision has never, so far as we can find, been questioned or overruled by the court rendering it. The subsequent case of *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 877, 28 L. ed. 787, though decided only a year later, does not mention it. Certainly it does not overrule it in terms, and we think the cases are not in conflict. They simply treat of the relation of the master to the servant under different conditions. In the *Ross Case*, the Supreme Court of the United States declined "to lay down a rule which would determine, in all cases, what was to be deemed a common employment;" but placed its decision on the ground that "the conductor, having the entire control and management of a railway train, occupies a very different position from the brakeman, porters, and other subordinates." "He is in fact and should be treated as the personal representative of the corporation for whose negligence it is responsible to its subordinate servants." So that while the learned judge who wrote that opinion discusses with marked ability what is now

sometimes termed "the department rule," it seems not to have been the basis of the decision in that case.

In the subsequent case, in the same court, of *Quebec Steamship Co. v. Merchant*, 133 U. S. 875, 33 L. ed. 656, it appeared that the plaintiff was the stewardess of the ship. It was her duty to attend to the ladies' room in the cabin, and in the course of that duty to empty slops, as to which her orders were to throw them over the side of the vessel. The cabin was on deck. A railing extended round the vessel, and consisted of four horizontal iron rods, which were supported by stanchions at intervals of 4½ feet. In this railing there were openings or gangways for receiving and discharging freight and passengers. Three of the gangways were for passengers. On her voyage, at one of her stopping places, the gangway was opened to let off passengers. In replacing the rods, they were not placed in proper positions, but remained so far unfastened that the hooks were not secured in the eyes. The carpenter and porter undertook to fasten the rods. The porter testified he told the carpenter of the ship to put the rods in, and he replied, "Wait until the rain is over." While in this condition, the plaintiff came to the gangway with a bucket of slops, leaned against the railing, it gave way, and she fell into the sea, and was injured. The servants were divided into "three departments," the "deck department," the "engineer's department," and the "steward's department." The carpenter was in the deck department, the plaintiff in the steward's. There was a master or captain in command of the whole vessel. The court, *Judge Blatchford*, delivering the opinion, says: "The contention of the plaintiff is that, as the carpenter was in the deck department and the stewardess in the steward's department, those were different departments, in such a sense that the carpenter was not a fellow servant with the stewardess. But we think both the porter and carpenter were fellow servants with the plaintiff. The carpenter had no authority over the plaintiff, nor had the porter." The division into departments was one of convenience of administration. "The case, therefore, falls within the well-settled rule, as to which it is unnecessary to cite cases, which exempts an employer from liability for injuries to a servant caused by another servant. The plaintiff took upon herself the natural and ordinary risks incident to the performance of her duty, and among such risks was the negligence of the porter and carpenter, or of either of them, in the course of the common employment. There was nothing in the employment or service of the carpenter or the porter which made either of them any more the representative of the defendant than the employment of the stewardess made her such representative." In *Murray v. St. Louis, C. & W. R. Co.*, 98 Mo. 573, 5 L. R. A. 735, this court held that the gripman of a cable car, employed upon it in operating it, was a fellow servant of a watchman of the company, whose duty it was, from his station on the ground, to keep watch of cars as they

approach a curve, and give signals to the gripman to prevent more than one train from passing the curves at a time. They were employed in the same "common employment of operating the cars, one from the car, the other from his station on the ground." The learned judge who wrote the opinion in that case very clearly distinguishes those cases in this state in which it was the duty of the master to furnish reasonably safe instrumentalities for his servants from those in which injury occurred by the act of a fellow servant. He concludes by saying: "The majority of the courts, it is believed, hold that servants are in a common employment when they are engaged under the same master, in the same general business." As in that case the gripman and the watchman were engaged in the common employment of operating the train, so in this case the crew and men in charge of this construction train, and the plaintiff's husband and the section gang to which he belonged, were engaged in the common employment of repairing and making safe and secure the track of their employer, the defendant herein, on a common section. So that, if we apply the general rule in this case, unquestionably they were fellow servants; or if we apply "the department rule, as interpreted by the Supreme Court of the United States in the *Randall Case* and the *Quebec Steamship Case*, *supra*, they are fellow servants, in the same department,—that of the construction and repairing of the defendant's track on this section. But neither the general rule nor the rule requiring a co-sociation of the employes would justify the judgment in this case. These train men on the construction train were daily hauling and delivering stone on the section on which plaintiff's husband worked, and had worked for three or four years. This train passed the working place of plaintiff's husband at least four times a day. He was required to get off the track for its passage each time. He could readily observe whether the engineer was in the habit of giving signals as he came and went, and whether he ran his engine so fast that it imperiled the safety of the section hands. This construction train and the section men belong to the same department, that of construction and repair of the track. This train necessarily brought the work of the section and the construction crew daily in contact, so that this section gang could have observed and reported to the roadmaster any dereliction of duty in this regard. As remarked by this court in *Marshall v. Schricker*, 63 Mo. 308, "it would be carrying the rule to an absurd extreme to hold that those only are fellow servants who are employed in doing precisely the same thing." The rule has never been circumscribed in any such a narrow circle. We cannot think of any danger more obvious or likely to happen to a section man than the danger to be apprehended from irregular trains. It was the most ordinary incident to his employment. This seems to have been fully understood by the men. Plaintiff's witness Hudgens says: "All section men are expected to watch and get off the track when the trains come. Trains never stop to

give us time to get off." "We are expected to look out for all trains." And to the same effect is the evidence of Henry Hudgens, Joseph Dawson, and M. J. Barry. The risk was one he assumed when he went to work on that section. We think the demurrer to the evidence should have been sustained. The court, having overruled the demurrer to the evidence, should have given defendant's fifth instruction. The evidence clearly made them fellow servants, and it was the court's duty to declare the law. As this disposes of the case, it is unnecessary to examine the other assignments of error.

Sherwood, Ch. J., and **Macfarlane, J.**, concur, and are of opinion, with myself, that the judgment should be simply reversed; but in order to a disposition of the cause, and for that reason alone we consent that the case be remanded. **Sherwood, Ch. J.**, in a concurring opinion, and **Black, J.**, in a separate opinion, hold the judgment should be reversed and the cause remanded. **Barclay, Brace**, and **Thomas, J.**, dissent. **Judge Thomas** files a dissenting opinion, in which **Judge Brace** concurs in the conclusions reached. **Barclay, J.**, dissents for reasons given by him in *Dixon v. Chicago & A. R. Co.* (Mo.) 19 8 W. Rep. 412, in division No. 1, at this term.

The judgment is accordingly reversed, and the cause remanded.

Sherwood, Ch. J., concurring:

I have deemed it best to add a few observations respecting this case. If I employ hands to haul and distribute manure over my meadow, some to drive the team and unload the wagon, and others to distribute the manure when thrown out, and if, while engaged in such work, one of the hands engaged in distributing the manure should be run over by reason of the carelessness of the driver of the wagon and killed I suppose no court in Christendom would hesitate to say the hand run over and the driver of the wagon were fellow servants, engaged in a common employment, and serving a common master, and, therefore that no recovery could be had against me. I am entirely unable to distinguish, in point of principle, the hypothetical case from the one at bar; to note any appreciable difference between the common employment of hauling and distributing stone along the line of a railroad, and hauling and distributing manure upon a meadow. The largeness or smallness of the area over which the given work progresses, the distances to be traveled, or the amount of work to be performed surely cannot affect the principle involved, or vary in any respect the legal conclusion to be drawn from the premises. If the farmer, in the case supposed, should not be held liable, neither should the railroad corporation in the real one, unless it be declared as a matter of law that the law will exonerate the farmer from all liability in circumstances where it will hold the corporation responsible and guilty of actionable negligence.

Black, J., delivered the following opinion:

I find myself unable to agree to all that is 18 L. R. A.

said in either of the opinions just filed, and hence the following observations: We all agree, I believe, that the rule which exempts the master from liability to one servant for the negligent acts of a fellow servant prevails in this state. The real question, therefore, is whether the deceased track repairer was a fellow servant with those persons engaged in operating the rock train, within the meaning of the rule of exemption. That rule, as declared in *Farwell v. Boston & W. R. Corp.*, 4 Met. 49, 38 Am. Dec. 839, was, in substance this: That the master is not liable for injuries sustained by one employé by reason of the negligence of a coemployé; and all persons are coemployés who are engaged in the prosecution of the same general business, and this, too, without regard to rank or station. We believe it is conceded on all hands that, notwithstanding this rule, there are certain duties personal to the master, and for the nonperformance of which, resulting in an injury, he is liable, even to a servant. Thus, he must observe due care in furnishing suitable machinery and appliances, in seeing that the machinery and appliances are kept in repair, in the selection of competent and trustworthy servants, in making suitable rules and regulations for the conduct of a complex business; and he must see that youthful persons receive proper warning. It is often said that the servant entrusted with the performance of these duties, personal to the master, is not a fellow servant with those engaged in the prosecution of other work; but such statements are misleading, and have been the source of much trouble. The master is liable for a negligent performance of these duties, no matter by or through whom he undertakes to perform them. It is therefore evident that the question as to who are fellow servants within the rule of exemption cannot be determined from expressions found in those cases which have to deal with some default or alleged default of the master in the performance of some personal duty. The broad and sweeping rule of the *Farwell Case* was adopted in many of the states. It had but little more than been approved, when courts and legislatures began the process of cutting it down, because of the gross injustice which it worked out in its application to the great enterprises of the day. This is clearly shown by the constant enlargement of the field of duties held to be personal to the master. Again, it is held in this and other states, in direct opposition to the rule as laid down in the *Farwell Case*, that when the master delegates to an employé the power to manage, direct, and control men in the performance of their work, such person is a vice principal or representative of the master, and the master is liable to an under servant for the negligent acts of this representative. But the servants under this representative may be coservants with those under another representative of the same master. Thus, the persons engaged in and about machine shops, foundries, and the like are often strictly fellow servants, though under and subject to the orders of a different foreman. It must be apparent that cases like those before mentioned, whether founded on

the nonperformance of some personal duty or the negligent act of a vice principal, do not dispose of the question now in hand. They point out the growth of the law, and furnish some aid in determining who are fellow servants within the rule of exemption, but do not furnish any exact or reliable guide. To determine who are coservants within that rule it may be well to recall the ground upon which it is based, which is, in substance, this: That from considerations of public policy and convenience the law will imply a contract on the part of the employé to take upon himself all risks arising from the negligent acts of his cocompoyés. The reasons for the rule are: "Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends to a great extent on the care and skill with which each shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct in capacity or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require." Now, it being conceded, as it must be, that the master is liable to third persons for the negligent acts of his servants, it is difficult to see how public policy has much to do with the question as to who shall be deemed fellow servants within the rule of exemption. The liability being admitted in a case a third person is injured, but denied in case a servant is injured by another servant, the denial in the latter case must stand on some peculiar relation between master and servant. This peculiar relation cannot be simply the fact that the servants are in a position where one may be injured by the negligence of another, for third persons often occupy the same position, as where they become passengers. The real and only point of distinction, it seems to us, arises out of the fact that the servants are so associated and related in the performance of their work that they can observe and influence each other's conduct, and report any delinquency to a correcting power. To say a clerk engaged in an office making out pay rolls for a railroad company is a fellow servant, within the rule of exemption, with those engaged in operating trains, is out of all reason. Guided by the real reason for the rule, it seems to us it should be applied, and applied only, in those cases where the servant injured and the one inflicting the injuries are so associated and related in their work that they can observe and have an influence over each other's conduct, and can report delinquencies to a common correcting power or head. In short, they should be fellow servants in fact, and not simply in dialectic theory. If in separate and distinct departments, so that the circumstances just stated do not and cannot exist, then they are not fellow servants within any just or fair meaning of the rule. This conclusion, though not in strict accord with the majority of the adjudged cases, is, it is believed, within the true and only reason for the rule, and has the support of many cases, some of which go much further

than has been indicated. The following are some of the cases: *Nashville & O. R. Co. v. Carroll*, 6 Heisk. 847; *St. Louis & S. F. R. Co. v. Weaver*, 85 Kan. 412; *Chicago & N. W. R. Co. v. Moranda*, 98 Ill. 302, 34 Am. Rep. 168. On this question the closing observations of Justice Paxson in *New York, L. E. & W. R. Co. v. Bell*, 112 Pa. 400, 3 Cent. Rep. 576, may be consulted. The real point in judgment in *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787, was that a conductor, who has charge of a train, with the power to direct its movements, represents the company, and in the performance of such duties is not a fellow servant with the engineer and other operatives of the train, within the rule of exemption. Some observations made in that case support our conclusion. That Justice Miller so understood that case is evident from what he said in *Garrahy v. Kansas City, St. J. & O. B. R. Co.* 25 Fed. Rep. 258.

The deceased was one of a gang of five track repairers, all under a foreman. The rock train and the thirty men operating it were all under the command of a conductor. The evidence tends to show, in an incidental way, that the deceased and his gang had nothing to do with loading or unloading the rock train, and were not subject to the orders of the conductor, but were under the control of their own foreman or boss, and that this boss had no control over the rock train men. In short, the evidence tends to show that the two gangs were entirely independent of each other, both as to the work which they performed and as to the supervising power over them. If these are the facts then, applying the conclusion before stated, the deceased and the men employed in operating the rock train were not fellow servants within the rule of exemption. Prima facie, they were all fellow servants within that rule, and it devolved upon the plaintiff to disclose a state of facts which takes Parker out of it. Those facts should be found by the jury. The instructions do assume the existence of some of these facts, but that will not do. Indeed, the cause does not appear to have been tried with a view of showing that these gangs were independent of each other. For these reasons the judgment should be reversed, and the cause remanded for a new trial.

I do not regard the conclusion before expressed as in conflict with prior cases in this court when we come to look at the facts in judgment. In *Rohrbach v. Pacific R. Co.*, 48 Mo. 187, it appears the men were all at work at the same yard, and, for aught that appears, were under the same foreman, and in constant association. The question considered in *Marshall v. Schricker*, 63 Mo. 308, was whether Clifford occupied the position of a vice principal. So far that case has any direct bearing upon the question in hand, it seems to amount to a recognition of much that we have here said, for it is there said: "Nor was he engaged in a distinct department of the general service, and therefore a stranger to the service in which the plaintiff was engaged;" and the department doctrine finds recognition in other portions of the

opinion in that case. What we have said is also in perfect accord with *Murray v. St. Louis, C. & W. R. Co.*, 98 Mo. 573, 5 L. R. A. 785, for there the negligent servant and injured servant were strictly fellow servants. This case is also unlike that of *Miller v. Missouri Pac. R. Co.* (Mo.) 19 S. W. Rep. 58, (not yet officially reported,) for there it was part of the duty of the track repairers to unload the gravel train, and these two gangs of men joined in their work for the purpose of unloading the cars; not so in the case in hand. Nor, in my opinion, is this case at all like the case where different crews are engaged in operating trains on the same line of road under orders from a common train dispatcher. Should the judgment be for the plaintiff, the damages will be the sum of \$5,000, because the case, if any the plaintiff has, comes under the second section of the Damage Act. *Sullivan v. Missouri Pac. R. Co.* 97 Mo. 114; *Miller v. Missouri Pac. R. Co.* *supra*.

Thomas, J., delivered the following opinion:

My opinion is that Parker was not a fellow servant of the conductor, engineer, and members of the crew in charge of the construction train which caused his death. This position I know will be regarded by many as antagonizing principles of law well established by the adjudged cases of this state and the other states of the Union, as well as those of England. No one living has profounder respect for the ancient landmarks of the law than I have, and I hesitate long in refusing to follow precedents long recognized by the courts as sound. *Stare decisis* is a wholesome maxim, that ought not, in judicial investigation, to be disregarded, except for the most weighty considerations and cogent reasons. Private opinion and speculation should have no license to oppose themselves arbitrarily to established principles of jurisprudence. Innovations, whether introduced by legislative action or judicial construction, tend to unsettle the law, and make men feel insecure in their titles to property, and uncertain as to their legal rights. I have given the subject of fellow service the fullest examination I was capable of, and the conclusion I have reached is not, in my humble opinion, in conflict with the adjudged cases in Missouri except the *Schaub Case*, reported in 106 Mo. 74, in which I concurred. In the *Schaub Case* it was held that the train men of one train were fellow servants of the train men of another train. That case is not in line, according to the view I take of the subject, either with the letter or spirit of the previous decisions of this court, and it ought not, therefore, to be followed as authority. Let us examine the history of the law of fellow service as it has been evolved and developed by judicial decisions in Missouri.

The first case in this state in which the doctrine of fellow service was discussed and announced was *McDermott v. Pacific R. Co.*, 80 Mo. 115, in 1860. That controversy grew out of the breaking down of the Gasconade

bridge, which created such widespread consternation among the people at the time. Plaintiff, McDermott, was a brakeman on the train that went down on account of the frailty of the bridge, as alleged. Judge Napton, who delivered the opinion of the court, laid down the broad doctrine that a servant who is injured by the negligence or misconduct of a fellow servant can maintain no action against the master for such injury, and that the rule should be "applied in all cases alike, without regard to the degrees of subordination in which the different servants or agents may be placed with reference to each other," and in support of this proposition *Redfield, Railroads*, p. 387, and *Farwell v. Boston & W. R. Corp.*, 4 Met. 49, 38 Am. Dec. 339, are cited. In 1869 the *Robbuck Case*, 43 Mo. 187, was decided by Judge Wagner, in which it was held that a track repairer and a train man were fellow servants, and the *McDermott Case*, *supra*; *Priestley v. Fowler*, 3 Mees. & W. 1; *Murray v. South Carolina R. Co.* 1 McMull. L. 885; and *Farwell v. Boston & W. R. Corp.* *supra*,—were cited in support of the doctrine laid down. These are the foundation cases upon which the law of fellow service was built in our state up to the year 1869. Since that date the principles announced in the *McDermott Case* have, like the baseless fabric of a vision, totally disappeared in the evolution and development of the common law of Missouri. There is not a vestige of it left. It is now universally recognized here and elsewhere that the master must not only use reasonable care in furnishing his employes safe appliances with which to perform their duties, but he must also use reasonable care in keeping them in repair and in safe condition. *Gutridge v. Missouri Pac. R. Co.* 105 Mo. 520, and 94 Mo. 468, 13 West. Rep. 644; *Parsons v. Missouri Pac. R. Co.* 94 Mo. 286, 12 West. Rep. 615; *Sooder v. St. Louis, I. M. & S. R. Co.* 100 Mo. 673. And it is equally well settled that the rule of fellow service does not apply alike to all cases, without regard to the degrees of subordination in which the different servants or agents may be placed with reference to each other. *Moore v. Wabash, St. L. & P. R. Co.* 85 Mo. 588; *Mound City Paint & Color Co. v. Conlon*, 92 Mo. 221, 10 West. Rep. 100; *Stephens v. Hannibal & St. J. R. Co.* 96 Mo. 207. That the courts in the *Farwell*, *Murray*, *Priestley*, and *McDermott Cases* started out with the proposition that all servants employed and paid by a common master, in a common employment, were fellow servants, without regard to gradations in authority, is evident from the language used in the opinions of the courts, and of the dissenting opinions in the *Murray Case*. Judge Napton manifestly so understood it in the *McDermott Case*, for he cited, *Little Miami R. Co. v. Stevens*, 20 Ohio, 415, and *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201, as denying the principle of the *Farwell Case*. The Ohio cases cited are in full accord with the later decision of this court upon the doctrine of *respondent superior*. In the *Stevens Case* the engineer, and in the *Keary Case* a brakeman, was injured by the negligence of the conductor, and in both it was held that the conductor represented the corporation,

and was its vice principal, and that the corporation was therefore liable. This principle finds support in the adjudged cases,—in Kentucky, *Louisville & N. R. Co. v. Moore*, 83 Ky. 675; in West Virginia, *Madden v. Chesapeake & O. R. Co.* 28 W. Va. 610; in Virginia, *Moon v. Richmond & A. R. Co.* 78 Va. 745; *Richmond & D. R. Co. v. Williams*, 86 Va. 165; and *Johnson v. Richmond & A. R. Co.* 84 Va. 713; in South Carolina, *Boatwright v. Northeastern R. Co.* 25 S. C. 128; in Washington, *Northern Pac. R. Co. v. O'Brien*, 1 Wash. 599; and in the Supreme Court of the United States, *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787.

It is very clear the rule in Missouri is that, where a conductor has control and management of a train, he is not a fellow servant of train hands placed under him. What the common understanding of the bench and bar as to the extent of the rule in the earlier cases was appears again very fully from the opinions and dissenting opinions of these Ohio cases. Judge Wagner, in the *Rohback Case*, while following, severely criticised the principle of the older cases, and utterly failed to follow it afterwards in the cases of *Devitt v. Pacific R. Co.* 50 Mo. 302; *Gibson v. Pacific R. Co.* 46 Mo. 163, 2 Am. Rep. 497; *William Bros. v. Cartter*, 52 Mo. 372; *Harper v. Indianapolis & St. L. R. Co.* 47 Mo. 567; and *Lewis v. St. Louis & I. M. R. Co.* 59 Mo. 495,—in its application to the condition of railway tracks and appliances, and to servants standing to each other in the relation of superiors, with authority to direct and control, and subordinates whose duty it is to obey. The process of paring down and limiting the broad rule announced in the *McDermott Case* has continued in this court up to date, and the doctrine that servants cannot recover for injuries resulting from defective appliances, and that all the servants of a corporation are fellow servants, without regard to subordination, is now utterly repudiated without dissent. The principle of fellow service is, however, still recognized and firmly fixed in our law. A servant cannot recover for injury inflicted upon him by the negligence of a fellow servant. Who, then, is a fellow servant? No definition of fellow service can be laid down that may not be subject to criticism,—indeed, that is not subject to criticism, and difficult of application. Men employed and paid by a common master to perform a common service are said to be fellow servants. But this definition would make all the employes of a great railway corporation, owning thousands of miles of road, extending into and through many states, fellow servants. No court now gives the rule any such broad signification. A few years ago, in Missouri, all employes of a common master, engaged in a common employment, who had no authority to hire and discharge hands, were held to be fellow servants. *Noddard v. St. Louis, K. C. & N. R. Co.* 65 Mo. 514; *William Bros. v. Cartter*, 52 Mo. 372; *Marshall v. Schricker*, 63 Mo. 308. Then the rule was modified so as to exclude from the common service those who were clothed with authority to direct and control the move-

ments of men placed under them. *Moore v. Wabash, St. L. & P. R. Co.* 85 Mo. 588; *Day-harsh v. Hannibal & St. J. R. Co.* 108 Mo. 570. Then finally came the decision in the *Sullivan Case* in 1888 (97 Mo. 113,) in which it was announced that a track walker on a railroad is not a fellow servant of a locomotive engineer or fireman of a passenger train. This, I take it, in effect, though not in terms, overrules the *Rohback Case*; and in the determination of the question now under review we must affirm the doctrine of the *Sullivan Case*, or overrule it, and go back to the principle announced in the *Rohback Case*. This alternative being presented, I feel at liberty to resort to general principles and reason to guide me in determining what my duty is in the premises. I find two deliverances of this court upon the question, which, to my mind, are in direct conflict with each other, and I choose to follow the last, and in doing so I do not deem that I am disregarding the maxim *stare decisis*. I regard the *Sullivan Case* as in line with the spirit and tendency of the development and evolution of the law of fellow service in Missouri and in many other states of this Union, and to overrule it now, and return to the doctrine of the *Rohback Case*, would be taking a step in the wrong direction. As I have shown, the foundation (*McDermott Case*) upon which the *Rohback Case* was based has been wholly removed, and it seems that the superstructure ought to go with its foundation. When I say the principles of the *McDermott Case* have been repudiated I mean, of course, all of it that is not *obiter dictum*.

The *Rohback Case* being founded on the *McDermott*, *Farnell*, *Priestley*, and *Murray Cases*, it becomes important and appropriate to examine and see what was in fact decided. *Priestley v. Fowler*, was decided by the Court of Exchequer of England in 1837, and is the first case to be found in the English books where the limitation of the liability of the master for the negligent acts of his servant is even hinted at. The action grew out of an injury resulting from the negligent overloading of a van by another servant. Chief Baron Abinger, *arguendo*, said: "There is no precedent for the action by the servant against his master. We are therefore to decide the question upon general principles, and in doing so we are at liberty to look at the consequences of a decision one way or the other." With a view to the actual state of English society and the state of labor at that time, he concluded that to hold the master liable for the injuries of one servant by the negligence of another would lead to alarming consequences. The argument of Lord Abinger is characterized in a note to Redfield's work on Railways, (6th ed.) p. 566, as the most ingenious attempt "at *reductio ad absurdum* upon the subject of fellow service in supposing, among other speculations, some fearful consequences if the master were to be held liable for the negligence of the chambermaid in putting another servant into wet blankets." But in that case both servants were on the van, working together, with no common superior servant over them, and hence that cannot be taken as a precedent

that all servants of a common master in a common employment are fellow servants; and it is very questionable if nine tenths of the courts of to-day would not hold the master liable in such case, upon the well-recognized and familiar principle that the master is required to furnish the servant a safe place to work, especially when it was alleged and proved that the master knew the van was overloaded.

The next case decided was *Murray v. South Carolina R. Co.*, *supra*, in 1841. There it was held that the section foreman was a fellow servant of the engineer. This case and the *Farwell Case*, where the engineer was injured by the negligence of his fireman, are in line with an almost unbroken current of authority. In both cases the men worked under a common superior,—the conductor,—and were engaged in the joint performance of the same service. All else that was said by the judges in those cases was *obiter dicta* and we are not bound to follow them, unless their reasoning is satisfactory to us. In other words, as to *obiter dicta* we are at perfect liberty to examine the foundations upon which they stand, and if they are found to be unsound or unsafe, and not in accord with the eternal fitness of things, to repudiate them. I will not go into an examination of the reasons of the rule laid down in the *Priestley*, *Murray*, *Farwell*, and *McDermott Cases*, for I find the subject so exhaustively discussed in the dissenting opinions of the judges in the *Murray Case*, and the opinions of the court in the case of *Cleveland, C. & C. R. Co. v. Keary*, *supra*, and the opinion of Lord Cockburn in *Dixon v. Ranken*, 1 Am. Ry. Cas. 569, that I am not able, and therefore not disposed, to attempt to add anything by way of argument or illustration to what they have said. But if their logic and reasoning upon the state of labor fifty years ago were so cogent and conclusive, with how much more force will they apply now, when we find labor divided and systematized as it never was before, and when not only capital but industries are centralized to an extent not dreamed of a few short years ago. Labor is not only divided and organized, but the laborers are also organized. Every man has his place and his sphere, not fixed alone by the master, but by the joint action of master and servant. The large factories and railway corporations could not transact business except upon the plan of gradations in service, and a strict enforcement of obedience by subordinates to the orders of their superiors. This obedience is given unquestioned. The movements of the thousand employes of a great railway system are carried on with the regularity and precision of the maneuvers of an army, and an employe would no more undertake to discuss the propriety of an order with his superior than a private would that of his captain in the midst of battle. He must yield unquestioned obedience at once, or quit the service. Indeed, such business could proceed upon no other theory. In the progress of society, and the general substitution of ideal and invisible masters and employers for the actual and visible ones of former times in the forms of corporations engaged in varied,

detached, and wide-spread operations, "it has been seen and felt that the universal application of the rule [the rule in regard to fellow service] often resulted in hardship and injustice. Accordingly the tendency of the more modern authorities appears to be in the direction and limitation of this rule as shall eventually cast upon the employer, under these circumstances, a due and just share of the responsibility of the lives and limbs of the persons in its employ." *Gilmore v. Northern Pac. R. Co.* 18 Fed. Rep. 866. In the case of *Louisville & N. R. Co. v. Collins*, 5 Am. L. Reg. N. S. 265, which involved the identical question decided in the *Sullivan Case*, the court of appeals of Kentucky, per Chief Justice Robertson, said: "We cannot admit that the appellee's relation as an employe in its service should exempt the corporation from that general liability, as it might perhaps do by the application of a recent rule, adjudged in England with some exceptions, and echoed with more exceptions by a few American courts. But this anomalous rule, even as sometimes qualified, is, in our opinion, inconsistent with principle, analogy, and public policy, and is unsupported by any good and consistent reason. In the use and control of the engine the engineer is the chief and governing agent of the corporation, and all his associates in that employment are employes in a common service. Neither of these subordinates under his control is, as between themselves, an agent of the railway company, and therefore it is not responsible for any damage by one of them to another, while in its service; and so far the British rule has foundation in both reason and analogy, but beyond this it is baseless of any other support than a falsely assumed public policy or implied contract." And, speaking of the relation that section men sustain towards train men, the court adds: "They are not, therefore, in the essential sense of contradistinctive classification, in the same service with the engineer and his running co-operators, who act in a different sphere, and constitute a distinct class. Consequently neither of the assumed reasons for the British rule as to employes in the same service can be in any way consistently applied as between the engineer and such common laborer as the appellee. And the apparent extension of the rule to them may be deemed inadvertent, or not carefully and logically considered with rational discrimination and precision. We can, therefore, neither feel the *rationale*, nor acknowledge the authority of the crude and self-contradictory decisions or loose and incongruous *dicta* referred to on that subject. But to harmonize the law we must recognize a more congenial principle of normal vitality, and adjudge, as we do now, that the appellee, in his humble and isolated employment, should be treated as a stranger to the engine as a motive power." Mr. Redfield, in a note to this case, says: "We have felt that the opinion is altogether entirely sound in its principles, and maintained with very uncommon ability in its logic as well as its illustrations, both of which seem altogether unexceptionable." And in a note to the dis-

cussion of the *Ollins Case* in Redfield's work on Railways, (6th ed.) p. 570, it is added: "But the profession should be warned that the decisions on the other side embrace a very large number of the best-considered English cases, and almost an equal number in the American states, including all, so far as we know, with the exception of Illinois, Georgia, and Kentucky. And the decisions in these latter states are all placed on peculiar grounds, thereby virtually confusing the soundness of the general rule that one cannot recover of his employer for an injury inflicted through the want of care of a fellow servant, employed in the same department of the master's business, and under the same general control. The consequences of mistake and misapprehension on this point have led many courts into conclusions greatly at variance with reason and the common instincts of humanity. The reasonableness and justice of this construction may, it is to be hoped, induce its universal adoption at no distant day." And as late as 1888, in *Kentucky Cent. R. Co. v. Ackley*, 87 Ky. 278, 12 Am. St. Rep. 480, the court of appeals of Kentucky held that an engineer of a passenger train and those in charge of a freight train were not fellow servants.

In *Chicago & A. R. Co. v. Kelly*, 127 Ill. 687, it was held that a section hand and those in charge of a construction train were not fellow servants. The court there said: "What co-operation was there, at the time of the injury, it may be asked, between Kelly, who was working as a section hand, under the direction of a section boss, and the conductor and engineer of the construction train? None whatever; and it is claimed they were fellow servants. . . . Under the facts shown in evidence, we think it plain that Kelly was not a fellow servant with those in charge of the construction train." In *Nashville & O. R. Co. v. Carroll*, 6 Heisk. 847, the Supreme Court of Tennessee held that a section foreman is not a fellow servant of men in charge of a train of cars. In *Calco v. Charlotte, O. & A. R. Co.*, 23 S. C. 526, it was held that a "railway locomotive engineer and section master of track repairers are not fellow servants within the rule as to masters' liability for injury by one servant to another." In *Chicago & N. W. R. Co. v. Moranda*, 108 Ill. 580, where the plaintiff, who had charge of the section of a road, was injured by a piece of coal falling from a passing train, the Supreme Court of Illinois said: "In the former opinion in this case we held that, in order to constitute servants of the same master fellow servants, within the rule *respondens superior*, it is not enough they are engaged in doing parts of the same work, or in promotion of the same enterprise, carried on by the master, not requiring co-operation, nor bringing the servants together or into such personal relations that they can exercise an influence upon each other promotive of proper caution in respect to their mutual safety, but it is essential that they shall be at the time of the injury directly co-operating with each other in the particular business in hand, or that their mutual duties shall bring them into habitual consociation, so that they may exercise an in-

fluence upon each other promotive of proper caution. We feel constrained to adhere to this ruling." In *Copper v. Mullins*, 30 Ga. 146, 76 Am. Dec. 638, the Supreme Court of Georgia said: "In this case the person whose negligence produced the injury was on one train of cars, and the person who was injured was on another train, and had not the slightest possible opportunity of preventing the other's carelessness. To hold the employes on different trains of cars responsible for the carelessness of each other seems to me about as reasonable as it would be to exact such a mutual responsibility between employes on different railroads, or in different quarters of the earth, because they might happen to be all servants of the same master." In *Hobson v. New Mexico & A. R. Co.*, (Ariz.) 11 Pac. Rep. 545, the Supreme Court of Arizona held that "a teamster who hauls ties in the construction of a railroad is not consociated with the engine driver of a train on which the workmen ride to dinner, so as to defeat his recovery against the common master for injuries caused by the negligence of the engine driver." In *Madden v. Chesapeake & O. R. Co.*, *supra*, the Supreme Court of West Virginia held that a railway company is liable for the death of the engineer on one train caused by the negligence of its conductor on another train. The circuit court of the United States for Vermont, in 1889, in *Howard v. Delaware & H. Canal Co.*, 40 Fed. Rep. 195, held that track men and train men are not fellow servants, saying: "Track men are no more collaborators with train men than the train men of one train are with those of another train on the same road, and not so much so as train men of the same train are. Those in charge of this train were placed there and clothed with authority by the defendant. They acted for the defendant in the exercise of the control given them over the movements of the train, and their negligence in that behalf appears to be the negligence of the defendant." In *Chicago, M. & St. P. R. Co. v. Ross*, *supra*, it was held that the engineer and the conductor of a train were not fellow servants. Justice Field, who delivered the opinion of the majority of the court, after reviewing the English cases in regard to the subject, said: "But notwithstanding the number and weight of such decisions, there are in this country many adjudications of courts of great learning, restricting the exemption to cases where the fellow servants are engaged in the same department, and act under the same immediate control, and holding that, within the reason and principle of the doctrine, only such servants can be considered as engaged in the same common employment."

Thus it will be seen that the *Sullivan Case* finds support in the courts of the United States,—Kentucky, Georgia, Illinois, Arizona, and West Virginia. It is in line also with the *Barry Case*, 98 Mo. 62, where it was held by this court that the engineer of a freight train was not a fellow servant of section men. Nor do I regard the *Murray Case*, 98 Mo. 578, 5 L. R. A. 735, as in conflict with it. Murray was aiding the gripman in running the cable car, and in its operations and

movements at the point of the accident evidently ranked the latter in authority. And I think there is a marked distinction to be taken between the *Sullivan Case* and the case at bar and that class of cases of which *Quebec Steamship Co. v. Merchant*, 133 U. S. 875, 88 L. ed. 656, is a type, where the master, his foreman and subordinates are all present and consociated in the performance of general work on board a ship, or in one building or one locality.

I know an attempt is made to distinguish the *Schaub Case* from the *Sullivan Case*, but to my mind the distinction tendered is without a difference in principle. The embarrassment the courts encounter in the discussion of the law of fellow service grows out of the difficulty in adopting and adhering to some general principle upon which to proceed. When the principle announced in the earlier cases, that all servants employed and paid by the common master to perform common service were fellow servants, was abandoned, the courts were left apparently with no sound principle by which they could be guided and controlled in concrete cases, and the tendency has been steadily to abrogate the rule of fellow service by the limitation of its application and introducing exceptions to it. Let us examine the *Sullivan Case*, and see if we can deduce a sound principle from it which can be applied in cases involving injuries resulting to servants from the negligence of other servants, employed by the same master to manage one general business. It is settled law that if a servant, representing his master, or standing in his stead, and being his *alter ego*, injure another servant of the same master in the performance of the same work, the master is liable upon the principle of *respondet superior* and the maxim *qui facit per alium, facit per se*. A laborer is sent to drive a spike to make firm a rail on the railroad, or to fasten a handhold on a freight car, and it is held that his hand in driving the spike or fastening the handhold is the master's hand, upon the principle that the master must furnish a clear track and safe appliances for its servants. The act of the laborer is imputed to the foreman, and through him to the master. So it has been held that one having authority to direct and control men under him represents the master, and the latter is liable for his negligent acts. Sullivan was a track walker, and was killed by the negligence of the employés in charge of a passenger train. It was held they were not fellow servants. Upon what theory? Upon the theory alone that the conductor and those employed with him in running the train represented the master, and stood in his stead. It is said Sullivan's duty was to keep the track clear, and hence he was not performing the same kind of work the train men were performing. He and the train men were engaged in the same general work,—that is, in operating traffic on a railroad. He kept the track clear while the train men ran the train on that same track. They were all employed and paid by the same master to aid in carrying on commerce on the same road, and hence it is illogical to predicate a right to recover in such case upon the ground that Sullivan and the train men were engaged in

the performance of different kinds of work. The train men were under the conductor as their immediate superior, and Sullivan was under the section foreman as his immediate superior. The conductor represented the corporation in running the train, and, in contemplation of law, it was present in the person of the conductor. The section foreman, on the other hand, represented the corporation in keeping the track clear and in suitable condition for the safe movement of the train. Hence the train men and section men were not fellow servants; not because they performed different work, but because they performed distinct parts of the same work in different groups, under different foremen. They looked to different individuals for directions in their work. They had no common, immediate superior, to whom they could look or appeal, if need be, for protection. They had no control of each other. They were not consociated in the performance of their duties. So, in the case at bar, Parker worked under the immediate direction of the section foreman, and the construction train was operated under the immediate direction of a conductor. Parker was required to obey the directions of the section foreman, and the train men were required to obey the conductor. They had no common, immediate superior, from whom to receive directions for their work. One group of men was subject to one independent will, while the other group was subject to another independent will. I do not mean that these groups of men were independent of the common master, but simply that they were independent of each other. It is true, the train was hauling material for the section men to use in constructing the roadbed. The train was, however, being operated on the road, and I cannot see why the train men's relation to the section men could be changed simply by what the former hauled. Such a distinction is arbitrary and artificial, and hence unsatisfactory. What did Parker know about the skill of the engineer or conductor in charge of the construction train? What right had he to inquire into the operation of that train? He and those in charge of that train were in no proper sense consociated in the performance of their respective duties. I am fully conscious that ample authority can be found to sustain the position, directly contradictory of the one here maintained; but, finding a conflict of opinions, I prefer to follow that line that more fully accords with my conceptions of justice and the best interests of society and of employers and employés, and now, after another quarter of a century of criticism and discussion in my own state and elsewhere of the law of fellow service, and of the reasons upon which it rests or ought to rest, I quote and heartily indorse the eloquent language of Chief Justice Robertson in the *Collins Case*, *supra*, where he says the rule announced "is the only doctrine we can recognize as consistent with the enlightened and homogeneous jurisprudence of its ripening maturity. And, looking back through the mist of the adjudged cases and elementary dicta, we can see no other fundamental principle which can mould them into a consistent or abiding

form." I stand squarely by the *Sullivan Case*, and do not hesitate to apply the principle there announced to the facts of this case, and hold that Parker was not a fellow servant of those in charge of the construction train. I think the case was well tried and the judgment ought to be affirmed.

Brace, J., concurs in the conclusion, and all that part of this opinion that treats of the principle announced in the *Sullivan Case*.

Barclay, J., delivered the following opinion:

In *Dixon v. Chicago & A. R. Co.* (Mo.) 19 S. W. Rep. 412, (Nov. 9, 1891, in division No. 1), with the concurrence of *Judges Black and Brace*, my views of some phases of the law governing the case at bar were given. It is unnecessary to repeat what was then said.

The present case comes closer than that did to the doubtful line, but yet appears to involve the same general principles then touched upon. My brother Black has formulated them with vigor and clearness in his opinion here. My only difference from him now is that, in my judgment, those principles point plainly to an affirmance, instead of a reversal. His summary of the evidence, the instructions asked by defendant at the trial, and its statement and brief in this court, indicate that the facts bearing upon the issue of fellow service are admitted. Hence this court may properly pass upon that issue as one of law only, as did the trial court, and, in my opinion, correctly. That course was followed in *Garrahy v. Kansas City, St. J. & C. B. R. Co.*, (1885,) 25 Fed. Rep. 258, a case which arose in Missouri, though tried in Kansas, which *Mr. Justice Miller* approved after full consideration. Moreover, as to that phase of the case, such action on the part of the court is but the application of a familiar principle of practice, governing the exercise of the respective functions of court and jury. Applying to the conceded facts the rules of law stated by *Judge Black*, it seems to me that the judgment should be affirmed.

Emma J. RELYEA, *Appt.*,

v.

KANSAS CITY, FT. SCOTT & GULF
R. CO. *et al.*, *Respts.*

(.....Mo.....)

*1. Those are fellow servants who are engaged by the same master and so related and associated in their work that they can observe and have an influence over each other's conduct and report delinquencies to a common correcting power; but they are not

*Headnotes by BARCLAY, J.

NOTE.—[On the subject treated in this note see also the notes to the two preceding and to the two following cases in this volume.

The injured employé, in the illustrative precedents mentioned, is usually indicated by italics.]

Common service.

Where employés work under the eye or direction of a common superior to whom a ready resort may

such if engaged in different and distinct departments of work.

2. Two freight trains were operated by orders of a train dispatcher on the same section of a railroad; some cars of the forward train escaped and ran down grade into collision with the rear train, killing the plaintiff's husband, who was on duty as fireman; the collision resulted from neglect of a brakeman on the forward train to set the brakes on the cars that escaped. *Held*, that the brakeman and fireman were fellow servants.

3. The conductor of the forward train ordered the brakeman to set out four cars from the train, and, in executing that order, the brakeman left unsecured on the track the remaining cars, which escaped. *Held*, that the conductor was not bound to follow up the brakeman to see that his orders were correctly executed, and that his omission to do so was not negligence of the company.

4. The rear freight train was running on train dispatcher's orders, ahead of schedule time when the accident occurred, but not on the time of the first train. *Held*, no evidence of negligence in operating the trains.

5. The evidence reviewed, and *held* not to support a charge of negligence in respect to the number of brakemen in charge of the forward train.

(*Brace and Thomas, JJ.*, dissent from proposition 2.)

(November 14, 1892.)

APPEAL by plaintiff from a judgment of the Circuit Court for Jackson County in favor of defendants in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by the actionable negligence of defendants' servants. *Affirmed*.

The facts are stated in the opinions.

Messrs. Crittenden, Stiles & Gilkeson and G. L. Jones, for appellant:

The court erred in holding that the conductor in charge of a section of train No. 54 was a fellow servant with the fireman of train No. 52, in such sense as to relieve the company from the negligence of said conductor in causing his train to be cut on a grade, and insecurely and without any one in charge, so leaving it that it would naturally, and did, run down the grade and collide with the train on which was plaintiff's husband.

Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377, 28 L. ed. 787; *Au v. New York, L. E. & W. R. Co.* 29 Fed. Rep. 72; *Garrahy v. Kansas City, St. J. & C. B. R. Co.* 25 Fed. Rep. 258; *Moon v. Richmond & A. R. Co.* 78 Va. 745, 49 Am. Rep. 401; *Kentucky Cent. R. Co. v. Ackley*, 87 Ky. 278, 12 Am. St. Rep. 480; *Louisville, O. & L. R. Co. v. Cavens*, 9 Bush, 559; *Louisville & N. R. Co. v. Brooks*, 88 Ky. 129; *Moore v. Wabash, St. L. & P. R. Co.* 85 Mo. 588; *Dick v. I. O. & L. R. Co.* 88 Ohio St. 389; *Levis v. St. Louis & I. M. R. Co.* 59

be had by one for the correction of negligence of a co-employé, they are held fellow servants as in the principal case.

Thus, a brakeman on freight train and the conductor and engineer of another freight train which collided with it, both moved by one train dispatcher. *Baltimore & O. R. Co. v. Reynolds* (1892), 50 Fed. Rep. 723, 6 U. S. App. 75.

Brakeman (acting as switchman) of one freight

Mo. 495, 21 Am. Rep. 885; *Calvo v. Charlotte, C. & A. R. Co.* 28 S. C. 526; *Hall v. Missouri Pac. R. Co.* 74 Mo. 298; *McDermott v. Hannibal & St. J. R. Co.* 4 West. Rep. 641, 87 Mo. 285; *Sullivan v. Missouri Pac. R. Co.* 97 Mo. 118; *Ford v. Fitchburg R. Co.* 110 Mass. 240, 14 Am. Rep. 598; *Atchison, T. & S. F. R. Co. v. Moore*, 81 Kan. 197; *Hannibal & St. J. R. Co. v. Fox*, 81 Kan. 536; *Chicago & E. I. R. Co. v. Geary*, 110 Ill. 888; *Burlington & M. R. Co. v. Crockett*, 19 Neb. 188; *Mason v. The Edison Mach. Works*, 28 Fed. Rep. 228; *Chicago & A. R. Co. v. May*, 108 Ill. 288; *Coleman v. Wilmington, C. & A. R. Co.* 25 S. C. 446, 60 Am. Rep. 516.

Plaintiff was entitled to have her case go to the jury on the issue that the train, second section of train No. 54, was insufficiently manned to do the work, of cutting the train, side-tracking four of the cars, of securely staying and guarding the portion so cut, while the other portion was being side-tracked.

Fluke v. Boston & A. R. Co. 53 N. Y. 549, 18 Am. Rep. 545; *Booth v. Boston & A. R. Co.* 73 N. Y. 38, 29 Am. Rep. 97; *Snow v. Housatonic R. Co.* 8 Allen, 441, 85 Am. Dec. 720; *Jones v. Old Dominion Cotton Mills*, 82 Va. 140, 8 Am. St. Rep. 93; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541; *Johnson v. Ashland Water Co.* 71 Wis. 553, 5 Am. St. Rep. 243.

If it should be conceded for the argument's sake that the accident was alone due to the negligence of the brakeman, Short, still in view of the advanced ground modifying the old rule as applied to the vast railroad corporations of the present time, taken by many of the leading courts of this country, and especially in view of the department rule now established in this state by the *Parker Case*, by the *Sullivan Case*, by the *Dixon Case* and other recent decisions

of this court, Short, who was on another train and in another department of the service, was not a fellow servant with the plaintiff's husband in such a sense as to deprive her of the right to recover in this action.

Messrs. Wallace Pratt, Frank Hagerman and I. P. Dana, for respondents:

The undisputed testimony showed that the collision was caused by the negligence of a brakeman on the first train. The latter was a fellow servant with the deceased, who was fireman on the second train, and therefore respondent, the common master, was not liable for the latter's death resulting from the collision, and the court properly sustained the demurrer to the evidence.

1 Shearm. & Redf. Neg. 4th ed. § 224; *Moore v. Wabash, St. L. & P. R. Co.* 85 Mo. 594; *McMaster v. Illinois Cent. R. Co.* 65 Miss. 264, 7 Am. St. Rep. 658; *Randall v. Baltimore & O. R. Co.* 109 U. S. 479, 27 L. ed. 1004; *Howard v. Denver & R. G. R. Co.* 26 Fed. Rep. 887, 24 Am. & Eng. R. R. Cas. 448; *Hewitt v. Flint & P. M. R. Co.* 11 West. Rep. 148, 67 Mich. 61, 81 Am. & Eng. R. R. Cas. 249; *Hayes v. Western R. Corp.* 8 Cush. 270; *Harvey v. New York Cent. & H. R. Co.* 32 N. Y. S. R. 817.

There is no testimony showing that the negligence of the conductor of the first train caused the collision, or that he was negligent in any way. But even if he was negligent, plaintiff cannot recover, for he was a fellow servant with her husband, a fireman on another train.

Easton v. Houston & T. C. R. Co. 33 Fed. Rep. 895; *Pittsburgh, C. & St. L. R. Co. v. Adams*, 8 West. Rep. 887, 105 Ind. 151; *McAndrews v. Burns*, 39 N. J. L. 117; *McMaster v. Illinois Cent. R. Co.* and *Howard v. Denver & R. G. R. Co. supra*.

train, and engineer of a freight locomotive. *Randall v. Baltimore & O. R. Co.* (1888), 109 U. S. 478, 27 L. ed. 1008.

A baggage-master on a passenger train in Indiana, and the conductor of another such train. *Kerlin v. Chicago, P. & St. L. R. Co.* (1892), 50 Fed. Rep. 185.

Engineer of one train killed in a collision occasioned by negligence of engineer of another, in misinterpreting an order of the train dispatcher, directing movements of both trains. *Norfolk & W. R. Co. v. Donnelly* (1882), 88 Va. 563; *Norfolk & W. R. Co. v. Lindamood* (Va.) March 24, 1892.

Conductor of a freight train and the engineer of another such train, which collided with the first by negligence of the engineer. *Enright v. Toledo, A. & N. M. R. Co.* (Mich.) Nov. 4, 1892.

Brakeman and engineer of same train under direction of a conductor. *Newport News & M. V. R. Co. v. Howe* (1892), 52 Fed. Rep. 362.

This ruling discards earlier Kentucky decisions, to the contrary, in a case arising in that state, as not being correct expositions of general law. *Louisville & N. R. Co. v. Brooks* (1885), 83 Ky. 129; *Louisville & N. R. Co. v. Moore* (1885), 83 Ky. 675.

Brakeman and engineer upon a freight train, "the conductor being in charge thereof." *Railway Co. v. Smith* (1890), 89 Tenn. 114.

Cooper v. Mullins (1890), 30 Ga. 146, 76 Am. Dec. 688, arose in 1855 (before the statute, approved March 5, 1856, Laws 1855-56, p. 155, which changed the common-law rule in Georgia as to railroads on this subject), and has been sometimes cited as holding that employes on different trains of the same company are not fellow servants; but a careful reading of the opinion reveals that the judgment was placed on a different ground, it being held by a majority of the court that in the peculiar cir-

cumstances of that case the injured engineer was to be regarded as in the service of a different master from that in whose employ the negligent operatives of the colliding train were.

So the stewardess, carpenter, and porter on a steam vessel, though in different departments of service on the vessel, are fellow servants, where "the master or captain was in command of the whole vessel." *Quebec S. S. Co. v. Merchant* (1890), 138 U. S. 375, 33 L. ed. 656.

And a cook on a steam-tug and engineer, by whose negligence the tug blew up, "where the master is on board." *Grimsley v. Hankins* (1891), 46 Fed. Rep. 400.

A "shoveler," belonging to a section gang, was injured by a negligent movement of the locomotive attached to a work train. It was held that the negligence was that of a fellow servant, where the sectionmen "with the engineer, fireman, and brakeman, with this engine and train of cars, were there together, engaged in one common enterprise, that of hauling dirt with the train and filling it in, on the roadbed." *Parrish v. Pensacola & A. R. Co.* (1891), 28 Fla. 251.

A stone mason and bridge carpenters, "engaged together, at the same place, in a work that required co-operation and such association as would bring them in frequent contact with each other," where they were all participating in the building of a bridge, though the mason was directed by a different foreman from the one superintending the carpenters. *Bier v. Jeffersonville, M. & I. R. Co.* (Ind. Sup.) May 24, 1898.

Longshoreman assisting in unloading a cargo, and the operative of the hoisting machinery of the steamship when both were working. *McDonough v. Walsh* (1892), 49 N. Y. S. R. 361.

That Relyea, the fireman on one train, was a fellow servant with Short, the brakeman on the other train, there can be no doubt under all the authorities.

Farwell v. Boston & W. R. Corp. 4 Met. 49, 38 Am. Dec. 889.

The Supreme Court of Ohio, which has encroached in its decisions further upon the fellow-servant doctrine, as held by the overwhelming weight of authority in England and this country, than any other appellate court, except that of Kentucky, decided in *Pittsburgh, Ft. W. & C. R. Co. v. Devinney*, 17 Ohio St. 198, as follows: "A railway company is not liable in damages to a brakeman on one of its trains for injuries sustained by him in a collision of his train with another train of the same company, where the collision occurred by means of the negligence of the conductor or engineer, or both, of such other train; unless it appear that the company was guilty of a want of ordinary care in the selection and employment of an incompetent conductor or engineer, through whose negligence the collision occurred."

See also *Naylor v. New York Cent. & H. R. Co.* 38 Fed. Rep. 801; *Wright v. New York Cent. R. Co.* 25 N. Y. 562; *Slater v. Jewett*, 85 N. Y. 61, 29 Am. Rep. 627; *Hutchinson v. York, N. & B. R. Co.* 5 Exch. 341; *Greenwald v. Marquette, H. & O. R. Co.* 49 Mich. 197; *Nashville, O. & St. L. R. Co. v. Wheelless*, 10 Lea. 741, 15 Am. & Eng. R. R. Cas. 315; *Miller v. Southern Pac. R. Co.* 20 Or. 285.

While this court has not had the question before it exactly as raised in the case at bar, yet we think the tenor of all of its decisions on the fellow-service question supports our contention.

Moore v. Wabash, St. L. & P. R. Co. 85 Mo. 594; *McGowan v. St. Louis & I. M. R. Co.* 61 Mo. 532; *Kersey v. Kansas City, St. J. & C. B. R. Co.* 79 Mo. 362; *Murray v. St. Louis Cable & W. R. Co.* 5 L. R. A. 785, 98 Mo. 573; *Sherrin v. St. Joseph & St. L. R. Co.* 103 Mo. 378; *Schaub v. Hannibal & St. J. R. Co.* 106 Mo. 74.

In *Slater v. Jewett*, 85 N. Y. 61, 29 Am. Rep. 627, a fireman on one train, killed by the negligence of a conductor of another, was held to be a fellow-servant with the latter.

Wright v. New York Cent. R. Co. 25 N. Y. 562; *Hayes v. Western R. Corp.* 3 Cush. 270.

And the following cases, although differing somewhat in their facts from this, support our position fully:

Easton v. Houston & T. O. R. Co. 32 Fed. Rep. 895; *Naylor v. New York Cent. R. Co.* 38 Fed. Rep. 801; *Pittsburgh, O. & St. L. R. Co. v. Adams*, 8 West. Rep. 387, 105 Ind. 151; *Hewitt v. Flint & P. M. R. Co.* 11 West. Rep. 148, 87 Mich. 61, 81 Am. & Eng. R. R. Cas. 249; *Nashville, O. & St. L. R. Co. v. Wheelless*, 10 La. 741, 15 Am. & Eng. R. R. Cas. 315; *Harvey v. New York Cent. & H. R. Co.* 32 N. Y. S. R. 817.

The conductor and fireman on different trains, as in this case, come within those definitions of fellow service and common employment as to which all the text-writers and all the courts (except Kentucky) agree.

1 Shearm. & Redf. Neg. § 224; *Randall v.* 18 L. R. A.

Baltimore & O. R. Co. 109 U. S. 478, 27 L. ed. 1003; *McAndrews v. Burns*, 39 N. J. L. 117; *Sherrin v. St. Joseph & St. L. R. Co.* 103 Mo. 378; *Moore v. Wabash, St. L. & P. R. Co.* 85 Mo. 588; *Schaub v. Hannibal & St. J. R. Co.* 106 Mo. 74.

An engineer killed through the negligence of a switchman in misplacing switch was held to be a fellow servant of latter.

Naylor v. New York Cent. R. Co. 38 Fed. Rep. 801.

To the same effect are the following:

Roberts v. Chicago, St. P. M. & O. R. Co. 33 Minn. 218; *Brown v. Central Pac. R. Co.* 68 Cal. 174; *Slattery v. Toledo & W. R. Co.* 23 Ind. 83; *Walker v. Boston & M. R. Co.* 128 Mass. 10; *Miller v. Southern Pac. R. Co.* 20 Or. 285; *Chicago, R. I. & P. R. Co. v. Henry*, 7 Ill. App. 323; *Harvey v. New York Cent. & H. R. Co.* 32 N. Y. S. R. 817; *Howard v. Dence & R. G. R. Co.* 26 Fed. Rep. 887, 24 Am. & Eng. R. R. Cas. 448; *Ohio & M. R. Co. v. Rodd*, 38 Ill. App. 627; *Peaslee v. Fitchburg R. Co.* 153 Mass. 155.

Black, J., delivered the opinion of the court:

The plaintiff brought this suit as the widow of Johnson Relyea to recover damages because of the death of her husband who received injuries while in the employ of the defendant, and from which injuries he died. The trial court sustained a demurrer to the plaintiff's evidence, and she took a nonsuit, with leave, etc. In support of this ruling it is insisted that plaintiff's husband received the injuries which caused his death by reason of the negligence of a fellow servant, and for this reason the defendant is not liable. The evidence produced by the plaintiff discloses the following facts: At the time of the accident that part of the plaintiff's road extending from Thayer in a northwest direction for a distance of 138 miles to Springfield constituted a division. Two through freight trains, known as "section 1" and "section 2" of No. 54, left Thayer for Springfield at 2 or 3 o'clock in the morning. Each of these trains had a conductor and two brakemen, besides an engineer and fireman. They were followed by local freight train No. 52, which had in charge of it a conductor, three brakemen, an engineer, and a fireman. The plaintiff's husband was fireman on the engine of this train 52, which was the last of the three to leave Thayer. The distance from Thayer to a station called "Burnham" is 41 miles, and it is four miles from there to the next station, called "Willow Springs." From Burnham to the latter station there is a down grade for about half the way, and then an up grade to the switch at Willow Springs. Section 2 of train No. 54 was in the rear of section 1, and had fourteen or fifteen cars when it reached Burnham. It took on four more cars at that place. When it reached Willow Springs, the conductor concluded to drop four cars on the switch, because the train was too heavy to haul over the up grade from there to Sterling, the next station; and to that end the engine and four forward cars were uncoupled, leaving

the fourteen cars standing on the main track. These fourteen cars ran back of their own momentum towards Burnham, and collided with train 52, which had in the meantime left that station for Willow Springs. It was in this collision that plaintiff's husband received the injuries of which he died. Frank Shea was the conductor, Austin the head, and Short the hind brakeman on section 2 of train 54. The plaintiff called Shea and Austin as witnesses, and they are the only witnesses who have any knowledge of what occurred at Willow Springs. Shea, the conductor, says when he reached Willow Springs with his train he directed Short, the rear brakeman, to cut out four cars; that Short went to assist the engineer in setting them in on the side track; that it was Short's duty to see that the hind end of the train was secured with the brakes. From Austin's testimony it appears section 1 of train 54 was at Willow Springs when section 2 arrived. He and his conductor, Shea, had a conversation at that place on the station platform, in which Shea told him to go on to Sterling, the next station with section 1, and there notify train No. 3, coming from the other direction. This order was given to avoid a collision between No. 3 and section 2. Austin got on the caboose of section 1, and that train started up, and then stopped. It seems the engineer of section 1 refused to take the chances of reaching the next station in time to pass No. 3. Austin then went back to the head of his train, and met Shea and Short, when Shea said: "Go after the hind end; they have run back." He and Short, with the engineer and the four cars, went back after the escaping fourteen cars. These cars ran back because the brakes were not set. It was still very dark when all these things took place at Willow Springs.

1. From the foregoing statement of the facts it is manifest that Short, the hind brakeman on section 2 of train 54, was guilty of negligence in not setting the brakes on some of the fourteen cars before he cut out the four cars. The question then arises whether the brakeman on one of these trains and the fireman on the other were fellow servants within the rule which exempts the master from liability when one servant is injured by the negligence of his coservant. Much has been said on this subject of late in the following cases: *Sullivan v. Missouri Pac. R. Co.* 97 Mo. 113; *Dixon v. Chicago & A. R. Co.* (Mo.) 19 S. W. Rep. 412; *Parker v. Hannibal & St. J. R. Co.* (Mo.) 19 S. W. Rep. 1119; *Schlereth v. Missouri Pac. R. Co.* (Mo.) 19 S. W. Rep. 1184. These cases reject the rule of exemption as it is often broadly stated, though less frequently applied, that all are coservants who are engaged by the same master in carrying on some general enterprise, no matter how different and disconnected the work may be. They assert the more reasonable and just rule that they are coservants who are so related and associated in their work that they can observe and have an influence over each other's conduct, and report delinquencies to a common correcting power; and they are not coservants who are

engaged in different and distinct departments of work. They show that track walkers and track repairers and persons operating a stone crusher are not fellow servants with those engaged in operating trains. Now, in this case each servant was under the immediate command of his own conductor. It is true: but that fact does not constitute a decisive or controlling circumstance. Many cases may be instanced where different gangs of men, each gang under the orders of its own foremen, are clearly coservants within the rule of exemption. It does appear in this case that train 52 left Thayer and pursued its trip under the orders of the train dispatcher, and it is fair to presume that the other trains made their trips under orders emanating from the same source. The injured and offending servants were operating trains over the same section of the road. Though sometimes far apart, they were necessarily thrown into close relation in respect to the performance of their work, and they were engaged in the same department of service. They were, in our opinion, coservants, within the fair meaning of the rule of exemption, so that defendant is not liable for injuries inflicted by one upon the other. This case, is, on its unquestioned facts, unlike those above mentioned. It is more like *Schaub v. Hannibal & St. J. R. Co.*, 106 Mo. 74. In that case a brakeman was injured by cars standing on a side track. Says the court: "There was no evidence of any negligence in the case of any one except the train men who put the cars on the switch, and for that negligence the company was not liable to the deceased." That case was, in its facts, different from those before mentioned, where the relation of fellow servant was held not to exist, and, in the opinion of the writer, it is not in conflict with them in the conclusion reached on this subject.

2. But it is insisted on the part of the plaintiff that the liability of the defendant may be made to stand on the ground that the conductor of the forward train was an agent and representative of the defendant; that he was guilty of negligence leading to the injury; and that the defendant is liable for his negligence, he being an agent and vice principal of the company. This presents, of course, a different question from that which we have been considering. The first inquiry is, Was there evidence tending to show negligence on his part? If not, that disposes of this whole contention. If Conductor Shea was negligent, it was because he knew, or, in the discharge of his duties, ought to have known, that the 14 cars had not been secured. He was called to the stand by the plaintiff, but not questioned as to the details of the transaction. The only inference that can be drawn from his testimony and the evidence of Austin, the head brakeman, is that Shea was standing on the station platform, and there told Short, the hind brakeman, to cut out the four cars, and place them on the side track. Short undertook to obey this order, but in doing so failed and neglected to set the brakes on the cars left on the main track. There is no evidence

in the case tending to show that Shea knew that Short had not secured those cars by setting some of the brakes. The only inference which can be drawn from the evidence is that he was not with Short when the forward cars were cut out. We then come to the further inquiry whether it was his duty to know whether the other cars had been secured. The proof shows, and there is no evidence to the contrary, that it was Short's duty, as hind brakeman, to look out for his end of the train. It was necessary and proper for the conductor to go to the station, and to give orders as to the movement of the train, but it is out of all reason to say that he was in duty bound to follow up each brakeman, and see how each movement was executed. There is, in our opinion, no evidence to show, or tending to show, that the conductor was guilty of any negligence whatever. It is again insisted that the defendant was negligent in that the rear train was run ahead of schedule time by orders from superior officers, without giving the conductor of the forward train notice thereof. The evidence shows that No. 52—the rear train—reached Burnham 48 to 55 minutes ahead of its schedule time, and that it made the gain in time pursuant to orders from superior officers, without notice to the conductor of the forward train. But it also appears that it was no uncommon thing for these trains to run ahead of their schedule time when ordered so to do, and that it was not usual or necessary to notify the conductor of the forward train of that fact. Specials were to be expected at all times. There is no evidence that No. 52 was ordered to run on the time of the forward trains. We do not see any evidence of negligence in this respect. Besides all this, the fact that this train was running in advance of its regular time was not the cause of the accident. The direct and only cause was the negligent act of the brakeman in failing to secure the cars at Willow Springs.

4. The further point is made that defendant was negligent in this, that it did not man the forward train with a sufficient number of brakemen. These trains were operated at a slow rate of speed, not exceeding fifteen miles per hour. Three brakemen were allotted to the local freight trains, because it was necessary to handle cars at the way stations. Two were allotted to the through freight trains, and the proof is that they were sufficient to handle such trains composed of fifteen or eighteen cars. Use could have been made of another brakeman at this particular time, but the fact remains that two brakemen and a conductor constituted the usual and a sufficient crew for all ordinary occasions. There is no proof in the case to justify a conclusion that this train was not manned with a sufficient number of brakemen. It is sufficient to say in conclusion that from the evidence produced by the plaintiff this accident occurred solely by reason of the negligence of the brakeman. The court therefore did not err in sustaining the demurrer to the evidence, and the judgment is affirmed.

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Brace and Thomas, JJ., dissent. The other Judges concur; **Barclay, J.**, expressing his views in note below, by him written.

Barclay, J., concurs, except that he does not wish to be understood as approving the judgment in the *Schaub Case*, 106 Mo. 74.

Thomas, J., dissenting:

I find myself unable to concur in the foregoing opinion. The party killed and the negligent brakeman were not, in my judgment, fellow servants, within the rule that exempts the master from liability for the negligence of a coservant. I think the principle announced in *Sullivan v. Missouri Pac. R. Co.* 97 Mo. 113; *Dixon v. Chicago & A. R. Co.* (Mo.) 19 S. W. Rep. 412; and *Parker v. Hannibal & St. J. R. Co.* (Mo.) 19 S. W. Rep. 1119,—should be applied to and control the decision in this case. The rule, I concede, was not, in those cases, formulated in the same language by the four concurring judges, but the principle upon which the rule was made to rest was announced by all substantially alike. Judge Barclay, in the *Dixon Case*, in holding a railroad company liable for the death of a workman engaged in its quarry, caused by the negligence of one of its engineers, said, "the master had seen fit to place the deceased quarryman and the train men under supervision and management totally apart from each other. They were not acting under the same immediate control." *Missouri Pac. R. Co. v. Mackey*, (1888,) 127 U. S. 208, 32 L. ed. 108. Each looked to a different individual as the master's representative for directions in his work, and had no practical connection with the superior who guided and supervised the acts and conduct of the other." Judge Black, in the *Parker Case*, in holding the company liable for the death of a trackman, caused by the negligence of the engineer, stated the rule with great terseness and precision thus: "Guided by the real reason for the rule, it seems to us it should be applied, and applied only, in those cases where the servant injured and the one inflicting the injuries are so associated and related in their work that they can observe and have an influence over each other's conduct, and can report delinquencies to a common correcting power or head. In short, they should be fellow servants in fact, and not simply in dialectic theory. If in separate and distinct departments, so that the circumstances just stated do not and cannot exist, then they are not fellow servants, within any just and fair meaning of the rule." (The italics in these extracts are mine.) And in the opinion in this case the rule is again stated in substantially the same language. The rule, as stated by myself in the *Parker Case*, and in which Judge Brace concurred, is this: "The train men and section men were not fellow servants; not because they performed different work, but because they performed distinct parts of the same work, in different groups, under different foremen. They looked to different individuals for directions in their work. They had no com-

mon, immediate superior, to whom they could look or appeal, if need be, for protection. They had no control of each other. They were not consociated in the performance of their duties." In these extracts we find a difference in the statement, but not in the principle and grounds, of the rule. A distinction is attempted to be made between laborers in different departments of service, but I think the distinction is wholly an artificial one, and cannot be upheld without abandoning all the grounds on which the rule is made to rest. If those are not fellow servants who are not "so associated and related in their work that they can observe and have an influence over each other's conduct, and can report delinquencies to a common correcting power or head," or who do not act "under the same immediate control," why should the liability or nonliability depend on the nature of the work done? Why hold a railroad company liable when a section man is injured by the negligence of an engineer, or when a trackman, who tamps rock under the rails and ties, is injured by the negligence of an engineer, who is engaged in hauling the rock thus being tamped, on the ground that these employes are not so associated and related in their work, under a common, immediate superior, as to observe and have an influence over each other's conduct, and let the company escape liability where the fireman on one train is injured by the negligence of a brakeman on another, when they are not so associated and related in their work, under a common, immediate superior, as to observe and have an influence over each other's conduct? I must confess I am unable to see or appreciate the distinction. This distinction cannot be based on the ground of public policy, general convenience, or expediency, for that would apply to all, without regard to the departments of the service or rank among the employes; and, besides that, I think this court has repudiated that ground as a support for the rule of exemption. The distinction cannot be made to rest on an implied contract of the assumption of risks, for that, like the other, would apply to all employes, without regard to rank, and without regard to the departments of service. I prefer to rest the rule on the grounds, fairly deducible, in my opinion, from the cases above named, *i. e.*, upon such association of employes in the master's work, under a common, immediate superior, to whom they can look for protection, as that they can observe the conduct of each other, and mutually encourage and influence each other in the careful and faithful performance of that work. Thus far I feel justified in going from a consideration of the decisions and grounds of decisions in the *Sullivan, Dizon, and Parker Cases*, alone; but my position finds support elsewhere, for to such limitation of the rule of exemption on the ground of fellow service as herein stated the judicial mind seems to be trending, as illustrated in the following cases: *Kentucky Cent. R. Co. v. Ackley*, 87 Ky. 278, 12 Am. St. Rep. 480; *Cooper v. Mullins*, 30 Ga. 146, 76 Am. Dec. 638; *Hobson* 18 L. R. A.

v. New Mexico & A. R. R. Co. (Ariz.) 11 Pac. Rep. 545; *Madden v. Chesapeake & O. R. Co.* 28 W. Va. 610, 57 Am. Rep. 695; and *Howard v. Delaware & H. Canal Co.* 40 Fed. Rep. 195.

Let us apply the rule thus announced to the facts of the case in hand. (1) Relyea and the rear brakeman on the forward train were not consociated in their work, so they could observe each other's acts, and have an influence over each other's conduct. They were miles apart. (2) They did not work under a common, immediate superior. They were under the direction and control of independent conductors, not, it is true, independent of their common superior, but simply independent of each other. And, conceding the propriety of reporting delinquencies, they had no opportunity of reporting the misconduct of each other, nor did they have a common, immediate superior, to whom they could have reported, had they so desired, each being under the supervision and control of an independent and separate conductor. Hence every ground on which the rule announced by a majority of this court in the *Sullivan, Dizon, and Parker Cases* is made to rest is here wanting, and yet the defendant company is exempted from liability on the ground that the rule applies to co-servants engaged in the same line or kind of service, without regard to consociation in their work or common supervision and control. It seems to be assumed, though not expressly, in the opinion of the court, that liability would have attached in this case if the death of Relyea had been caused by the negligence of the conductor of the forward train. I pause to inquire upon what theory such liability can be predicated. As to deceased, the conductor and members of the crew of that train occupied the same relation as to rank, precisely, and no other. None of them had any control or authority to direct the movements of the conductor and members of the crew of the rear train. Here were two distinct groups of men, controlled and directed by two conductors wholly independent of each other, not consociated in their work, and widely separated by distance. But these distinct, and, as to each other, independent, groups were under the control of a common superior, said in the opinion to be the train dispatcher, and, if he was the common, immediate superior, not only of the conductors, but also of the other members of the crew, and the firemen and brakemen of these trains were required to look for orders and directions, not to their respective conductor, but to the train dispatcher, then, according to the reason of the rule, it logically follows that the conductor of the forward train, with the members of his crew, was a fellow servant of deceased; nay, more, the conductor of the rear train would likewise be his fellow servant. That the latter proposition is not the law I think will be conceded without argument or citation of authority, and the correctness of the former seems in the opinion to be denied, at least by implication; and yet defendant is exempted from liability, apparently, because

the injury resulted from the negligence of one servant holding the same rank in one crew that the deceased held in the other, both being engaged in the same line or kind of service, i. e., both being engaged in the operation of trains. But, according to the adjudged cases, nonliability cannot be predicated upon the rank alone of the offending and injured servants. It is true the offending servant here was a subaltern, but so were the engineers in the *Sullivan*, *Dixon*, and *Parker Cases* subalterns,—that is, they were inferior in rank in the groups in which they respectively did service; and yet in those cases it was not supposed that the master was, therefore, exempted from liability. They had charge of their engines, subject to the order of their conductors; and the hind brakeman of the forward train in this case had charge of the fourteen cars, subject to the orders of his conductor. In neither case was the conductor required or expected to go and personally see that the engine was properly managed on the one hand, or the brakes properly set on the other. The engineers and brakemen were required to perform their duties without direct, immediate, and constant oversight. If the master is present in the persons of his engineers, and their negligent acts are his, why is he not present also in the persons of his brakemen, and why are their negligent acts in setting brakes not his? If an engineer under the control of the conductor is the agent of the master in the management of that part of the train (the engine) of which he has charge, upon what principle can it be said the brakeman in this case, under the control of the conductor, was not the agent of the master in his conduct in relation to that part of the train (the fourteen cars) committed to his charge? Whose act was that brakeman's act in setting the brakes on these fourteen cars? It certainly was not the conductor's for it is conceded that "it is out of all reason to say that he [the conductor] was in duty bound to follow up each brakeman, and see how each movement was executed;" nor was it the brakeman's act alone, for he did not own the road nor the cars, but was simply acting under orders for the owner. Then, whose act was it? Beyond controversy it was the act of the company. The company ran the train, and it would be absurd to say that it, through its engineer, opens and closes the throttle of the engine, and opens and closes the valve of the whistle, but it has nothing to do with setting and loosening the brakes, or that the order of the conductor to set the brakes is the order of the company, but the act of setting them in obedience to its order is not its act. Following, therefore, the rule, and the true reason of the rule, as heretofore stated by four of the seven judges of this court, I have no hesitancy in saying that the offending and injured servants in this case were not fellow servants, and the judgment ought to be reversed, and the cause remanded for new trial. I am authorized to say that *Brace, J.*, concurs with me in these views.

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William RUSS, *Resp.*,
v.

WABASH WESTERN R. CO., *Appt.*

(.....Mo.....)

- *1. Plaintiff was one of a section gang on a hand-car under orders of the section foreman; the latter had placed an empty keg on the car before it started, and after sitting upon the keg awhile, arose, while the car was moving, and began to help the men operating the levers, leaving the keg, unsecured, near the front end of the car; the keg soon fell off and threw the hand-car from the track, inflicting injury on plaintiff. *Held*, that the foreman was charged with the master's duty of reasonable care for the safety of the workmen, and that the above facts tended to show negligence in the performance of that duty, in the circumstances stated in the opinion.
2. The foreman in the case above stated was not a fellow servant with the plaintiff.
3. In the discharge of the master's duties toward the men in his employ, the master is liable for negligent acts of his representative as well as for negligent orders of the latter.
4. It is error to permit the submission to experts of hypothetical questions, assuming facts which the evidence does not tend to establish.
5. Such error is not cured by subsequent action of the adverse party in submitting other hypothetical questions, similarly objectionable.

(November 14, 1892.)

A PPEAL by defendant from a judgment of the Circuit Court for St. Charles County

*Headnotes by BARCLAY, J.

NOTE.—(On the points discussed in this note, see also the notes to the three cases preceding and to the next one following.

Italics are used in noting cases to point out the party injured in each instance.)

Negligent superiors.

1.

In the cases following, the courts (except as otherwise stated) have held the master liable for injuries sustained by one employé by reason of negligence of a superior in rank, and thus that they were not fellow-servants:

Laborers in a mine and the "mine boss" or superintendent in general charge of the mining operations. *Ryan v. Bagaley* (1893), 50 Mich. 179, 45 Am. Rep. 38; *Rima v. Rossie Iron Works* (1890), 120 N. Y. 433; *Quincy Coal Co. v. Hood* (1875), 77 Ill. 68. But such a "boss" with power to hire and discharge and a *miner* under his orders were held fellow servants in *Gilmore v. Oxford Iron & N. Co.* (N. J.) Nov. 8, 1892, and in *Haley v. Keim* (Pa.) Oct. 3, 1892.

A *carman* in a mine and the foreman in charge of the mine were held not fellows in *Kalley v. Cable Co.* (1897), 7 Mont. 70.

Carpenter employed to work at a coal mine, and the mine foreman under whose orders the former was placed. *Miller v. Union Pac. R. Co.* (1892), 4 McCrary, 115.

"*Top-Miller*" in a blast furnace, and the head engineer under whose orders the former was working when injured. *Fox v. Spring Lake Iron Co.* (1891), 89 Mich. 387.

in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from the negligence of defendant's servant. *Reversed.*

The facts are stated in the opinion.

Messrs. F. H. Lehmann and George S. Grover, for appellant:

The demurrer to the evidence should have been sustained, as the evidence simply disclosed the happening of an unfortunate accident without any fault whatever on the part of the defendant.

Lee v. Detroit Bridge & Iron Works, 62 Mo. 565; *Marshall v. Schricker*, 63 Mo. 312; *Bowen v. Chicago, B. & K. O. R. Co.* 14 West. Rep. 744, 95 Mo. 268; *Cooley, Torts*, 2d ed. p. 91, and cases cited; *Schaub v. Hannibal & St. J. R. Co.* 106 Mo. 74; *Steffenson v. Chicago, M. & St. P. R. Co.* (Minn.) Feb. 1, 1892; *St. Louis, A. & T. R. Co. v. Lemon* (Tex.) Jan. 26, 1892.

For a purely accidental occurrence, causing damage without the fault of the person to whom it is attributable, no action will lie, for though there is damage the thing amiss, the *injuria*, is wanting.

Cooley, Torts, 2d ed. p. 91, and cases cited.

Messrs. Nat. C. Dryden and T. J. Rowe, for respondent:

Plaintiff made a prima facie case.

Louisville & N. E. Co. v. Northington (Tenn.) 16 L. R. A. 268; *Dowling v. Allen*, 74 Mo. 14, 41 Am. Rep. 298; *McDermott v. Hannibal & St. J. R. Co.* 4 West. Rep. 641, 87 Mo. 287; *Moore v. Wabash, St. L. & P. R. Co.* 85 Mo. 588; *Hoke v. St. Louis, K. & N. R. Co.* 4 West. Rep. 69, 88 Mo. 369.

The proximate cause of plaintiff's injuries was the carelessness and negligence of Wm. Bizenberger, a section foreman, under whom

plaintiff was working, in placing a water keg on the front part of a hand-car, and in failing and neglecting to secure and fasten same so that it would not fall in front of the car, and in promising to sit on same so that it would not fall off, and after such promise neglecting to hold the keg on the car by sitting upon it and thereby allowing it to fall in front of car, derail the car and without notice or warning to plaintiff throw him off the car on his head.

Miller v. St. Louis, I. M. & S. R. Co. 7 West. Rep. 122, 90 Mo. 389; *Weber v. Kansas City C. R. Co.* 7 L. R. A. 822, 100 Mo. 194; *Forney v. Geldmacher*, 75 Mo. 113.

Wm. Bizenberger was not plaintiff's fellow servant. He was defendant's vice principal.

Gulf, O. & F. S. R. Co. v. Wells (Tex.) June 2, 1891; *Dowling v. Allen*, 74 Mo. 14, 41 Am. Rep. 298; *Patton v. Western N. O. R. Co.* 96 N. C. 463; *McDermott v. Hannibal & St. J. R. Co.* 4 West. Rep. 641, 87 Mo. 287; *Smith v. Peninsular Car Works*, 60 Mich. 501; *Wabash, St. L. & P. R. Co. v. Hawk*, 10 West. Rep. 137, 121 Ill. 259; *Gilmore v. Northern Pac. R. Co.* 18 Fed. Rep. 866; *Chicago & A. R. Co. v. May*, 108 Ill. 288; *Moore v. Wabash, St. L. & P. R. Co.* 85 Mo. 588; *Hoke v. St. Louis & N. W. R. Co.* 4 West. Rep. 69, 88 Mo. 369; *Louisville & N. R. Co. v. Northington* (Tenn.) 16 L. R. A. 268.

Black, J., delivered the opinion of the court:

This was an action to recover damages because of personal injuries received by the plaintiff while in the employ of the defendant company. The plaintiff and four other persons were section hands, and were all under the orders of one Bizenberger, who was

Head "tracklayer," having power to hire, discharge and direct men, and a section man, injured in consequence of negligence of former in overloading flat cars with laborers, etc. *Colorado M. R. Co. v. O'Brien* (1891), 16 Colo. 219.

"Chief foreman" of a gang of laborers, where one of the latter was hurt by the negligent movement of a locomotive by order of the foreman. *Nall v. Louisville, N. A. & C. R. Co.* (1891), 129 Ind. 268.

Section foreman and a laborer, riding together on a hand-car, where the latter was hurt by the negligent act of the former in suddenly checking the car without warning, thus bringing it into collision with one closely following it. *Northern Pac. R. Co. v. Peterson* (1892), 51 Fed. Rep. 182, 4 U. S. App. 674. [But *Justice v. Pennsylvania Co.* (1892), 130 Ind. 321, is to the contrary.]

The foreman of railroad repair shops and a section-hand, working in a wrecking crew under orders of the former. *Borgman v. Omaha & St. L. R. Co.* (1890), 41 Fed. Rep. 667, per Brewer and Shiras, JJ.

A foreman in charge of the building of a railroad trestlework and a laborer under his orders. (Caldwell, Ch. J., and Thayer, J.; Hallett, J., dissenting). *Woods v. Lindvall* (1891), 4 U. S. App. 49, 48 Fed. Rep. 62. [But the same case had previously been decided to the contrary by the Supreme Court of Minnesota. *Lindvall v. Woods* (1889), 4 L. R. A. 793, 41 Minn. 212, 30 Am. & Eng. R. R. Cas. 339, with valuable note on this general subject.]

Foreman, who prepares material for use and directs laborers in their work, and laborer under him held not co-servants. *Sullivan v. New York, N. H. & H. R. Co.* (Conn.) 1892.

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In *Coyne v. Union Pac. R. Co.* (1890), 133 U. S. 370, 33 L. ed. 651, it is assumed that a foreman of a section gang is not to be regarded as a fellow servant of the laborers under his direction; but the court finds that there was no negligence on the part of the foreman in that case. On this latter point compare *Gulf, O. & F. S. R. Co. v. Brentford* (1891), 79 Tex. 619.

A section laborer, loading poles under direction of the assistant roadmaster, is not a fellow servant of the latter. *Harrison v. Detroit, L. & N. R. Co.* (1890), 7 L. R. A. 623, 79 Mich. 409, 41 Am. & Eng. R. R. Cas. 368, with note.

Conductor of switching crew injured in a switch frog, left unblocked by negligence of the yard master. *Ashman v. Flint & P. M. R. Co.* (1892), 90 Mich. 567.

Laborer on gravel train and the foreman and conductor of the train; former hurt in obeying order of latter. *Erickson v. Milwaukee, L. S. & W. R. Co.* (Mich.) Nov. 4, 1892.

Section laborer and the assistant roadmaster, directing the former and others in unloading rails from cars. *Palmer v. Michigan Cent. R. Co.* (Mich.) Oct. 27, 1892.

Roadmaster and sectionman of his working crew. *Atchison, T. & S. F. R. Co. v. Wilson* (1891), 43 Fed. Rep. 57, 4 U. S. App. 25.

Section foreman and laborer under his direction, injured, while on a hand-car, which collided with an extra train. *Gregory v. Ohio River R. Co.* (1893), W. Va.

Foreman in charge of removing a barge from the water, and laborer in his crew, injured by breaking of defective rope selected by foreman. *Lund v. Hersey Lumber Co.* (1890), 41 Fed. Rep. 202.

their foreman. The foreman and his men, including the plaintiff, were out on the road at work at a point west of O'Fallon. Preparatory to going east to O'Fallon, they placed their tools and a water keg on a hand-car, and then started. The keg was large enough to hold ten gallons, and on their way it rolled off in front of the car. It threw the car and the plaintiff and the other men off the track, and he was seriously and permanently injured. He was removed to a hospital in St. Louis, where he remained five days. At the expiration of that time he went to the defendant's office in St. Louis, where he executed a writing, whereby, for the consideration of one dollar and re-employment by defendant for such time only as might be satisfactory to defendant, he released defendant from all claims he might have for damages because of the injuries so received. The defendant answered by setting up, among other things, the release. To this the plaintiff made reply by admitting that he executed the same, and by alleging that at the time he signed it his mind was so impaired from the injuries which he had received that he did not know what he was signing. The complaint, and the only one, arising out of the pleadings and trial, as to this particular issue, is that the court erred in admitting certain expert evidence. The plaintiff produced several physicians, and his counsel propounded to them lengthy hypothetical questions, one covering seven pages of printed matter. The defendant objected to this question on the ground that it assumed facts not proved, and because it was wholly incompetent. In stating the facts from which the witness is asked to give his professional

opinion, the question sets out at great detail the incidents and circumstances which it is assumed occurred at the defendant's office at the time the contract was signed. There was no evidence produced in the cause showing, or tending to show, that such incidents and circumstances occurred, and for this reason the question should have been excluded. Counsel, in propounding a hypothetical question to an expert witness, may assume any state of facts which the evidence tends to establish, and may vary the questions so as to cover and present the different theories of fact. But there must be evidence in the case tending to establish all of the facts stated in the question. If the question assumes any fact which the evidence does not tend to prove, it should be excluded. Rogers says: "To allow, on the direct examination, a hypothetical question to be put which assumes a state of facts not warranted by the testimony, is error, and counsel will never be permitted to embrace in one hypothetical question anything which the testimony does not either prove or tend to prove." Rogers, *Expert Testimony*, 2d ed. § 27. The following cases and many others are to the same effect: *Williams v. Brown*, 28 Ohio St. 547; *Muldoney v. Illinois Cent. R. Co.* 39 Iowa, 615.

Again, the question does not, in many respects, state the facts, but leaves it to the expert witness to say what the facts are, that is to say whether the witnesses testified to the truth. Thus it states that the plaintiff appeared at the railroad office five days after the reception of the injury, with a letter signed by the physician in charge of the hospital, "which physician says he never

Master mechanic in charge of car shops and a machinist, injured by negligence of the former in pulling an "equalizer" out of its proper position. *Taylor v. Evansville & T. H. R. Co.* (1899), 6 L. R. A. 584, 121 Ind. 124, 41 Am. & Eng. R. R. Cas. 437, with note.

A locomotive engineer and the train dispatcher who directed the movements of the train on which the former was on duty. *McCheesney v. Panama R. Co.* (1892), 49 N. Y. S. R. 148.

2.

On the other hand, in the following instances, the courts have ruled that superior servants were co-employees of the others named.

A blacksmith and an assistant to the superintendent, who was, at the time, working along with the blacksmith in a gang of men, putting in a splice block of a railroad crossing. *McBride v. Indianapolis F. & S. Co.* (Ind. App.) Nov. 29, 1892.

Superintendent of a reservoir company and a workman injured by the fall of a derrick. *McGinty v. Athol Reservoir Co.* (1892), Mass.

Foreman of a gang and a laborer under his orders, injured by negligence of the former. *Ell v. Northern Pac. R. Co.* (1891, N. Dak.) 12 L. R. A. 97. This case furnishes a number of illustrations of rulings on this subject.

In Texas, conductor and brakeman of the same train (*Corona v. Galveston, H. & S. A. R. Co.* (Tex.) Oct. 21, 1891); a laborer and the engineer and conductor of the train (*Galveston, H. & S. A. R. Co. v. Arispe* (1891), 81 Tex. 517) were held fellow servants, in cases arising before the "Fellow Servants" Act of 1891 (Gen. Laws, 1891, chap. 24) by which persons intrusted with command or control

of others are not fellow servants with the latter; and persons employed in different departments of service are not fellows.

Brakeman on freight train, and the conductor and engineer of the same train, in South Carolina. (*Hovis v. Richmond & D. R. Co.* (Ga.) Oct. 17, 1892); but in Kentucky a contrary rule prevails in the state court, where a brakeman and conductor of the same train under whose orders the former was, are held not fellows. *Kentucky Cent. R. Co. v. Jameson* (Ky.) Oct. 18, 1892.

The foreman of a laboring gang who negligently directed a laborer to use a defective chain, which broke and injured the latter was held a co-servant. *Kinney v. Corbin* (1890), 132 Pa. 841.

Also the captain of "dredge" boat, having power to employ men, and to direct operations of the boat and crew, and a deck hand on the dredge. *O'Brien v. American Dredging Co.* (1891), 58 N. J. L. 291, citing many earlier decisions.

Mate of vessel, in sole charge at the time, and lumper (laborer) engaged in unloading cargo. *Sanderson v. Smith* (1882), 8 N. S. Wales, L. R. 31. But the contrary was ruled in *Brown v. Sennett*, 68 Cal. 225, 58 Am. Rep. 8, somewhat criticised in *Congrave v. Southern Pac. R. Co.* (1891), 88 Cal. 370.

The captain and one of his crew on board ship while at sea were held fellow servants in *Hedley v. v. Pinkney & Sons*, 8 S. S. Co. (1892), L. R. 1 Q. B. Div. 58, and in *Gabrielson v. Waydell* (1892), 135 N. Y. 1, by a majority of the court.

Foreman of quarry and laborer, drilling rock for blasting purposes, injured by negligence of the former in omitting to remove an unexploded charge from a drill hole. *Cullen v. Norton* (1891), 128 N. Y. 1 (Ruger, Ch. J., and O'Brien, J., dissenting).

wrote the letter." "He acted and talked, so Austin says, rationally, stating," etc. "Probably nineteen days after the reception of the injuries he marries, of which he claims to have no knowledge whatever." It was the duty of the jury not of the expert witness, to say whether the physician wrote the letter, whether plaintiff talked rationally, and whether the plaintiff did not know of his marriage. The question should state that the physician did not write the letter, that plaintiff talked rationally on the one occasion, and that he did not know of his marriage. It is the province of the jury to say what the facts are, and the answer of the expert is of no value whatever if the jury do not believe the assumed facts to be true. If the assumed facts are found to be true by the jury, then the answer of the expert becomes of value. Hence it is that the assumed facts should be stated as facts, so that the jury can consider or reject the opinion of the expert, accordingly as they may find the assumed facts to be true or false.

The interrogatory under consideration is bad for the further reason that it parades before the jury a vast number of immaterial circumstances; circumstances which, if true, have no tendency whatever to show that the mind of the plaintiff was sound or unsound. Coupling into a question so many immaterial circumstances must have a tendency to mislead the jury into the belief that these immaterial matters are of some value. The plaintiff insists that the question propounded to the expert was not erroneous, in so far as it assumed unproved facts, because counsel for defendant in his opening statement to the jury said he expected to prove the particular facts, and because there were depositions on file which tended to establish the assumed facts. As the depositions were not read in evidence, they furnished no proof of the assumed facts. Statements made by an attorney, at the opening of the trial, as to what he expects to prove, do not amount to admission. They bind no one. For the error in allowing this and some other like questions the judgment must be reversed. It may be added that the fact that defendant in putting in its evidence committed a like error does not cure the error committed at the instance of the plaintiff in making out his case.

2. The case was submitted to the jury on the second ground of negligence, wherein it is stated that the plaintiff was injured in consequence of want of care and caution of the foreman in failing to secure the water keg on which he had been sitting, and which keg he negligently knocked off of the car, or negligently permitted to fall off, while the car was in motion. The evidence is to the effect that the foreman had power to and did employ and discharge the men constituting his gang, and that he had full control of the work and the men under him. A west-bound train was nearly due, and hence the foreman directed the men to go to O'Fallon. In obeying this order the men placed their tools on the hand-car. The plaintiff testified that Crews, another laborer, picked up the keg, and started to place it on the car between the handles, when the foreman said:

"Set it in front; I will take care of it." Crews testified that he started to put the keg between the handles on the car, when the foreman said: "Let me have it; I want it to sit on." The keg was used by the gang for the purpose of carrying water. It was placed on the front end of the car, and the foreman used it as a seat for a time. After they had moved some 300 yards, the foreman gave the order, "Put her through, boys." He at the same time jumped up, and commenced "pumping;" that is, assisting the men in propelling the car. At this moment one of the men who was at the rear lever said: "The keg is falling off; catch it." Plaintiff was operating the forward lever, but his back was in the direction in which the car was moving. The keg fell off in front of the car, causing the car to leave the track producing the injuries complained of.

The first contention is that the defendant's demurrer to the evidence should have been sustained, because the evidence shows, and only tends to show, an unfortunate accident, without any fault or negligence on the part of the foreman. We are of a contrary opinion. The foreman had caused the keg to be placed at the front end of the car. He used it as a seat, and, of course, knew that he left it unsecured when he got up. It stood at a place where it was liable to roll off in front by reason of the jostling of the car. We think the jury might well find that he was negligent in leaving the keg in its then position without in any way securing it.

The further point is made that, even if the foreman was negligent in leaving the keg unsecured when he got up to assist the men in propelling the car, he was not then in the performance of any duty which the law imposed upon the defendant, and that, therefore, the defendant is not liable; that as to this negligent act he was not the representative of the defendant, but was simply the fellow servant of the plaintiff. There can be no doubt but the foreman was the vice principal of the defendant, for he had the power conferred upon him to employ and discharge the men under him, and he had full control of the work and movements of the men. In the performance of the duties devolved upon him as foreman, he was not a co-servant with the plaintiff, but was a representative of the defendant. His negligent acts, done in the performance of duties devolved upon him as foreman, were the negligent acts of the defendant, and for such negligence the defendant is liable. *William Bros. v. Cartter*, 53 Mo. 372; *Gormly v. Vulcan Iron Works*, 61 Mo. 492; *Cook v. Hannibal & St. J. R. Co.*, 63 Mo. 398; *Sullivan v. Hannibal & St. J. R. Co.*, 107 Mo. 66. When speaking upon this subject, this court said, in substance, in *Moore v. Wabash, St. L. & P. R. Co.*, 85 Mo. 588, that they are "co-laborers" who are engaged in the same common work without rank, either under the direction and management of the master himself or of some servant of the master placed over them. He is a vice principal who is intrusted by the master with power to superintend and control the workmen engaged in the performance of the

work. That case has been followed, and the rule there asserted applied, in a number of subsequent cases, under a variety of circumstances. *Hoke v. St. Louis & N. W. R. Co.* 48 Mo. 860, 4 West. Rep. 69; *Stephens v. Hannibal & St. J. R. Co.* 86 Mo. 221; *Smith v. Wabash, St. L. & P. R. Co.* 92 Mo. 359, 8 West. Rep. 729; *Tabler v. Hannibal & St. J. R. Co.* 98 Mo. 79, 11 West. Rep. 458. In the most of these cases the negligent act of the agent consisted in giving some order by the foreman or superintendent, but the principle of liability is not confined to negligent orders. The liability may arise from the negligent performance of some work done by the foreman or superintendent. Thus where a master provides suitable materials for a staging, and intrusts the duty of erecting it to the workmen as a part of the work which they undertake to perform he is not liable for injuries resulting to one of them from the falling of the staging; but, if the master undertakes to furnish the staging, he must use due care in its erection; and, if there is negligence on his part or the part of one representing him in that respect, he is liable for injuries resulting to the servant using the structure. *Whalen v. Centenary Church of St. Louis*, 62 Mo. 327; *Bowen v. Chicago, B. & O. R. Co.* 95 Mo. 277, 14 West. Rep. 744; and cases there cited. In the recent case of *Duyharsh v. Hannibal & St. J. R. Co.*, 108

Mo. 574, one Stephens had charge of the engine in the roundhouse, and of the men necessary to assist him in the work. He with his own hand ran an engine upon one of the men under him, and it was held that the injured employé could recover. There are cases where the agent's authority to represent the master is limited, but that is not the present case. As to this gang of men, the foreman represented the defendant to the fullest extent. He took his seat on the keg on the front end of the car, so as to look ahead and to observe the track as he passed over it; and this was in the line of his duty as foreman. It was also his duty to look out for the safety of the men who were engaged in propelling the car; and, if he saw fit and proper to assist the men, it was still none the less his duty to continue to care for their safety. Such a negligent act as that here complained of cannot be separated from negligence in the performance of other delegated powers.

8. There is the further objection that the third instruction given at the request of the plaintiff is erroneous, in this: that it enlarges the issues made by the pleadings. We need not enter into any discussion of this objection, since it can be easily avoided on another trial.

The judgment is reversed and the cause remanded.

All concur.

MISSOURI SUPREME COURT (First Div.).

Louis SCHROEDER, *Rept.*,

v.

CHICAGO & ALTON R. CO., *Appl.*

(108 Mo. —.)

*1. When plaintiff submits evidence to sustain his burden of proof, the defendant, though offering nothing to contradict it, is entitled to have the jury determine its credibility.

*Headnotes by BARCLAY, J.

2. It is part of the personal duty of the master to give direction to the work he undertakes, and to prescribe a system for conducting it. This may be done by rules, when necessary, or by the personal guidance of managers and foremen. In so doing the master must use ordinary care for the safety of his employes.

3. A foreman is not a fellow servant of a man under his orders, in respect to his performance of the master's duty of directing the work in his charge.

NOTE. [On the subject of this note, compare also notes to the four preceding cases. The servant injured in the cases cited is indicated generally by italics.]

Superior employes.

Where one employé is injured by the carelessness of another, resulting from the master's negligent omission to give reasonable and necessary direction to the work, *e. g.* by means of rules, the party injured has been held in many cases to have a right of action.

Thus a defective "system," or mode of conducting the practical workings of a railroad may be actionable if injury results therefrom, though the immediate damage should be caused by the act of a fellow servant. *International & G. N. R. Co. v. Hall* (1890), 78 Tex. 657; *Ford v. Lake Shore & M. S. R. Co.* (1891), 124 N. Y. 498.

So where a *car repairer*, injured by the movement of a switch-engine by other employes against the car on which he was at work, in consequence (as was found) of negligence in omitting to have reasonable rules for the management of the railway business was allowed a recovery in *Abel v. Delaware & H. Canal Co.* (1891), 128 N. Y. 662. To same effect, upon somewhat similar facts is *Wild v. Ore-*

gon Short Line & U. N. R. Co. (1891), 21 Or. 159. See also *Smith v. Baker* (1891), L. R. App. Cas. 323.

Where one servant was caught in a snarl in the fall of a winch on shipboard, and a co-employé, in charge of the winch attempted to stop it, but, in his excitement, hastened its motion, whereby the former was hurt, the master was held liable in admiralty, because the injury was due to the fact that the place where the men were working was insufficiently lighted. *Nelson v. The Manhattan* (1892), 53 Fed. Rep. 843.

So also the master has been held answerable by some courts for negligent direction of his work through the intervention of managers, superintendents, foremen, and other controlling servants, as well as in respect of rules, etc. In such instances the directing employé and the injured subordinate have been held not to be fellow servants.

On this point *Judge McCrary*, in *Gravelle v. Minneapolis & St. L. R. Co.* (1892), 8 McCrary, 362 stated the rule thus: "Fellow servants, within the meaning of the law, are such as are employed in the same service and subject to the same general control. But if a railroad company sees fit to invest one of its servants with control or superior authority over another with respect to any particular part of its business, the two are not, with respect to such business, fel-

4. A servant assumes all ordinary risks of his employment, but not unknown perils arising from negligent direction of the work. The latter are not usual risks of the service.
5. An employe is bound to use ordinary care to avoid dangers that arise, whether usually incident to the service or not.
6. Persons are justified in assuming greater risks to protect human life than would be sanctioned in other circumstances.
7. Obedience to an order involving personal danger cannot be declared negligent in law unless the danger was so glaring that no prudent person in like situation would have obeyed.
8. It is not error to refuse requests to instruct, where the findings for which they call are necessarily embraced in the verdict upon the instructions given.
9. Plaintiff was one of a section gang under a foreman. On the way to work, while riding on a hand-car, they saw a passenger train approaching on the same track. The gang, under the lead of the foreman, attempted to get the car off, but when the engine was some 60 feet distant the foreman ordered the men to "get out of the way." Plaintiff had not reasonable time to escape, and was struck by the hand-car when it was thrown off by the engine. Held, that the questions of negligent direction by the foreman and of contributory negligence of plaintiff were for the jury.

(February 8, 1892.)

APPEAL by defendant from a judgment of the Circuit Court for Saline County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from the negligence of defendant's servant. *Affirmed.*

The facts are stated in the opinion.
Mr. Samuel Boyd, for appellant:

The evidence shows that plaintiff's injury was occasioned by his own negligence, directly contributing to his injury and that the negligence charged in the plaintiff's petition was not the proximate cause of his injury.

low servants within the meaning of the law. One is, in such a case, subordinate to the other, and the superior stands in the place of the corporation."

In *Justice v. Pennsylvania Co.* (1892), 130 Ind. 321, a number of definitions of fellow service are given and the criterion thereof, as to servants of different rank, said to be "determined by an inquiry into the nature of the service at the particular time in question. If, at the time the offending servant was injured, he was in the performance of a duty which the master owed to his servants, he was not a fellow servant. . . . On the other hand, if, at the time of the alleged negligence, the servant was not engaged in the performance of a duty which the master owed to his servants, but was in the discharge of a duty which the servant acting owed to the master, he will be held to be a fellow servant with others engaged in the same common business."

In the following cases the servants named have been held not co-employees:

Derrick-man of a wrecking gang, and the road-master directing its operations. *Atchison, T. & S. F. R. Co. v. Wilson* (1891), 48 Fed. Rep. 57, 4 U. S. App. 25.

Foreman of a wrecking crew and one of the latter, injured by negligent direction of the former. *Wabash, St. L. & P. R. Co. v. Hawk* (1887), 121 Ill. 259.

Pit boss and *miner*, hurt by negligence in the former in failing to take reasonable precautions 18 L. R. A.

Hudson v. Wabash & W. R. Co. 101 Mo. 31; *Steffen v. Mayer*, 96 Mo. 423; *Milburn v. Kansas City, St. J. & C. B. R. Co.* 86 Mo. 109; *International & G. N. R. Co. v. Hester*, 72 Tex. 40.

Plaintiff knew the danger and assumed the risk.

See *Cummings v. Collins*, 61 Mo. 520; *Aldridge v. Midland Blast F. Co.* 78 Mo. 559; *Steffen v. Mayer* and *Hudson v. Wabash & W. R. Co. supra*.

The evidence showed that plaintiff's injuries occurred in attempting to take the hand-car off the track, after the hand-car had been stopped, and plaintiff had got off of it, and that the negligent running of the hand-car was not the proximate cause of his injury.

O'Brien v. Western Steel Co. 100 Mo. 189; *Gurley v. Missouri Pac. R. Co.* 12 West. Rep. 330, 93 Mo. 450.

The petition does not charge negligence in removing the hand-car, and the action is not based upon such negligence.

Buffington v. Atlantic & P. R. Co. 64 Mo. 246; *Ely v. St. Louis, K. C. & N. R. Co.* 77 Mo. 34; *Werner v. Citizen's R. Co.* 81 Mo. 373.

The section men had hold of the car to remove it, and while they had hold of it, the foreman ordered them to let the car alone and get out of the way, and all but plaintiff did get out of the way; the man who was beside plaintiff got 30 feet off before hand-car was struck.

The fact that plaintiff stumbled and fell is not charged to be negligence in defendant.

See *International & G. N. R. Co. v. Hester*, 72 Tex. 40; *Union Pac. R. Co. v. Estes*, 37 Kan. 715; *Parker v. Georgia Pac. R. Co.* 83 Ga. 539. **Messrs. Davis & Wingfield and Alf. F. Rector**, for respondent:

The question of contributory negligence by plaintiff was submitted to the jury under proper instructions, and the finding was against the defendant, and the finding was conclusive.

against fall of roofing of the mine. *Consolidated Coal Co. v. Wombacher* (1890), 134 Ill. 57.

Train dispatcher, directing movement of trains, and a locomotive *fireman* employed on one of such trains. *Hunn v. Michigan Cent. R. Co.* (1890), 7 L. R. A. 500, 78 Mich. 513.

A railroad laborer and the foreman in obeying whose negligent order the former was injured. *Stackman v. Chicago & N. W. R. Co.* (1891), 80 Wis. 428.

Elevator man and another employe deputed to instruct former in his work. *Brennan v. Gordon* (1890), 8 L. R. A. 818, 118 N. Y. 489.

Brakeman and conductor, having directing power over the former. *Louisville & N. R. Co. v. Kenley* (1893), Tenn.

But, on the other hand, where a *car repairer* was injured by negligence of an assistant yardmaster, in directing a car to be run down against that on which plaintiff was working, he and the yardmaster were held fellow servants. *Corcoran v. Delaware, L. & W. R. Co.* (1891), 126 N. Y. 673.

And the chief train dispatcher and locomotive *fireman*, injured by negligence of subordinate train dispatcher of whose incompetency the chief dispatcher had notice, were held co-servants in *Reiser v. Pennsylvania Co.* (1892), 152 Pa. 33.

And in *Russell v. Richmond & D. R. Co.* (1891), 47 Fed. Rep. 204, it was held that a conductor is not authorized to rescind a rule prohibiting a *brake-man* from going between cars to couple them.

Fell v. Rich Hill Coal Min. Co. 28 Mo. App. 326; *Herriman v. Chicago & A. R. Co.* 27 Mo. App. 435; *Petty v. Hannibal & St. J. R. Co.* 8 West. Rep. 297, 88 Mo. 815; *Mauerman v. Siemerts*, 71 Mo. 104.

The negligence charged in the petition was the proximate cause of the injury complained of. The negligence of Klein in operating, managing, and controlling said hand-car, and attempting to remove the same from the track under the circumstances caused the injury to plaintiff, and the defendant is liable—this is true although other causes may have concurred at the time to produce the injury.

McDermott v. Hannibal & St. J. R. Co. 4 West. Rep. 641, 87 Mo. 302; *Page v. Buckport*, 64 Me. 51, 13 Am. Rep. 239.

Plaintiff is not expected to be equal to the foreman in judgment and must be governed by the foreman in all things except such as present such manifest danger as a prudent man would see and refuse to remain in.

Herriman v. Chicago & A. R. Co. 27 Mo. App. 443.

While the plaintiff may have assumed the ordinary risks of the employment, it is not true that he assumed the risks that result from the negligence of defendant or those placed in authority over him.

Wood, Mast. & S. § 326; Smith, Neg. White's ed. § 130.

Barclay, J., delivered the opinion of the court:

Plaintiff sustained the damage which forms the subject of this action near the city of Marshall, Mo., while in defendant's employ as a section hand.

His evidence tended to show that he was working under Mr. Klein, foreman of the section on which the accident took place. The men began work, usually, at 7 A. M. On the day of the injury, August 7, 1888, the westward bound passenger trains of defendant's line, due at Marshall at 5 and 6 A. M., respectively, had not arrived when the time came for the section gang to go to work. Klein learned at the telegraph office that these trains were overdue. He ordered a hand-car put on the track, and started eastward with his crew of five men, including plaintiff. The hand-car carried necessary tools, as well as the foreman and all the men, excepting one, who went ahead at some distance to give warning on the approach of a train.

About a mile east of Marshall, they met the first train. The men lifted the hand-car from the track, and the train passed without mishap. The car was then replaced, and continued its course eastward, but this time no one was sent forward; all the men rode on the car.

After proceeding thus two miles the second train was seen approaching around a curve, emerging from some timber, at the rate of 35 or 40 miles an hour. When first observed, it was about 900 or 1,000 feet away. The foreman immediately stopped the hand-car, jumped off as quick as he could, and began to lift it from the track. All the men did likewise. They did not get the car off.

When Klein saw the engine was about 60 feet from them, he called to the men to "let

the car go and get out of the way." They tried to do so. All escaped save plaintiff, who had the misfortune to stumble and fall near the track, and on rising to his feet was struck by the hand-car as the latter was thrown to one side by the passing locomotive. Both of his legs were broken, and he suffered severely in consequence.

When the foreman and men had hold, before the catastrophe, three stood in front and three at the end of the car. Plaintiff was in the middle of the latter group, on the side farthest from the coming train, and facing it.

Plaintiff had had several months' previous experience as a track hand, but had been employed by Klein as one of this gang only the day before the accident.

The jury returned a verdict for plaintiff for \$4,000; and, after the usual preliminaries, defendant appealed.

The defendant offered no testimony, so that the plaintiff's was uncontradicted, but from this it is not to be assumed that that evidence is to be accepted as true.

The allegations of plaintiff's cause of action were denied by the answer. Thus was imposed on plaintiff the burden of proving the facts necessary to a verdict in his favor. Upon his submission of proofs to support the issues on his part the defendant was entitled to have the triors of fact determine its credibility, though defendant may have tendered nothing to contradict it.

Should a verdict be returned against the evidence given in such circumstances, it might furnish a matter for the corrective action of the trial court in a proper case, but not for the exercise of the revisory power of an appellate court, reviewing questions of law only.

It is not now necessary to give the reasons for these positions. They inhere in a proper understanding of the system of trial by jury as established by our constitution and laws, and have been already clearly stated by *Commissioner Phillips in Gregory v. Chambers*, (1883,) 78 Mo. 298, where some of the earlier cases to the same effect are cited.

We are aware that intimations to the contrary have been thrown out in several decisions, but we do not regard those intimations as furnishing a safe guide for the action of appellate courts in Missouri.

Instances may, and often do arise in which the conduct of the case at the trial involves a concession or admission of material facts, previously in issue. In that event, no court can properly deprive the benefited party of the full effect of such admission or concession.

Our remarks do not apply to such instances, or, indeed, to any other facts than those now before us.

Here we shall treat the undisputed testimony for the plaintiff, in determining its sufficiency to support the verdict, just as it would be treated if it had been met by evidence of the defendant, as it was met by denials in the answer; and so the trial court viewed this phase of the case.

The cause was submitted to the jury on plaintiff's theory of defendant's negligence in the management of the hand-car and crew by the section foreman; and on the other side the

question of plaintiff's exercise of ordinary care, in the circumstances, was presented. Both of these issues were finally given to the jury as questions of fact; but in the first instance the court was called upon to meet them by an instruction asked by defendant, in the nature of a demurrer to the evidence. That instruction was refused, and error is now assigned upon that ruling.

1. From the outline already given of plaintiff's case, it will be seen that he was a laborer under the orders of the foreman, Klein, and at the time of the accident subject to the sole authority of the latter.

It is a part of the personal duty of the master to give direction to the work he undertakes, and to prescribe the system or method of conducting it. In so doing, he must use ordinary care for the safety of those engaged in his service. Accordingly, it has been held that the omission to adopt and to enforce rules necessary for the reasonably safe management of a business as complex and as hazardous to life and limb as that here in view may sometimes form the basis for a finding of negligence on the part of the master. *Reagan v. St. Louis, K. & N. W. R. Co.* (1887,) 98 Mo. 848, 12 West. Rep. 367; *Atel v. Delaware & H. Canal Co.* (1891,) 128 N. Y. 662; *Whittaker v. Delaware & H. Canal Co.* (1891,) 126 N. Y. 544. Such holdings rest upon the same principle that supports the rule of liability for defects in the plant or appliances. As has lately been tersely said in a case which received very thorough consideration, "a master is no less responsible to his workmen for personal injuries caused by a defective system of using machinery than for injuries caused by a defect in the machinery itself." *Lord Watson in Smith v. Baker*, (1891,) L. R. 16 App. Cas. 353.

Rules, however, are but one means of giving direction to the master's work. Its guidance, as to details, is often necessarily intrusted to managers, foremen, and others. By whatsoever name such a superior employé may be called, his relation to the subordinates acting under his orders is not that of a fellow-workman in respect to his performance of the master's function of directing them and the work in his charge.

In the case before us, defendant placed plaintiff under the control of the section foreman, Klein, as to the mode and manner of performing the labor he had engaged to do. Any want of ordinary care on the part of the foreman in commanding that labor involved a breach of the master's duty mentioned, and cannot justly be regarded as the negligence of a fellow servant. It is not thought needful to discuss this proposition further at this time, in view of the attention it has received here of late. *Stephens v. Hannibal & St. J. R. Co.* (1888,) 96 Mo. 207; *Dayharsh v. Hannibal & St. J. R. Co.* (1890,) 103 Mo. 570.

Plaintiff assumed all ordinary and usual risks of the service in which he engaged, but he did not assume unknown perils, arising from any omission of reasonable care in the performance of the master's duty of control of the work in hand. That duty was devolved upon the section foreman by defendant, and in its discharge

the law required him to use common prudence to so direct the movements of those subject to his orders as not to expose them to any greater danger than was usually incident to the employment. We think the plaintiff's testimony tends to show a want of such care on the foreman's part.

The facts leading up to the accident have been already stated, and need not be repeated. It may be that the plaintiff's injury should be ascribed, as a matter of fact, solely to his fall near the track, and to the delay it occasioned; but we believe it cannot be declared, as a conclusion of law, that it might not reasonably be found to have been caused by the foreman's negligence in keeping the men at their posts, trying to remove the hand-car, until too late to afford them opportunity for escape from the danger of a collision, and thereby subjecting plaintiff to a greater risk than his service ordinarily involved.

The foreman, it is true, gave them no express command to lift the car off, but his acts were an unmistakable order to that effect. There was little time for speech. Action was the eloquence for the occasion. All present knew that the passenger train had the right of way, and their united efforts indicated that they interpreted alike the foreman's conduct as a direction to follow his leadership in the attempt to clear the track.

The place which fell to plaintiff's lot in lifting was probably the most dangerous around the car. As the middle man of three, on the side furthest from the coming train, he stood between the rails until the foreman's order to "let go." It required a longer time to reach a place of safety from his position than from that of any of the other men.

Reviewing the whole evidence, we think it was fairly a case for triers of fact to say whether or not the foreman allowed him reasonably sufficient time to escape the impending danger, and, if not, whether the omission to do so constituted negligence in directing and managing the car and men, and whether or not such negligence (or want of ordinary care in the circumstances) was the direct cause of plaintiff's injury.

These elements made up the case stated in the petition. No negligence in the management of the locomotive or train was asserted or need be discussed.

It seems almost unnecessary to observe that there is no room in this case for the application to plaintiff's conduct of the maxim, *volenti non*, etc. The risk occasioned by the foreman's negligence, which forms the gist of defendant's present liability, was of such a nature as could not have been previously known to plaintiff by any ordinary exercise of care or foresight; and it cannot, we think, be reasonably regarded as one of the usual perils of the master's service, in which plaintiff embarked.

In this connection it may be well to notice one of defendant's exceptions, touching the refusal of its request for the following instruction, viz.:

"The court instructs the jury that, when plaintiff entered into the employment of defendant as a section hand, he assumed all risk of injury usually incident to the serv-

ices he engaged to perform; and if the jury believe from the evidence that, when plaintiff undertook to work for defendant on its track, he knew that in going to and from his work he would be required to travel on the track on hand-cars, and that trains were run over the road at regular and irregular times without notice to section men, then he assumed all risks usually incident to passing and attempting to pass such trains."

In declining to so instruct, we think there was no error. Whatever may be the nature and extent of the usual risks of such a service, as to which this case requires no expression of opinion, it is clear that omission of ordinary care in the conduct and direction of the business is not one of such risks. Negligence in the performance of any personal duty of the master is not, speaking generally, such a peril as an employé should reasonably apprehend or be considered to assume. Dangers arising from such negligence cannot justly be regarded as ordinary risks of the employment. The instruction was hence irrelevant to the only issue on which plaintiff claimed a right of recovery on the facts.

2. We next view the case with reference to the plea that plaintiff's negligence should bar his recovery of damages.

"There is a clear and logical distinction between a defense resting upon the assumption of risks and that predicated upon such negligence. Even if a servant encounters, in the service, perils which are held unusual and extraordinary, he is nevertheless bound to use ordinary care to avoid injury thereby." *Alcorn's Case*, (Mo.) 18 S. W. Rep. 188, (decided at this term.) That care is to be judged from the standpoint furnished by the facts of the particular case, and also by considering, as a very discriminating judge has recently remarked, "under what exigency he acted; that is to say, the exigency legitimately may affect, not only the question how far he appreciated or ought to have appreciated the danger, but also how far he could run a risk known to be greater than prudently could be incurred under ordinary circumstances, without losing his right to recover in case he was hurt." *Pomeroy v. Westfield* (1891), 154 Mass. 462. So in passing on this plaintiff's conduct in obeying the tacit direction of the foreman, and in standing to his work until ordered to "let go and get away," we must bear in mind, not only the servant's general duty of obedience, but the self-evident danger to defendant's passengers on the train in event of a collision with the hand-car. It is true that in this instance the locomotive tossed the car from the track without damage to the train or its cargo; but the possibility of serious injury from such a meeting was obvious, at least to an experienced railroad man, if indeed it is not a matter of common knowledge.

Persons are justified in taking somewhat greater risks to protect human life or limb than would be sanctioned in other circumstances.

In view of all the facts before us, we are of opinion that it cannot properly be said that the act of the plaintiff, in remaining at his post, to aid in averting the possibility of a collision, until his superior pronounced the

effort hopeless, was negligent, as a matter of law. We think his conduct falls within the protection of the rule that has been sometimes stated to be that if "the master orders the servant into a situation of danger, and he obeys, and is thereby injured, the law will not deny him a remedy against the master on the ground of contributory negligence, unless the danger was so glaring that no prudent man would have entered it, even where, like the servant, he was not entirely free to choose." *Stephens v. Hannibal & St. J. R. Co.* (1888,) 96 Mo. 212; *Keegan v. Kavanaugh*, (1876,) 62 Mo. 280.

This rule, closely viewed, amounts to nothing more than a statement that, in determining what is ordinary care on the part of a given individual, all the circumstances of his position should be regarded, including, in cases like the present, the servant's orders, the demands of his duty, the apparent risk to be met, and the purpose of his action, no less than his physical surroundings.

Having weighed all these considerations, unless the case then discloses that the risk was such as would not be taken by a man of common prudence, so situated, the court cannot justly declare the assumption of that risk by a servant, in obedience to orders, as negligence. To warrant such declaration by the court, as has often before been said, it must be satisfied that no other conclusion is fairly deducible from the evidence, giving plaintiff the benefit of every favorable inference that may be reasonably drawn from it. *Becke v. Missouri Pac. R. Co.* (1890,) 102 Mo. 544, 9 L. R. A. 167; *Barry v. Hannibal & St. J. R. Co.* (1888,) 98 Mo. 62. Here we are not so satisfied, but, on the contrary, regard the issue of plaintiff's negligence as a proper one for the jury.

The only reasonable inferences of negligence on his part, suggested by the testimony, arise from his remaining so long at his post of work with the foreman, in view of the coming train; and from his falling, outside the track, afterwards, in the effort to escape. As to the first of these acts the jury were plainly told by the fourth instruction for defendant that if they found "that plaintiff saw the approaching train, and at the time he undertook to remove the hand-car from the track the danger of a collision with the hand-car was manifest to any section man of ordinary care and caution, and that, after such danger was so manifest, plaintiff had time, by the exercise of reasonable care, to get out of the way, then it was the duty of plaintiff to abandon the hand-car and get out of danger, regardless of the orders of the foreman or his duty to defendant to remove the car; and, failing to do so, he cannot recover, and the verdict must be for the defendant."

As to the second (plaintiff's fall), the court, in defendant's third instruction, declared that if the foreman notified plaintiff to get out of the way in time for a section man of ordinary vigilance and judgment to avoid danger from collision, the finding should then be for defendant. So that, had the jury found plaintiff wanting in ordinary care with respect to either of these phases of

the case, they were bound to return a verdict for defendant, under the instructions. Their finding for plaintiff consequently negatived any negligence of the plaintiff in the circumstances.

3. We now reach defendant's exceptions to rulings upon the other instructions.

It is claimed that those given for the plaintiff submit a different sort of negligence to the jury as actionable from that counted upon. Negligence on the part of the foreman, Klein, "in so running the hand-car," is charged in the petition, after a statement of the substance of the facts we have mentioned above, preceding plaintiff's injury.

It is insisted that no negligence in "running" the car was shown; but it is evident that that term was employed, and, in the connection in which it appears, should fairly be construed, to mean "operating" the car; and in that expression may reasonably be comprehended the management of the men engaged in its operation.

The petition is unnecessarily prolix in furnishing the particulars of the occurrence. Defendant could not possibly have misunderstood the nature of the plaintiff's grievance alleged in it. All the plaintiff's instructions place his right of action solely on the ground of Klein's negligence in the direction of the car and men. They are verbose, and need not be quoted as models for imitation; but each requires a finding of negligence or "want of proper care and caution" on the part of Klein, in the management of the hand-car, as essential to plaintiff's recovery. They are not as explicit in all respects as might be desired; but any defects in them, in this regard, are corrected by the limitations in those given at the instance of defendant. In the latter the jury were told (1) not to consider any evidence of the speed of the train, or that it did not stop, or of the acts or omissions of the train men; (2) that the verdict should be for defendant, if Klein used ordinary care in attempting to remove the hand-car from the track after the train came in sight and the injury of plaintiff was caused by accident, without negligence of the foreman; while defendant's third and fourth instruc-

tions, mentioned already in the second paragraph of this opinion, presented for decision the question of plaintiff's exercise of reasonable care for his own safety.

Reading the instructions together, as they should be read, we do not discern in them any material error, to the prejudice of defendant's substantial rights upon the merits. Rev. Stat. 1889, §§ 2100, 2303. We think they assert correctly the principles of liability hereinbefore announced, and only permit a recovery by plaintiff in conformity thereto.

The defendant's instructions closely confined the inquiry as to the proximate cause of plaintiff's injury to a consideration of the foreman's negligence in the matter of attempting to remove the hand-car from the track, and declared, in effect, (in the third) that, if he gave plaintiff sufficient time for escape to have enabled a section man of ordinary vigilance to avoid the danger of collision, there could be no recovery.

Under these instructions the jury would have been bound to find for defendant if they believed the fall of plaintiff, in his haste to escape, to have been the efficient cause of his injury, or, indeed, if they found that cause to have been any other than the foreman's negligence, already indicated.

4. Respecting the errors assigned upon the refusal of other requests for instructions, all that need be said is that the findings for which the latter call were necessarily embraced in the findings upon the instructions which the court gave. The refusal of such requests is not error in a civil action, where this court, viewing the case broadly on its merits, is of opinion that such ruling did not injuriously affect the substantial rights of the appellant. *Haniford v. Kansas City*, (1890,) 108 Mo. 182; Rev. Stat. §§ 2100, 2303. Such is our opinion here.

5. No point is made upon the instruction touching the measure of damages, or upon the award thereunder.

The case bears many points of resemblance to *Stephens v. Hannibal & St. J. R. Co.*, (1888,) 96 Mo. 207, and in the main is governed by the same general principles.

The judgment is affirmed.

All the Judges of this division concur.

ILLINOIS SUPREME COURT.

Edward A. STEVENS *et al.*, *Plffs. in Err.*,
v.

ST. MARY'S TRAINING SCHOOL *et al.*

(.....ILL.....)

An injunction cannot be granted to prevent a board of county commissioners from making an illegal contract or illegal appropriation, at least where there is nothing to show that the remedy to prevent enforcing any illegal act of the board would not be equally effective.

NOTE.—In respect to injunctions to prevent the passage of municipal ordinances, with which question the above case is very closely connected, see

(January 12, 1889.)

ERROR to the Circuit Court for Cook County to review a judgment refusing to restrain defendants from entering into a contract in reference to the education of certain children. *Affirmed.*

Statement by **Magruder, J.:**

This is a bill filed on January 12, 1889, in the circuit court of Cook county by Edward A. Stevens and John M. Stiles, of the city of Chicago, in said county, in behalf

tion the above case is very closely connected, see note to *Roberts v. Louisville (Ky.)* 18 L. R. A. 844.

of themselves, as citizens and taxpayers, and on behalf of all other citizens and taxpayers who may choose to be made parties, against St. Mary's Training School, a corporation organized under the laws of Illinois, and its officers, the board of commissioners of Cook county, and its members, and George R. Davis, the treasurer of Cook county, for the purpose of enjoining said school and its officers from setting up or prosecuting against said county any claim for aid or compensation for the subsistence, shelter, clothing, care, or instruction of its wards or inmates, and from making any contract with said county with reference to such aid or compensation, and for the purpose of enjoining said board, and its members and agents, from approving or ordering paid any such claim, and from making any such contract, and from doing anything to promote or abet the payment of any such aid or compensation, or the making of any such contract, and for the purpose of enjoining said county treasurer from paying out of any public funds in his custody any sum of money whatever on any claim of said school, or for its aid, or for compensation to it for such subsistence, shelter, clothing, care, or instruction. A preliminary injunction was granted, in accordance with the prayer of the bill. A demurrer was filed to the bill by the training school and its officers, which was ordered to stand as the demurrer of all the defendants. The cause was heard upon said demurrer, as the demurrer of all the defendants, and upon such hearing the circuit court dismissed the bill for want of equity. The present appeal is prosecuted from such decree of dismissal.

The bill alleges that said school or corporation, and its officers, propose and intend to procure, out of the public funds of the county, money to aid it, and for its use and benefit; that said corporation is a school and institution under church control, within the meaning of section 3 of article 8 of the Constitution of this state; that said board and its members propose and intend to aid and abet the said interest of such church school by contracting to pay said moneys, and by approving quarterly its claims, and ordering the same paid; that said treasurer intends to pay said approved claims; that said proposals and intentions involve violations of the public trusts reposed in said board and in said treasurer, in that the same are contrary to the form and effect of said constitutional provision; that said corporation was instituted, and has been and is maintained, as an instrumentality of the Roman Catholic Church; that one of its main purposes is to effectuate the religious objects of said church; that said church is provided with a most efficient organization, and is able to sway its members in all matters involving their religion; that it deems itself specially and exclusively commissioned to teach religious truths; that it has an elaborate scheme of religious doctrines, whose acceptance its priests and adherents strive earnestly to promote; that its policy is to control the education of the young, and to surround them with its influence; that said

training school is governed and controlled, in accordance with said policy, by priests and laymen devoted to said church, zealous to promote its designs, and obeying its wishes without dissent; that the consequence of sending a minor child to said school is to put him in training to become a Roman Catholic churchman; that the governing purpose to be effected by said school is to mold the inmates thereof, as much as possible, into Roman Catholic Church members; that no other teaching except that of said church is tolerated at said school, and all of the teachers are members, and most of them ecclesiastics, of that Church; that for a number of years said board have contracted with said school for the reception into it of boys sent there as provided by the "Act to Provide for and to Aid Training Schools for Boys," approved June 18, 1888, for their subsistence, clothing, shelter, instruction, and training during their residence there, and for the payment to said school, out of the public funds in the custody of the county treasurer, various graded sums per month for each of said boys so sent; that by means thereof large sums of money have been misappropriated unwarrantably, and in contempt of said constitutional provisions; that the most recent of said contracts expired by its terms on December 31, 1888, that by a decision of the Supreme Court of Illinois the members of said board and the officers of said school were well advised of the illegality of such misappropriation of the public funds, and of such contracts in relation thereto, yet in despite thereof the said school, its officers and management, have presented for allowance to said board a claim in aid of said school, pursuant to said contract expiring December 31, 1888, and for the quarter at that date terminating, amounting to the sum of \$2,818, and have applied to said board to renew their contract on the old terms for another year; that complainants have been informed and believe that said board, unless enjoined therefrom, will affirm and order paid said claim of \$2,818, and renew said contract; that, from inquiry made and information acquired, complainants aver that members of said board, in number sufficient to approve said claim and said contract, and to order the same paid and executed, "are already pledged, in secret, to the promoters of said claim and contract;" that said school refrains as much as possible from permitting its constitution, rules, by-laws, and operation to be known, and secrecy governs the conduct of those interested in its management; that this reticence is observed for the reason that the real rules by which said school is administered could not be definitely expressed without manifesting the fact that said school has the character of a purely Roman Catholic institution; that, in the hope that said school may appear in the eyes of non-Catholics as a nonsectarian institution, and for the purpose of obtaining in its aid payments out of the public funds, the promoters of said school pretend and claim that it has not a church or sectarian character, and that there is nothing in its character that stamps it as such; that the

control of said institution has been from the first, and is intended to be, in the care of those who have special favor for the Roman Catholic Church and its religious interests, and will allow its wishes to govern their conduct in reference to said school. The bill prays that all contracts of said school with reference to the payment to it, out of any of the public funds of said county, of any claim for aid or compensation for the subsistence, shelter, clothing, care, or instruction of any of its wards or inmates, and especially the contract mentioned as expiring December 31, 1888, may be decreed and adjudged wholly void and of no binding effect, and that an injunction may issue against said school and its officers, said board and its members, and said county treasurer, enjoining them in manner and form as above stated.

Mr. F. C. Russell for plaintiffs in error.

Mr. George W. Smith for defendants in error.

Magruder, J., delivered the opinion of the court:

The bill in this case was demurred to, and therefore its statements must be assumed to be true. It alleges that the defendant in error, the St. Mary's Training School, is a corporation which is controlled by the Roman Catholic Church; and that the board of commissioners of Cook county has made contracts with said corporation for the payment to it, out of the funds of the county, of certain moneys, for the instruction and training of boys committed to its care. That such contracts are void, and such payments illegal, is settled by the decision of this court in *Cook County v. Chicago Industrial School for Girls*, 125 Ill. 540, 1 L. R. A. 487. It was there held that county boards in this state have no power to appropriate county funds in aid or support of sectarian schools, or of any school controlled by a church. The Constitution of Illinois is very emphatic upon this subject, and the language in which its meaning is expressed is too plain to be misunderstood. Section 8 of article 8 of that instrument is as follows: "Neither the General Assembly nor any county, city, town, township, school district, or other public corporation shall ever make any appropriation or pay from any public fund whatever anything in aid of any church or sectarian purpose, or to help, support, or sustain any school, academy, seminary, college, university, or other literary or scientific institution controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the state or any such public corporation to any church, or for any sectarian purpose."

But the question presented by the record is whether a court of chancery has power to enjoin a board of county commissioners from passing a resolution that an illegal contract be made by the county, and from making an order that an illegal claim be allowed against the county. The bill prays that the county board may be enjoined from making

contracts with the training school in the future, and also from ordering the payment to said school of a balance due for the quarter ending December 31, 1888, upon a contract already existing between the board and the school. Has equity the power to enjoin the passage of ordinances, by-laws, resolutions, and orders by municipal corporations, or is its power confined to the issuance of injunctions against the enforcement and execution of such ordinances, by-laws, resolutions, and orders, after the same have been passed. It is well settled that courts of equity will not attempt to control the discretionary or legislative powers vested by law in municipal corporations. 2 Dill. Mun. Corp. 4th ed. §§ 94, 475, 908; 2 High, Inj. 3d ed. §§ 1240, 1246. Counties are corporations created for the purpose of convenient local government, and possess only such powers as are conferred upon them by law. *Harney v. Indianapolis, C. & D. R. Co.* 32 Ind. 244. They have been called quasi municipal corporations, and their corporate powers are more limited than those of incorporated cities and towns. 1 Dill. Mun. Corp. 4th ed. § 25; *Symonds v. Clay County Suprs.* 71 Ill. 355. In the exercise of such discretionary or legislative powers as are conferred upon them by law, counties are as much beyond judicial control as other municipal corporations. *Fitzgerald v. Harms*, 92 Ill. 372. The board of commissioners of Cook county can exercise the same power as boards of supervisors in other counties. *McCord v. Pike*, 121 Ill. 288. Each county has power to make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers, and each county board has power to manage the county funds and county business, and to examine and settle all accounts against the county. *Fitzgerald v. Harms, supra*. Where county boards are acting within the boundaries of their discretionary or legislative power, the court will not only refrain from interfering with the passage of resolutions and orders by them, but will also refuse to enjoin the enforcement of such resolutions and orders, except in certain cases, where they are unreasonable. In *Fitzgerald v. Harms, supra*, where we refused to sustain an injunction against the county clerk from issuing an order upon the county treasurer for the amount of a claim previously allowed by the county board, and against the county treasurer from paying the same, we placed such refusal solely upon the ground that the board was acting within the bounds of the powers conferred upon it by law, and said: "A court of equity cannot interfere with the deliberations or the action of the board of commissioners over a matter which the law has intrusted to them, unless fraud be shown, or they have undertaken to allow a claim which was not of a character to be paid by the county." Literally interpreted, the language here used might be construed to mean that a court of equity could interfere with the deliberations of the board if its members were undertaking to allow a claim which was not of a character to be paid by

the county. But the case cannot be regarded as so deciding, because the question of the power of a court of equity to enjoin the board from making an order by a vote of its members for the payment of a claim, as distinguished from its power to enjoin the clerk or auditor from drawing a warrant, and the treasurer from paying the amount of the claim, after the order of allowance had been made, was not involved, nor in any way suggested.

It is correctly announced by the text-writers, in general terms, that taxpayers and property holders may resort to equity to restrain municipal corporations and their officers from making unauthorized appropriations of the corporate funds, and from misapplying the moneys of the corporation, and from making payment of illegal claims. 2 Dill. Mun. Corp. 4th ed. §§ 914, 919; Cooley, Taxn. 2d ed. 784; 2 High, Inj. 3d ed. §§ 1237, 1238, 1239; 1 Pom. Eq. Jur. § 260; 10 Am. & Eng. Encyclop. Law, 959. It is also correctly laid down, as a general proposition, that the restrictions upon the right of a court of equity to interfere with the action of municipal bodies do not extend to cases where those bodies are exceeding their lawful powers. 2 High, Inj. 3d ed. § 1241. But some of the adjudged cases which are referred to as sustaining these general doctrines are not in harmony with each other, and others of them are not definite and decided in their conclusions upon the question whether equity will confine its restraining power to the instrumentalities which undertake to carry out and execute the unauthorized resolutions and ordinances of municipal corporations, or whether it will enjoin such corporations, acting in their corporate capacity, from adopting resolutions and ordinances which are in excess of their legal or constitutional authority. There are cases which hold, or seem to hold, that where a municipal corporation is about to pass a resolution or ordinance which is void, as being *ultra vires*, a court of chancery will enjoin it from so doing. Among such cases may be mentioned the following: *Davis v. New York*, 1 Duer, 451; *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536; *Davis v. New York*, 14 N. Y. 506; *Spring Valley Water-Works v. Bartlett*, 16 Fed. Rep. 615; *Jacksonport v. Watson*, 33 Ark. 704; *State v. Hamilton County Comrs.* 39 Ohio St. 58; *Page v. Allen*, 58 Pa. 338, 98 Am. Dec. 272; *Follmer v. Nuckolls County Comrs.* 6 Neb. 204; *Peter v. Prettyman*, 62 Md. 566; *Patton v. Stephens*, 14 Bush, 324; *Galesburg Board of Education v. Arnold*, 112 Ill. 11; *Spilman v. Parkersburg*, 85 W. Va. 605; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Springfield v. Edwards*, 84 Ill. 626; *Howell v. Peoria*, 90 Ill. 104.

In none of the cases last above cited, except the first four, was the question now under consideration expressly passed upon, but the facts stated in the opinions seem to warrant the conclusion that injunctions were sustained against the corporate action of the municipalities, as distinguished from the action of agents or officers proceeding under their orders. In the New York cases it was

held that a court of chancery could enjoin the board of aldermen of a city from passing an ordinance to construct a railway in one of the streets; that municipal corporations are creatures of limited powers in the appropriation of the funds of the people; that when they attempt to appropriate such funds to purposes not authorized by their charters or by positive law, whether it be done by resolution, ordinance, or under the form of legislation, their acts are void, and that, while courts will not attempt to control their discretion, yet if, under pretense of exercising such discretion, they threaten or are about to do what amounts to a gross abuse of power, to the injury and in fraud of the rights of individuals and the public, the courts will interfere to prevent the threatened injury. But later decisions in New York, some of which are referred to hereafter, have taken a different view, refusing to follow the earlier cases above mentioned, as going too far in the direction of subjecting the legislative and political powers of municipal bodies to the control of the courts. *Alpers v. San Francisco*, 12 Sawy. 681, 32 Fed. Rep. 508. In *Spring Valley Water-Works v. Bartlett*, *supra*, an injunction against the mayor and supervisors of San Francisco, restraining them from passing an ordinance to fix the price of water furnished to the city, was sustained, over the objection that the defendants were a "legislative body, endowed with legislative powers, to be exercised with absolute discretion;" and it was held that the board of supervisors of a municipal corporation will be enjoined from passing an ordinance which is not within the scope of their powers, where its passage will work an irreparable injury. The *Bartlett Case*, however, seems to have been overruled by the later case of *Alpers v. San Francisco*, *supra*. The last four cases above cited, to wit, *Spilman v. Parkersburg*, *Valparaiso v. Gardner*, *Springfield v. Edwards*, and *Howell v. Peoria*, are cases where cities were enjoined from incurring indebtedness in excess of the constitutional limit, or from entering into contracts that would involve such excess of indebtedness. But in these cases the point to which attention was more especially directed was the meaning of the word "indebtedness," and what constituted a "debt," within the meaning of the Constitution, and it is not altogether clear that "incurring indebtedness" does not refer as well to the enforcement as to the passage of corporate resolutions.

A large number of the decisions which uphold the right of equity to interfere with the action of municipal corporations when such action is in excess of their legal powers will be found, on examination, to be based upon facts which show that the injunctions were issued against the officers or agents attempting to execute or enforce corporate resolutions, ordinances, by-laws, or orders, as will be seen by reference to the following cases: *New London v. Brainard*, 22 Conn. 553; *Webster v. Harwinton*, 32 Conn. 131; *Bayle v. New Orleans*, 23 Fed. Rep. 848; *Harney v. Indianapolis, C. & D. R. Co.* *supra*; *Davenport v. Kleinschmidt*, 6 Mont.

502; *Willard v. Comstock*, 58 Wis. 565, 46 Am. Rep. 657; *Lynch v. East La Fayette & M. R. Co.* 57 Wis. 480; *Place v. Providence*, 12 R. I. 1; *Austin v. Coggeshall*, Id. 329, 34 Am. Rep. 648; *Sherman v. Carr*, 8 R. I. 481; *Newmeyer v. Missouri & M. R. Co.* 52 Mo. 81, 14 Am. Rep. 391; *Osterhout v. Hyland*, 27 Hun. 167; *Baltimore v. Gill*, 31 Md. 875; *Merrill v. Plainfield*, 45 N. H. 126; *Hospers v. Wyatt*, 68 Iowa, 264; *Roberts v. New York*, 5 Abb. Pr. 41; *Schumm v. Seymour*, 24 N. J. Eq. 143; *List v. Wheeling*, 7 W. Va. 501; *Ruts v. Calhoun*, 100 Ill. 392; *McCord v. Pike*, 121 Ill. 298; *English v. Smock*, 84 Ind. 115, 7 Am. Rep. 215; *Madison v. Smith*, 83 Ind. 502; *Sackett v. New Albany*, 88 Ind. 478, 45 Am. Rep. 467; *Wright v. Bishop*, 88 Ill. 802; *Sherlock v. Winnetka*, 59 Ill. 389; *Crampton v. Zabriske*, 101 U. S. 601, 25 L. ed. 1070.

In the case of *Crampton v. Zabriske*, *supra*, which may be regarded as a leading case upon this general subject, *Mr. Justice Field* used the following language: "Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt, which they, in common with other property holders of the county, may otherwise be compelled to pay, there is at this day no serious question. . . . From the nature of the powers exercised by municipal corporations, the great danger of their abuse, and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere, upon the application of the taxpayers of a county, to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property holders." But the facts of the case, in the decision of which this language was used, show that the legislative action of the county board had already been put forth, in all essential respects, before the injunction was asked for. There the board of chosen freeholders of a county in New Jersey had purchased certain lands without legal authority to do so, and had issued bonds in payment for the same; and the object of the injunction, as is stated in the opinion of the court, was "to enjoin the prosecution of the action to enforce their payment" by the holder of the bonds. In *Colton v. Hanchett*, 18 Ill. 615, it was held that the board of supervisors of a county had no authority to appropriate the county funds to aid a private individual in the construction of a toll bridge, and that an injunction would issue, at the suit of a taxpayer, to restrain the board from granting a sum of money to a private individual for such purpose; but it appears from the statement of the facts in the case that the board had previously passed a resolution directing that an order should be drawn upon the county treasurer for the money, to wit, \$1,000, in favor of such individual upon his completion of the bridge, and upon his conveying to the county a right of way over the bridge for certain of its officers. In *Perry v. Kinneear*, 42 Ill. 160, the county board made an ap-

propriation to pay to a judge of the circuit court money in addition to the salary allowed him by law; and it was held that such appropriation of the money of the citizens was illegal, and would be enjoined by a court of equity, at the suit of taxpayers; but before the injunction was applied for the board had passed a resolution ordering the county clerk to issue an order on the treasurer in favor of the judge, and the injunction was against the county clerk, from issuing the order, and the county treasurer, from paying it. In *Beauchamp v. Kankakee County*, 45 Ill. 274, the facts were similar to those in the *Perry Case*, and the ruling was the same. In *Carter v. Chicago*, 57 Ill. 283, where the question was whether a city could be enjoined from so constructing a roadway as to include in it the portion of land set apart in the plat for sidewalks on either side of the roadway, it was held that the city held the fee of the streets in trust for the public, and would be enjoined from a violation of such trust by such an abuse of its powers as to injure the property of individuals; but the injunction there issued was against the enforcement of an ordinance which had already been passed. In *Sherlock v. Winnetka*, *supra*, where it was held that, although a municipal corporation was vested with the largest discretion in the exercise of its public and political powers, yet it must be regarded as the depository of a trust, in reference to the corporate property and, if guilty of a breach of such trust, would not be exempt from judicial interference merely because the forms of legislation were used, it appears that the injunction was mainly directed against the collection of a tax, the levy of which had been ordered in an ordinance theretofore passed by the village council. *Milhou v. Sharp*, 15 Barb. 198.

But we are not limited, in the investigation of this subject, to an examination of the facts of the cases which, while sustaining the general power of equity to restrain the action of municipal bodies, do not make any special reference to the mode of exercising such power. There are many decisions which hold, in express and definite terms, that "the courts will not enjoin the passage of unauthorized ordinances, and will ordinarily act only when steps are taken to make them available." 1 Dill. Mun. Corp. 4th ed. § 808, *note* on page 387. There may be instances where this restriction upon the power of the courts will sometimes be disregarded, as where municipal corporations are exercising mere business or ministerial rather than legislative powers, (*Valparaiso v. Gardner*, *supra*; Dill. Mun. Corp. 4th ed. §§ 478, 474, 927, 1048;) or are wrongfully disposing of property held by them as trustees for the public, (*Milhou v. Sharp*, *supra*; *Sherlock v. Winnetka*, *supra*;) or are attempting to act upon matters not, by their charters or by the law, subject to their jurisdiction, (*Alpers v. San Francisco*, *supra*;) or where it appears that the mere voting on, and formal passage of, a resolution or ordinance, will instantly, without any action or attempt to enforce any right or privilege

under it, effect an irremediable private injury, (*Whitney v. New York*, 28 Barb. 233.) The weight of authority, and the tendency of the more recent decisions, are in favor of the position, that the restraining power of the courts should be directed against the enforcement, rather than the passage, of unauthorized orders and resolutions or ordinances by municipal corporations. To this effect are the following authorities: *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505, 24 Am. Rep. 756; *Linden v. Case*, 46 Cal. 171; *Merriam v. Yuba County Supra*, 72 Cal. 517; *Chicago v. Evans*, 24 Ill. 52; *Whitney v. New York, supra*; *People v. New York*, 82 Barb. 85; *People v. New York*, 9 Abb. Pr. 253; *Cincinnati St. R. Co. v. Smith*, 29 Ohio St. 291; *Harrison v. New Orleans*, 33 La. Ann. 222, 39 Am. Rep. 272; *Alpers v. San Francisco* 12 Sawy. 631, 32 Fed. Rep. 508; 2 High, Inj. 3d ed. § 1243. In *Alpers v. San Francisco, supra*, Mr. Justice Field who wrote the opinion in *Crampton v. Zabriskie, supra*, says: "If by either body—the Legislature or the board of supervisors—an unconstitutional Act be passed, its enforcement may be arrested. The parties seeking to execute the invalid Act can be reached by the courts, while the legislative body of the state or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative action threatened may be in disregard of constitutional restraints, and impair the obligation of a contract, . . . does not affect the question. It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary. . . . The principle that the exercise of legislative power by a municipal body is beyond judicial control is too important, in our institutions, to be weakened by occasional decisions in disregard of it." In *Des Moines Gas Co. v. Des Moines, supra*, where the city of Des Moines had chartered a gas company, with certain exclusive privileges, and attempted by a subsequent ordinance to repeal said charter, and grant the same privileges to another company, it was sought to enjoin the passage of the repealing ordinance on the ground that it would be a violation of the contract created by the charter, and therefore unconstitutional, but it was held that the court had no power to issue the injunction, under the circumstances; and it is there said: "The General Assembly is a co-ordinate branch of the state government, and so is the lawmaking power of public municipal corporations, within the prescribed limits. It is no more competent for the judiciary to interfere with the legislative Acts of the one than the other. But the unconstitutional Acts of either may be annulled. Certainly, the passage of an unconstitutional law by the General Assembly could not be enjoined. If so, under the pretense that any proposed law was of that character, the judiciary could arrest the wheels of legislation. . . . After its passage the judiciary may declare the law unconstitutional. *Piqua Branch of the State Bank of Ohio v. Knoop*, 57 U. S. 16 How.

860, 14 L. ed. 977; *Dodge v. Woolsey*, 59 U. S. 18 How. 331, 15 L. ed. 401. But previous to that time judicial powers cannot be invoked. . . . A void law is no law, and this, without doubt, is true as to an ordinance. . . . While it is not the province of the judiciary to interfere and arrest the passage of the ordinance, yet the doors are open for the purpose of testing its legality." In *Linden v. Case, supra*, it was held that an injunction will not be granted to restrain a board of supervisors from contracting a liability, which is not a legal charge against the county, or "from allowing any accounts against the county thereon;" the Supreme Court of California saying: "No order made by a board of supervisors is valid or binding unless it is authorized by law. No claim against a county can be allowed unless it be legally chargeable to the county; and, if claims not legally chargeable to the county are allowed, neither the allowance nor the warrants drawn therefor create any legal liabilities. . . . If illegal claims are allowed by the board against the county, it will be the duty of the auditor to refuse to draw warrants therefor; and, if warrants are drawn, it will be the duty of the treasurer to refuse to pay them. The presumption is that these officers will faithfully discharge their duty in the premises." In the more recent case of *Merriam v. Yuba County Supra, supra*, (decided in 1887,) it was held that an injunction would lie at the instance of a taxpayer to restrain the board of supervisors of a county from ordering certain claims to be paid, on the ground that they were not proper or valid demands against the county; and it was there said: "The members of the board would themselves be individually responsible for moneys willfully paid out without authority of law. They are trustees of the funds for certain specified purposes, and cannot, except by violating their oaths, allow them to be applied to other purposes. They act judicially, it is true, and will not be held accountable for mere errors; but they will not be excused on the ground that they have acted honestly, merely because they do not steal the funds. If they willfully appropriate moneys for a purpose not authorized by positive law, they are liable, civilly and criminally." In *Chicago v. Evans, supra*, a bill was filed to enjoin the common council of Chicago from passing an ordinance granting to the North Chicago City Railway Company the right to construct a railway across the Clark street bridge, etc., and we said in that case: "The procuring the adoption of this ordinance is not such an illegal and unwarranted act as can produce injury, and until they act under it, as their only warrant, no reason is perceived why they should be stayed in their action. The passage of ordinances, which confer no right or authority are harmless, until steps are taken to make them available."

Our survey of the authorities leads us to the conclusion that in the case at bar the application for an injunction was premature. If the board of commissioners had passed a resolution to make a new contract with the

appellee, or had made an order directing the payment of the balance due on the old contract, and the appellants had filed a bill to prevent the mandates of the board from being carried into effect, by enjoining the clerk or auditor of the board from drawing a warrant on the county treasurer, and by enjoining the county treasurer from paying such warrant, or by enjoining such other steps as might be taken to enforce the action of the board, then a very different case would have been presented for our consideration. The direction that no county shall appropriate or pay any of the public funds to a school controlled by a church involves the ascertainment of a fact. It must be ascertained by the county board whether the school applying for the appropriation or payment is or is not controlled by a church. A court of chancery cannot assume, in advance, that the board of county commissioners will ignore the real facts, and violate the fundamental law of the state, by making illegal contracts or illegal appropriations. It is time enough for equity to stretch forth its preventive arm

when some attempt is made to enforce the unconstitutional act. A municipal corporation which has entered into a void contract cannot be estopped from taking advantage of its own incapacity when suit is brought upon such contract or other efforts are made to secure its execution. *Austin v. Coggeshall* and *Schumm v. Seymour*, *supra*. There is nothing in the bill to show that there would have been any haste in drawing a warrant upon the county treasurer, or in obtaining payment from him, if the order allowing appellees' claim had been made by the board. It does not appear that the remedy of appellants would not have been as effective against the instrumentalities attempting to carry out the mandate of the board as against the corporate body itself. While the legislative power which has been delegated to municipal corporations is of a limited and subordinate character, it yet remains true that judicial interference with it is fraught with serious consequences, and cannot be too carefully avoided.

The decree of the Circuit Court is affirmed.

KANSAS SUPREME COURT.

STATE of Kansas, *Plff. in Err.*,

v.

Robert CALHOUN.

(..... Kan.)

*1. Where the accused in a criminal prosecution in the district court is

*Headnotes by VALENTINE, J.

NOTE.—*Writ of error coram nobis*.

The above case shows how important the writ of error *coram nobis* still is in American practice notwithstanding the statements of text-books that it has "fallen into practical desuetude, being almost entirely superseded by the more speedy and efficacious remedy by motion in the same court;" (Black, *Judgm.* § 300), and that it is "generally if not universally superseded . . . by motion." Freeman, *Judgm.* § 94.

In some cases the writ is called *coram nobis* or *coram vobis*, indiscriminately. But the distinction is pointed out by Judge Cooley in a note in Blackstone's Commentaries in the following words: "This writ is called the writ *coram nobis* or *coram vobis* according as the proceedings are in the king's bench or common pleas, because the record is stated to remain before us (the king) if in the former, and before you (the judges) if in the latter."

The same distinction is expressed by the court in *Camp v. Bennett*, 16 Wend. 43, where it is said: "There is therefore in this state no such thing as a writ of error *coram nobis*." The name is not appropriate nor is it important. A writ of error lies here, as in England, to the supreme court to correct an error of fact in the same court.

In *Smith v. Kingsley*, 19 Wend. 620, it is said that we have lost the name of the writ only and that a writ will still lie to correct an error of fact in the judgment of the same court.

In Illinois it was said in *Sloc v. State Bank*, 2 Ill. 428, that the writ of error *coram vobis* has been disused and superseded by the more summary writ of a direct application to the court by motion. The court in that case refused to turn the party 18 L. R. A.

forced, through well-grounded fears of mob violence, to plead guilty to the criminal charge, and to be sentenced to imprisonment and hard labor in the penitentiary for a term of years, he has a right to relief from such sentence and plea by an action or proceeding in the same court in the nature of a writ of error *coram nobis*.

2. And in such a case where the accused was sentenced to imprisonment

over to the remedy by a writ of error *coram vobis* instead of giving relief on a writ of error from a decision upon a motion.

But this case cannot be regarded as holding that the writ of error *coram vobis* is entirely obsolete in that state. The later case of *Beaubien v. Hamilton*, 4 Ill. 213, declares that the "law is well settled that where an error of fact is committed in legal proceedings the court in which the error is committed may correct it by a writ of error *coram vobis* or on motion;" and the court in that case held accordingly that an appellate court could not correct an error of fact in a judgment of the lower court to which the question had not been presented.

In the still later case of *McKindley v. Buck*, 43 Ill. 489, a judgment on a writ of error *coram nobis* was reversed on writ of error; but the court did not decide that the remedy was obsolete. It did hold that where relief had been denied on motion to set aside a judgment by default during the term at which it was granted a writ of error *coram nobis* could not be used to obtain relief on the same ground after the term.

In Connecticut the writ has not been superseded by the statutory provisions for a new trial. *Jeffery v. Fitch*, 48 Conn. 601.

Nor in Indiana. *Sanders v. State*, 35 Ind. 318, 44 Am. Rep. 29.

In Arkansas the absence of any statutory or constitutional provision explicitly providing for or regulating the writ of error *coram nobis* does not defeat the right to the remedy as at common law. *Adler v. State*, 35 Ark. 517, 37 Am. Rep. 48.

In Ohio it was held that the court of last resort

in the penitentiary for a period of forty-two years, and after having served more than seven years of that term, he commences an action in the nature of a writ of error *coram nobis* to set aside such sentence and plea, his action is not barred by any Statute of Limitations, for the reason that no Statute of Limitations will operate against the remedy of a party while he is under the legal disability of imprisonment.

3. In such a case, where a deposition of the accused was read in evidence on the trial in his action for relief, and in such deposition was a statement made by him that the relation of attorney and client had never existed between himself and K., but the oral testimony of K., introduced on the trial, showed that such relation did once exist, and that a certain conversation had between them more than seven years prior to that time, and while that relation existed, was a confidential conversation had between them as attorney and client, and the state offered to show what that conversation was, but the accused, through his counsel in the action for relief, objected, and the court excluded the evidence.—*Held*, that the supreme court cannot say that any error was committed.

4. In such a case, where the trial court permitted the accused to show threats of mob violence, made both before and after, but on the same day of, the entering of his plea of guilty, and many of which threats were not communicated to the accused before his plea was entered.—*Held*, not error; that the evidence tended to show that there was a real danger from mob violence, and that the fears of the accused were well founded, and that the evidence was proper to go to the jury.

5. And further,—*Held*, that the question of guilt or innocence of the accused in such a case is not a necessary question to be determined in the case; that a mob

cannot, by compelling a person accused of a crime to plead guilty, and to be sentenced to imprisonment and hard labor in the penitentiary, so shift the burden of proof from the state to the accused as to compel the accused to prove his innocence, and to prove it by a preponderance of the testimony, and to relieve the state from proving his guilt, and from proving it by evidence sufficient to remove every reasonable doubt. The accused has the right to be placed back in the same condition as he was before he entered his plea of guilty.

6. And it is further held that no error was committed in refusing instructions.

(January 7, 1898.)

ERROR to the District Court for Marion County to review a judgment revoking pleas of guilty and sentences formerly entered upon two indictments charging defendant with carnally knowing females under the age of eighteen years committed to his care, and ordering his release from imprisonment and a new trial. *Affirmed*.

The facts are stated in the opinion.

Mr. W. H. Carpenter for the State.

Mr. Frank Doster, for defendant in error:

An accused who pleads guilty to a criminal charge, under duress of fear of mob violence, and who is sentenced to prison upon such plea, may after the term at which sentenced, upon proceeding in error *coram nobis*, have such sentence revoked, the plea of guilt set aside, and a trial upon such charge.

Sanders v. State, 85 Ind. 818, 44 Am. Rep. 29; *Adler v. State*, 85 Ark. 517, 87 Am. Rep. 48; *Re Malison*, 86 Kan. 729.

This proceeding by implication from all the authorities and under the definitions of our

can review its own judgment after the term by writ of error *coram nobis*. *Dows v. Harper*, 6 Ohio, 518, 27 Am. Dec. 270.

In other states as will be seen from the cases below, the writ has been recognized in many cases.

But the court of common pleas which is not authorized to issue a writ of error of any description cannot entertain a writ of error *coram nobis*. *People v. Oneida County Ct.* C. P. 20 Johns. 22.

In Michigan a circuit court is held to have no power to issue the writ where the Constitution and statutes defining its jurisdiction give it no power to issue a writ of error in any case. *Teller v. Wetherell*, 6 Mich. 46.

And under the Tennessee Code, § 8110, giving county, chancery, and circuit courts power to issue the writ of error *coram nobis*, the supreme court, which is given by section 4508 power to "issue all writs and process necessary for the exercise and enforcement of its jurisdiction," cannot issue the writ of error *coram nobis*. *Lamb v. Sneed*, 4 Baxt. 349.

But as the writ of error *coram nobis* can be issued to correct an error of fact only by the same court where the judgment was rendered, a court cannot by such writ reach a judgment of a higher court affirming its own judgment. *Land v. Williams*, 12 Smedes & M. 362, 51 Am. Dec. 117; *Latham v. Hodges*, 35 N. C. 267.

In *Arnold v. Sandford*, 14 Johns. 417, and *Camp v. Bennett*, 18 Wend. 43, it is held that the infancy of defendant who appeared only by attorney could be tried by the jury in the supreme court and therefore might be assigned as error on writ of error to an inferior court. This seems to be a

case if any such exists which it is technically proper to call a writ of error *coram nobis* as distinguished from the writ *coram nobis*.

In *Davis v. Paokard*, 6 Wend. 327, it was held that the New York Court of Errors and Appeals would not reverse a judgment of the supreme court for mere error of fact which might have been tried there on a writ of error *coram nobis*.

But in *Teller v. Wetherell*, *supra*, the court holds that error of fact such as the death of a party before suit can be assigned on a common writ of error.

Scope of the writ.

The writ is not now so comprehensive as it was at common law because where a proper remedy is afforded by appeal or new trial the writ will not lie. *Sanders v. State*, 85 Ind. 818, 44 Am. Rep. 29.

In a criminal case a new fact suggested, which if known would have prevented a conviction, entitles a convicted person to the writ of error *coram nobis*.

As in the main case mob violence was feared in *Sanders v. State*, *supra*, and a plea of guilty was made on counsel's urgent advice, although the prisoner denied any knowledge of the crime, and the judgment was reversed for a new plea and trial.

In *Reid v. Strider*, 7 Gratt. 76, 54 Am. Dec. 120, a writ of error *coram nobis* is held inappropriate to chancery proceedings and the court adds that it cannot "for errors of fact not apparent upon its records grant writs of error *coram nobis*." But it further held that in that case there was no ground for the writ.

But error to contradict the record cannot be as-

statute is a civil action, although brought to vacate a criminal sentence.

Kan. Civ. Code, §§ 7, 8.

Writs of error *coram nobis* were prosecuted at common law not to review errors of law apparent upon the record, but to bring to view some matter *dehors* the record, which upon being made to appear, justified the entry of a different judgment.

Sanders v. State and *Adler v. State*, *supra*.

Jurisdiction to issue writs *coram nobis* is in the district court.

Kan. Const. art. 8, § 3; Gen. Stat. chap. 27, § 1; Civ. Code, § 727; *Cohen v. Trowbridge*, 6 Kan. 385.

While district courts have only "such jurisdiction as may be provided by law," Kan. Const. art. 8, § 6; yet the law vests them with "general original jurisdiction of all matters, both civil and criminal, not otherwise provided by law."

Gen. Stat. chap. 28, § 1.

Habeas corpus will not lie because the process under which the confinement is had was issued on the final judgment of a court of competent jurisdiction.

Civ. Code, § 671; *Ex parte Nye*, 8 Kan. 99.

None of the statutory remedies are available.

Sanders v. State, *supra*.

The common-law writ of error *coram nobis* may under the express provisions of our statute be sued out.

Civ. Code, § 727.

The issue of fact involved in a proceeding *coram nobis* is to be tried by a jury.

Tyler v. Morris, 20 N. C. 487, 34 Am. Dec. 395; *Adler v. State*, *supra*.

The Statute of Limitations does not run against the right claimed in a proceeding *coram nobis*.

Powell v. Gott, 18 Mo. 488, 53 Am. Dec. 153; *Latah v. McNees*, 50 Mo. 381.

And it does not run against the right of a person under disability.

Gen. Stat. chap. 81, § 434; chap. 104, par. 27; Civ. Code, § 19; Angell, Limitations, 6th ed. § 195; *Moore v. Armstrong*, 10 Ohio, 11, 36 Am. Dec. 72, *note*.

Valentine, J., delivered the opinion of the court:

At the February term of the district court of Marion county, in 1885, the grand jury found two indictments against Robert Calhoun for defiling females under the age of eighteen years, committed to his care and protection, by carnally knowing them. The fact of such indictments having been found became known in the community. The public mind became greatly excited and hostile to the accused. Threats of lynching were freely made, and preparations to carry out the same were apparently going on. Knowledge of these threats and preparations was communicated to the accused, who was then in jail, and the same produced in his mind such a state of fear that, to appease the passions of the community, and secure himself from bodily violence, he pleaded guilty of the charges contained in such indictments, and was sentenced to the maximum limit of punishment—twenty-one years' con-

signed upon such a writ. *Holford v. Alexander*, 12 Ala. 280, 46 Am. Dec. 258.

A writ of error *coram nobis* lies to correct errors of fact only. *Hawkins v. Bowie*, 9 Gill & J. 428; *Day v. Hamburg*, 1 Browne, 75; *Phillips v. Russell*, Hempst. 62; *Roughton v. Brown*, 53 N. C. 308.

But it will not lie to correct errors of law. *Hillman v. Chester*, 12 Heisk. 34; *Patterson v. Arnold*, 4 Coldw. 364; *Bigham v. Brewer*, 4 Sneed, 422; *Bridendolph v. Zeller*, 8 Md. 325; *Hawkins v. Bowie*, *supra*; *Fellows v. Griffin*, 9 Smedes & M. 322; *Williams v. Clay*, 5 Litt. (Ky.) 66; *Dinsmore v. Boyd*, 6 Lea. 689.

Nor will it permit the review of a judgment for after-discovered testimony. *Bigham v. Brewer*, *supra*.

Nor will it lie to review an irregularity which arises upon the record where this can be done by motion under the statutes. *Hirsh v. Weisberger*, 44 Mo. App. 508.

But such an error of fact as the conviction of a slave as a free person is ground for a writ of error *coram nobis* and not for habeas corpus. *Ex parte Toney*, 11 Mo. 661.

And the insanity of a person not known at the trial is ground for a writ of error *coram nobis* after the term at which a conviction was had. *Adler v. State*, 35 Ark. 517, 37 Am. Rep. 43.

So the infancy of a defendant who appeared by attorney only is ground for a writ of error *coram nobis* in the supreme court to revoke its own judgment. *Higbie v. Comstock*, 1 Denio, 652; *Meridith v. Sanders*, 2 Bibb, 101.

In *Kemp v. Cook*, 18 Md. 130, 79 Am. Dec. 651, such a writ to set aside a judgment against an infant by confession of his attorney was brought but relief was denied on the ground of laches.

The coverture of a woman who was not given by statute the power to sue or defend without her husband is ground for the writ where her husband

was not joined with her and the attention of the court was not called to the omission, and the coverture was not apparent on the record. *Latah v. McNees*, 50 Mo. 381; *Roughton v. Brown*, 53 N. C. 308.

Such a writ is also the proper way of having the death of a defendant put upon record and established where a *venuditioni exponas* was issued after the death of the judgment defendant. *Wood v. Colwell*, 84 Pa. 92.

In *Meggott v. Broughton*, Cro. Eliz. 106, and *Weaver v. Shaw*, 5 Tex. 228, the death of a party before judgment was also held ground for the writ.

In *Case v. Ribelin*, 1 J. J. Marsh. 29, and *Hurst v. Fisher*, 1 Watts & S. 433, the death of a plaintiff before judgment was held to be an error of fact for which the remedy was by writ of error *coram nobis*.

And in *Day v. Hamburg*, 1 Browne, 75, the same was held in case of the death before judgment of the plaintiff in an action for assault and battery.

So if one of two defendants dies before a judgment against both, the error can be corrected only by writ of error *coram nobis*. *Calloway v. Nifong*, 1 Mo. 223.

And where an appellee was dead at the time of affirming an appeal, the judgment was annulled and vacated. *Mertel v. Hershheim*, 9 Tex. 294.

So in *Mills v. Alexander*, 21 Tex. 154, a writ of error *coram nobis* is recognized as the proper remedy where a judgment is rendered after the death of a defendant, and therefore the court holds that such a judgment is valid against collateral attack.

The same is decided in *Giddings v. Steele*, 23 Tex. 722, 91 Am. Dec. 336.

And the same principle is held applicable to a change in the representative character of a party from that of surviving wife to that of administra-

finement in the penitentiary at hard labor—in each case. In March, 1893, in the district court of Marion county, he brought proceedings in the nature of those known to the common law as writs of error *coram nobis*, to revoke the aforesaid sentences, and to set aside the pleas of guilty, upon the ground that such pleas had been extorted from him by duress and threats and appearances of impending and imminent mob violence, operating upon his fears, whereby he had not been allowed his constitutional rights to plead his innocence of the charges alleged against him in said indictments, to defend against the same in person and by counsel, to meet the witnesses against him face to face, and to have a public trial by an impartial jury. A trial was had in the error *coram nobis* proceeding at the September term, 1892, before the court and a jury, and the jury returned a general verdict in favor of the plaintiff, Calhoun, and also returned a special verdict, which, omitting title and signature, reads as follows: "We, the jury, impeached and sworn upon our oaths, do find that in the cases numbered 1,546 and 1,547, in the district court of Marion county, Kansas, at its February term for the year 1885, wherein the state of Kansas was plaintiff and Robert Calhoun was defendant, being indictments for the offenses of carnally knowing females under the age of eighteen years, confided to his care and protection, found and returned by the grand jury of said county at said term, and to which said indictments said defendant pleaded guilty, that the said pleas of guilty were made by said defendant unwillingly and involun-

tarily, and under the influence and duress of his fears of death or great bodily injury being inflicted upon him by a mob if he did not so plead guilty to such indictments." A motion by the state for a new trial was made and overruled, findings of fact were made by the court in accordance with the verdict of the jury, and judgment was rendered by the court revoking the sentences and the pleas of guilty, awarding the accused a trial in each case, ordering his release from confinement in the penitentiary, directing the warden to deliver him to the jailer of Marion county, and directing the issuance of warrants for his arrest and commitment to the jail of such county pending the trials to be had. The state in various ways interposed objections to the jurisdiction of the court, and to the sufficiency of the facts alleged and proved, interposed the Statute of Limitations in bar of the proceedings, and objected to the admissibility of some of the plaintiff's evidence, and preserved proper exceptions to all adverse rulings.

Before proceeding to the discussion of the questions presented by counsel as being involved in this case, it would be well to state that it is admitted by counsel that the proceedings in the lower court were civil in their nature, and not criminal, and that the remedy of petition in error, and not appeal, is the proper remedy in this court.

The first question presented by the state, which was the defendant below and is the plaintiff in error, is that the court below had no jurisdiction to hear or determine any of the matters in controversy in this case, no power

trix pending a writ of error. *Moke v. Brackett*, 23 Tex. 443.

But "only such errors in fact can be assigned as are consistent with the record on a writ of error *coram nobis*." *Williams v. Edwards*, 34 N. C. 118.

A finding of fact by the court cannot be contradicted on such a writ. *Williams v. Edwards*, *supra*; *Richardson v. Jones*, 12 Gratt. 58.

Such a writ will not reach facts found by referee, court, or jury. *Bronson v. Schulten*, 104 U. S. 410, 20 L. ed. 797.

So in *Hillman v. Chester*, 12 Heisk. 34, it is held that the writ will not reach a fact directly passed upon in judgment.

A writ of error *coram nobis* is the remedy where a judgment is rendered on a barred debt without notice, appearance, or defense by the defendant. *Merritt v. Barks*, 6 Humph. 332.

Also to review a judgment rendered without notice on a bond signed only in blank. *Wynne v. Governor*, 1 Yerg. 149, 24 Am. Dec. 448.

Also where a judgment by default is taken by plaintiff's attorney, who fraudulently suppressed a plea and deposition furnished him by defendant's attorney. *Tucker v. James*, 12 Heisk. 333.

So where all litigated cases were continued and a case was afterwards taken up and disposed of in the absence of a party and his attorney, a writ of error *coram nobis* was held a proper remedy. *Crouch v. Mullinix*, 1 Heisk. 478.

But not in case of a default judgment merely because a declaration had been made by some one not shown to the effect that no litigated case would be tried that term. *Thurston v. Belote*, 12 Heisk. 249.

A judgment jointly confessed for fine and costs cannot be shown on a writ of *coram nobis* to have been entered by mistake for more than the sureties authorized. *State v. Disney*, 5 Sneed, 598.

18 L. R. A.

Under a code provision which regulates the writ of error *coram nobis*, and allows it for a review by a court of its own judgment, the court cannot on such a writ inquire into the proceedings of arbitrators. *McKinney v. Western Stage Co.* 4 Iowa, 420.

The writ was issued in several cases in Mississippi and Kentucky to quash a forthcoming bond. In *Miller v. Patton*, 8 Smedes & M. 483, the court refused to quash the bond because it had become a judgment and nothing was said about the scope of the writ.

In *Parkinson v. Waldron*, 7 Smedes & M. 189, it is said that if the motion was considered merely as a mode of bringing up the merits of the case under a writ of error *coram nobis*, and not as an independent motion to quash the forthcoming bond, and upon investigation it should appear that the bond was absolutely void, the court might perhaps so declare it; but in *Fellows v. Griffin*, 9 Smedes & M. 382, it is said that this was not deciding that the judgment on the motion was a correct mode of bringing up the merits of the writ of error or that a defective bond could be reached by such writ of error.

In *Keller v. Scott*, 2 Smedes & M. 82, the writ was issued on behalf of a surety on a forthcoming bond.

In *Williams v. Clay*, 5 Litt. (Ky.) 56, the writ of error *coram nobis* was issued to quash an execution.

The practice in these states seems to be peculiar to them.

Right to the writ.

In *Combs v. Carter*, 1 Dana, 178, it is said that the writ of error *coram nobis* issues as a matter of right, but this case was one arising under the Kentucky Act of 1803.

In *Tyler v. Morris*, 20 N. C. 437, 34 Am. Dec. 306, and *Ribout v. Wheeler*, Sayer, 166, it is said that the

to set aside the aforesaid sentences or pleas, and no power to grant trials in the aforesaid criminal cases. It is admitted on the part of Calhoun—the defendant in the criminal cases, the plaintiff below in this proceeding, and the defendant in error in this court—that no express remedy is given to him or to any one else similarly situated under any express provision of any statute; but he claims that he has a remedy under the principles of the common law, inferentially under those provisions of the statutes which recognize the existence and binding force of the common law. That the common law has existence in Kansas in some cases and to some extent we suppose all will admit. It has existence and force in all cases where the same is not inconsistent with the

Constitution or the statutes or the institutions of this country, and where, except for the common law, proper remedies for injustice and wrong and for the redress of grievances would not be furnished. The territory now occupied by the state of Kansas has belonged to the United States ever since the year 1803, and the government of the United States recognizes and enforces the common law everywhere except where it is otherwise provided by the Constitution or statutes, or where it is inconsistent with the institutions of this country. This same territory was also once, and from 1804 to 1812, under the jurisdiction and control of Indiana territory (2 U. S. Stat. at L. p. 287), and was also once, and from 1812 to 1820, under the jurisdiction and control of

writ is not a writ of right but can be granted only upon an affidavit showing an error of fact, and that discretion of the court in refusing it is not appealable.

Limitations.

That there is no Statute of Limitations against such a motion is decided in *Latah v. McNees*, 50 Mo. 381; *Powell v. Gott*, 13 Mo. 458, 53 Am. Dec. 153. But in *Strode v. Stafford*, 1 Brock. 162, the limit of the time for such a writ is held not to be the same as that for a writ of error.

And in *Jeffery v. Fitch*, 46 Conn. 601, the time was held to be that allowed for a new trial.

And in *Weaver v. Shaw*, 5 Tex. 238, the time was held to be limited by analogy to that allowed for a bill of review.

Procedure.

In *Clarke v. Bell*, 3 Litt. (Ky.) 168, and in *Williams v. Clay*, 5 Litt. (Ky.) 55, an assignment of errors and law together was held not subject to amendment by striking out the errors of law.

That the papers on such a writ should not regularly be entitled in any suit is decided in *Maher v. Comstock*, 1 How. Pr. 175.

A writ of error *coram nobis* is held not to be a "writ of error" within the meaning of 2 N. Y. Rev. Stat., § 595, § 23, requiring bail on writs of error. *Comstock v. Van Schoonhoven*, 3 How. Pr. 258.

A plea *in nullo est erratum* is in effect a demurrer admitting the facts alleged. *Goodwin v. Sanders*, 9 Yerg. 91.

All the defendants in a joint judgment must be made parties to a writ *coram vobis* to set it aside and it cannot be set aside as to one only. *Cook v. Conway*, 8 Dana, 454.

But parties whom the error of fact does not affect need not be joined. Yet a husband must be joined with his wife where she cannot sue or prosecute any legal proceeding without him. *Rough-ton v. Brown*, 58 N. C. 368.

The writ should command the judges "that the record and proceedings aforesaid [i. e. remaining before you] being inspected you cause further to be done," etc., and it is entirely defective where the command is "that you cause a transcript of the record to be brought before you" at a certain date "that the record and proceedings being inspected we [the people] may further cause to be done," etc. *Smith v. Kingsley*, 19 Wend. 620.

But mere irregularities in a writ of error *coram vobis* to supersede an execution are not fatal when the parties have actually appeared in court. *Duff v. Combs*, 8 B. Mon. 386.

If a fact alleged as error is disputed it must be tried by a jury. *Fellows v. Griffin*, 9 Smedes & M. 362; *Adler v. State*, 35 Ark. 517, 37 Am. Rep. 48; *Crawford v. Williams*, 1 Swan, 341. 18 L. R. A.

A notice must be given in order to obtain the writ. *Crawford v. Williams*, *Comstock v. Van Schoonhoven*, and *Maher v. Comstock*, *supra*.

If the notice required by statute is not given the judgment may be affirmed. *Mears v. Garretson*, 2 G. Greene, 816.

But under the Kentucky Act of 1808, the want of notice required by statute is not cause for quashing the writ. *Combs v. Carter*, 1 Dana, 178.

Discretion as to refusing a writ of error *coram nobis* is not appealable where the ground of the writ was the death of the defendant at the time of the judgment. Issue might have been taken on that point and so made a question for the jury. *Tyler v. Morris*, 20 N. C. 487, 34 Am. Dec. 395.

In *Pickett v. Legerwood*, 32 U. S. 7 Pet. 144, 8 L. ed. 638, a writ of error *coram vobis*, which was but a substitute for a motion to the court to correct an error of its own in granting improvidently a motion for leave to amend a declaration in ejectment by extending the term when in fact unknown to the court the term declared on had long since expired, the terretenant changed, and only one of the original defendants survived, who had removed to a great distance, was held not reviewable by writ of error.

But a judgment on a writ of error *coram nobis* sustaining a *venditioni exponas* after the death of a defendant without a *scire factas* against the executor was reversed on a writ of error, in *Wood v. Colwell*, 34 Pa. 92.

In and *Holford v. Alexander*, 12 Ala. 280, 46 Am. Dec. 253, a judgment on such a writ recalling a former judgment for trial *de novo* is held final for the purpose of a writ of error.

The judgment on a writ of error *coram vobis* should be "revocatur." *DeWitt v. Post*, 11 Johns. 460.

But such judgment is proper only when the judgment of the same court is recalled for error in fact, and the judgment correcting an error of a lower court must be "reversed." *Camp v. Bennett*, 16 Wend. 48.

A judgment for the plaintiff in error on such a writ should be that the judgment is revoked and annulled and should not reinstate the case for new trial *de novo*, because judgment is final as relates to the former judgment and suit. *Crawford v. Williams*, 1 Swan, 341.

The writ of error *coram vobis* will not of itself operate to stay execution. *Ferris v. Douglass*, 30 Wend. 626; *Smith v. Kingsley*, 19 Wend. 620.

This is in accordance with the English practice as declared in *Horne v. Bushel*, 2 Strange, 948; *Ribout v. Wheeler*, Sayer, 166; *Birch v. Triste*, 8 East, 415; *Semple v. Turner*, 6 Mees. & W. 152.

A writ of error *coram vobis* cannot be brought after affirmance of a writ of error to review the law. *Lambell v. Pretty John*, 1 Strange, 600; *Burleigh v. Harris*, 2 Strange 978. B. A. R.

Missouri territory (Id. p. 743 *et seq.*), both of which territories recognized the common law. At the last-mentioned date a portion of Missouri territory was admitted into the Union as a state. 3 U. S. Stat. at L. p. 545. In 1854 the territory now constituting the state of Kansas became an organized territory, and from 1855 up to 1861 it was governed by its own territorial laws and the laws of the United States, when, in 1861, it became a state. As early as 1858 the following statute was enacted by the territorial Legislature of Kansas, to wit: "Sec. 603. That rights of civil action, given or secured by existing laws, shall be prosecuted in the manner provided for by this Code, except as provided in section six hundred and four. If a case ever arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this Code, the practice heretofore in use may be adopted, so far as may be necessary to prevent a failure of justice." Civ. Code 1858, § 603. A similar statute has been in force ever since, and is now in force. Civ. Code 1868, § 727; Gen. Stat. 1889, par. 4841. Also the common law, by express enactment, has been in force in Kansas almost from the beginning. The present statute with regard thereto reads as follows: "Sec. 3. The common law, as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people, shall remain in force in aid of the General Statutes of this state." Gen. Stat. 1889, par. 7281. There are but few statutory actions in this state. Nearly every right of action in this state is founded upon and given only by the all-reaching principles of the common law, and generally it is only the procedure, and not the right of action, that is furnished or regulated by statute; and even as to procedure the statutes sometimes fail, and in such cases parties must resort to and invoke the aid of the common law. That such a remedy as the one resorted to by the plaintiff in this proceeding existed at common law there can be no doubt, and we think it still exists wherever it is necessary to invoke its aid. See the case of *Sanders v. State*, 85 Ind. 818, 44 Am. Rep. 29, and the many authorities there cited. Is it possible that a person, who, under fear of mob violence and of death or great personal injury, is compelled to plead guilty to a criminal charge, and to be sentenced to imprisonment and hard labor in the penitentiary, is without remedy to restore to him his lost rights? But if he has no remedy, then what becomes of the guaranties of our own state Constitution? Sections 10 and 18 of the Bill of Rights of our Constitution read as follows: "Sec. 10. In all prosecutions the accused shall be allowed to appear and defend in person or by counsel, to demand the nature and cause of the accusation against him, to meet the witness face to face, and to have compulsory process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. No person shall be a witness against himself, or be twice put in jeopardy for the same offense." "Sec. 18. All persons, for injuries suffered in person, reputation, or property, shall have rem-

edy by due course of law, and justice administered without delay." If any court has jurisdiction of proceedings like the present, it is the district court. Under section 8, art. 3, of the Constitution, the supreme court has original jurisdiction only in proceedings in quo warranto, mandamus, and habeas corpus, and such appellate jurisdiction only as may be provided by law; and neither the Constitution nor any statute has given to the supreme court, nor, indeed, to any other court, unless it is the district court, any jurisdiction in any proceeding like the present. Under section 1 of the Act relating to district courts, the district court is made a court of record, and is given "general original jurisdiction of all matters, both civil and criminal, not otherwise provided by law," (Gen. Stat. 1889, par. 1961,) and jurisdiction like the present has not been otherwise provided for by the Constitution or by any statute. Upon the whole, we think the district court, and it alone, has jurisdiction in cases like the present; and this opinion follows from a consideration of the common law and the Constitution and the statutes both of this state and of the United States, viewed in the light of history and of usage, and under the decisions of our own courts and of the courts elsewhere.

But it is claimed that, even if the district court has jurisdiction in cases like the present, still the plaintiff's present action or proceeding was barred by some Statute of Limitations before it was commenced. The original pleas of guilty took place and the sentence and judgments following them were rendered on March 2, 1885, and this present proceeding was not commenced until some time in March, 1892, more than seven years having in the meantime elapsed; and it is now claimed by the state that the proceeding was barred either by the two-years Statute of Limitations (Civ. Code Pr. § 18, subd. 8) or by the five-years' Statute of Limitations, (Id. subd. 6.) There are decisions which hold that no Statute of Limitations can ever operate in cases like the present. *Powell v. Gott*, 18 Mo. 458, 58 Am. Dec. 153; *Latahaw v. McNeas*, 50 Mo. 381. But it is not necessary, as we think, to hunt for decided cases. Our statutes govern. Section 19, Civil Code Pr., provides as follows: "Sec. 19. If a person entitled to bring an action other than for the recovery of real property, except for a penalty or a forfeiture, be, at the time the cause of action accrued, under any legal disability, every such person shall be entitled to bring such action within one year after such disability shall be removed." And section 1, subd. 27, of the Act relating to the construction of statutes, reads as follows: "Twenty-Seventh. The phrase, 'under legal disability,' includes persons within the age of minority, or of unsound mind, or imprisoned." Gen. Stat. 1889, par. 6687. But it is claimed on the part of the state that if the plaintiff in this proceeding was under such a legal disability that the Statute of Limitations would not run against such a proceeding, then that he was under such a legal disability that he could not commence or maintain the proceeding at all; or, in other words, it is claimed that, if from fears of his life or of great personal injury, and to avoid death or great personal injury, he

pleaded guilty to a criminal charge, and was sentenced thereon to imprisonment and hard labor in the penitentiary for a term of years exceeding the time prescribed by the Statute of Limitations within which he could commence his action or proceeding, then that he was and is wholly without remedy, for he was under such a legal disability that he could not commence any such proceeding to set aside the sentence or the plea while imprisoned, nor until the term for which he was sentenced to imprisonment should expire. Under the Statute of Limitations, he would have one year after the disability from imprisonment was removed within which to commence his action. Civ. Code Pr. § 19. But could he not commence his action before the beginning of that year, and while he was still imprisoned? What would be the use of his commencing any action or proceeding to relieve him from the consequences of his sentence after he had served in the penitentiary the full time for which he was sentenced? The commencing of any action or proceeding would then be of no benefit to him. It must be remembered that the plaintiff's imprisonment commenced before he made his pleas in the criminal cases, and has continued without any interruption up to the present time. While we think that under the statutes the plaintiff is and has been under such a legal disability that the Statute of Limitations has not operated against his remedy, yet we think that he has not been under such a legal disability as would prevent his commencing or maintaining an action to restore him to his just rights, provided, of course, that some friend would commence and conduct the proceeding for him. We do not think that the plaintiff's remedy in this case is barred by any Statute of Limitations.

The state also claims that the court below erred in excluding certain evidence. It appears that on May 25, 1892, the deposition of the plaintiff below, Calhoun, was taken in Leavenworth county, and presumably in the penitentiary where he was confined. In that deposition he stated that the relation of attorney at law and client never existed between himself and C. W. Keller. Afterwards, and on the trial of this case, which occurred on September 12, 1892, in Marion county, the deposition was read in evidence. Also the oral testimony of Mr. Keller was introduced in evidence on the part of the plaintiff, Calhoun. It appeared from the testimony of both these witnesses that they had had a conversation about the last of February, 1895, in the county jail of Marion county where Calhoun was then imprisoned; and Mr. Keller also testified that at the time of this conversation he was employed as an attorney at law by Calhoun, and that the conversation then had was had between them in the relation of attorney and client. Notwithstanding this, the state offered to introduce the testimony of Mr. Keller to show what the conversation was, but Calhoun's counsel in this case, Frank Doster, objected upon the ground that the conversation consisted of confidential communications had between them as attorney and client, and the court excluded the evidence, and this the state claims was error. Calhoun himself was not present at the trial. We do not think that

any error was committed in the exclusion of this evidence. Civ. Code Pr. § 323, subd. 4. The court below heard the oral testimony of Mr. Keller, and could determine from it and from Calhoun's deposition very much better than we can whether the conversation had between Keller and Calhoun in the county jail was a confidential conversation had between them as attorney and client or not; and if it was such a conversation, (and we must hold that it was,) then the court below certainly did not err in excluding it. More than seven years had elapsed after the conversation had occurred and before Mr. Calhoun's deposition was taken, and during all that time, except a few days, Calhoun had been confined in the penitentiary at hard labor; and it cannot be expected that his memory would be as good as that of Mr. Keller. It is probable that, if he had had an opportunity to have had his memory refreshed by another conversation with Mr. Keller, he would have made a different statement. We do not think that he was conclusively bound by his statement made in his deposition, but had the right, through his counsel, to show by the testimony of Mr. Keller that the relation of attorney and client in fact existed between them at the time of the conversation had in the county jail in 1895, and therefore that what was said during that conversation could not be given in evidence over the objections of his counsel in this case.

It is further claimed that the court below erred in permitting the plaintiff, Calhoun, to prove threats made against his life both before and after the pleas of guilty in the criminal cases, and threats not communicated to him before his pleas. We do not think that any error was committed in this respect. It was very proper to show the temper of the mob, for the purpose of showing whether any real danger existed as to the life of Calhoun, and these threats tended to show this fact. All the threats proved that were made after Calhoun entered his pleas of guilty were made on the same day, and before the mob had completely dispersed. Of course, it was a very important fact—indeed, a necessary fact—as to whether Calhoun entertained fears of his life or great personal injury at the time he entered the pleas or not. But the fact that he had substantial grounds for such fears was another very important fact, and it was proper that evidence of that fact should also be given to the jury.

It is also claimed that the court below erred in instructing the jury, in substance, that they had no right to consider the question of the guilt or innocence of Calhoun. We would think this instruction was correct. It can scarcely be possible that a mob, by compelling a person accused of crime to plead guilty thereto, and be sentenced to imprisonment and hard labor in the penitentiary, can thereby shift the burden of proof from the state to the accused. Can a mob, by this means, abrogate all presumptions of innocence? Can the mob cast the burden upon the accused of proving his innocence, and of proving it by a preponderance of the testimony, and relieve the state of proving his guilt, and of proving it by evidence sufficient to remove every reasonable doubt? A mob has no

right by any means to shift the burden of proof from the state to the accused, or to relieve the state from proving the guilt of the accused beyond a reasonable doubt, and no right to compel the accused to prove his innocence, and to prove it by a preponderance of the evidence. The accused had the right to be placed back in the same condition as he was before he entered his pleas of guilty. He had the right to be placed back in such a condition that he could avail himself of all the rights given to him by sections 10 and 18 of the Bill of Rights of the Constitution, above quoted, and also of section 228 of the Criminal Code, and of all the other provisions of the Constitution and the statutes adopted or enacted in the interest of fair trials and of liberty and justice. On the final trials in the criminal cases he can be fairly tried, and, if his guilt shall then be fairly established, he can then be sentenced according to law. At the present, and in this proceeding, he is not required to establish his innocence. We think no error was committed in this respect.

It is further claimed by the state that the court below erred in refusing to give a certain instruction that, if Calhoun entered his pleas of guilty because he was in fact guilty, and honestly desired to enter such pleas, irrespective of any fear of mob violence, then that the fact that he was threatened with mob violence was not sufficient to avoid the sentence of the court. There are at least two sufficient answers to this claim of error: First, the court, in substance, gave the instruction in its general charge; and, second, the special findings of the jury would cure any error that might have intervened in this respect.

After a careful consideration of all the points presented by counsel in this case, we are of the opinion that no substantial error was committed by the court below. With regard to actions or proceedings in this country in the nature of writs of error *coram nobis*, a valuable note will be found appended to the case of *Hoford v. Alexander*, 46 Am. Dec. 257-261. Upon the points made by counsel our decision is as follows:

1. Where the accused in a criminal prosecution in the district court is forced through well-grounded fears of mob violence to plead guilty to the criminal charge, and to be sentenced to imprisonment and hard labor in the penitentiary for a term of years, he has a right to relief from such sentence and plea by an action or proceeding in the same court in the nature of a writ of error *coram nobis*.

2. And in such a case, where the accused was sentenced to imprisonment in the peni-

tenentiary for a period of forty-two years, and, after having served for more than seven years of that term, he commences an action in the nature of a writ of error *coram nobis* to set aside such sentence and plea, his action is not barred by any statute of limitations, for the reason that no statute of limitations will operate against the remedy of a party while he is under the legal disability of imprisonment.

8. In such a case, where a deposition of the accused was read in evidence on the trial in his action for relief, and in such deposition was a statement made by him that the relation of attorney and client had never existed between himself and K., but the oral testimony of K., introduced on the trial, showed that such relation did once exist, and that a certain conversation had between them more than seven years prior to that time, and while that relation existed, was a confidential conversation had between them as attorney and client, and the state offered to show what that conversation was, but the accused, through his counsel in the action for relief, objected, and the court excluded the evidence, held that the supreme court cannot say that any error was committed.

4. In such a case, where the trial court permitted the accused to show threats of mob violence, made both before and after, but on the same day of, the entering of his plea of guilty, and many of which threats were not communicated to the accused before his plea was entered, held not error; that the evidence tended to show that there was a real danger from mob violence, and that the fears of the accused were well founded, and that the evidence was proper to go to the jury.

6. And, further held, that the question of the guilt or innocence of the accused in such case is not a necessary question to be determined in the case; that a mob cannot, by compelling a person accused of crime to plead guilty, and to be sentenced to imprisonment and hard labor in the penitentiary, so shift the burden of proof from the state to the accused as to compel the accused to prove his innocence, and to prove it by a preponderance of the testimony, and to relieve the state from proving his guilt, and from proving it by evidence sufficient to remove every reasonable doubt. The accused has the right to be placed back in the same condition as he was before he entered his plea of guilty.

9. And it is further held that no error was committed in refusing instructions.

The judgment of the court below will be affirmed.

All the Justices concur.

NORTH CAROLINA SUPREME COURT.

James C. MASON, *Appt.*,

RICHMOND & DANVILLE R. CO., *Respt.*

(.....N. C.....)

1. The want of any bumpers on freight cars, whether received from another company or not, renders a railroad

company liable for injury received in consequence thereof by a brakeman who is suddenly called upon in the night to couple the cars and who has no knowledge of their defects.

2. It is not the duty of a brakeman to examine the bumpers of cars on a dark night before essaying to couple the cars in obedience to orders.

NOTE.—See, in connection with the above case, that of *Louisville & N. R. Co. v. Boland* (Ala.) *ante*, 18 L. R. A.

290; in which the use of different kinds of buffers in the same train was held not to be negligence.

3. The command of the conductor of a freight train to a brakeman to go between the cars when he cannot couple them otherwise is a waiver of a rule of the company prohibiting brakemen to go between cars under any circumstances.
4. Judicial notice will be taken of the relation between the brakemen and conductor of a freight train and that the brakemen feel impelled to obey the conductor's orders.

(Burwell, J., dissents.)

(December 22, 1892.)

APPEAL by plaintiff from a judgment of the Superior Court for Guilford County in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence.

Reversed.

Plaintiff was a brakeman in defendant's employ and signed the agreement which defendant required of its employés, of which the following is a copy:

"I fully understand that the rules of the Richmond & Danville Railroad Company positively prohibit brakemen from coupling or uncoupling cars except with a stick, and that brakemen or others must not go between cars, under any circumstances, for the purpose of coupling or uncoupling, or for adjusting pins, etc., when an engine is attached to such cars or train; and, in consideration of being employed by said company, I hereby agree to be bound by said rule, and waive all or any liability of said company to me for any results of disobedience or infraction thereof. I have read the above, and fully understand it."

Further facts appear in the opinion.

Mr. John A. Barringer for appellant.

Mr. D. Schenck for respondent.

Avery, J., delivered the opinion of the court:

The court below held that, upon the whole evidence, the plaintiff had failed to make out a prima facie case. The burden was upon the servant, suing his employers, to show (1) that the machinery was defective; (2) that the defects were the proximate cause of the injury; (3) that the master had knowledge, or might, by the exercise of ordinary care, have had knowledge, of such defects. *Hudson v. Charleston, C. & C. R. Co.* 104 N. C. 491. The question presented by the appeal, therefore, is whether, in any aspect of the evidence, the plaintiff has relieved himself of the *onus probandi* imposed upon him by law.

The first point to be considered is whether the defendant company was negligent in failing to provide what is known as the "Janney," or some other improved coupler, which would obviate the necessity, under any circumstances, of going between the ends of cars in order to fasten one to another. The general rule is that it is not the duty of railway companies to furnish machinery of the very best varieties, or to attach appliances of the latest and safest kinds, but that it is culpable to use cars or engines of any particular pattern which an ordinary inspection would show to be defective. In view of the changes incident to new inventions and

discoveries, facts which would not have shown negligence a few years since may now, or in the near future, be declared in law ample evidence of culpable dereliction in duty, such as will involve liability for damages. 1 Shearm. & Redf. Neg. § 12; *Blackwell v. Moorman* (N. C.) 17 L. R. A. 729 (decided at this term). We think that the time has arrived when railroad companies should be required to attach such couplers, and perhaps air-brakes, or appliances equally safe and effective for checking the speed of moving trains, on all passenger cars, since, as a rule, each corporation uses for carrying passengers none but its own conveyances, and the new couplers have now become so cheap, as compared to the value of the lives and limbs of servants and passengers, that it is not unreasonable to require that they provide them, on peril of answering for any damage which might have been obviated by their use. But while, doubtless, the day will soon come when they can be attached at comparatively small cost to all freight cars, it might seriously embarrass our commerce, involving an interchange, for the purposes of expeditious transportation, of vehicles between all of the roads from Canada to Mexico, were every carrier required, not only to incur the expense of buying the right, and readjusting all of its own cars for the use, of the improved fastening, but also to choose between refusing to receive a car of another company without such couplers, and incurring contingent liability for using it; since the liability of the corporation for such defects in those received from other companies is the same as for defects in its own. *Patterson, Railway Accident Law*, 812; *Miller v. New York Cent. & H. R. R. Co.* 99 N. Y. 657; *Jones v. New York Cent. & H. R. Co.* 92 N. Y. 628. But it appears from the evidence that the plaintiff was suddenly called upon on a very dark night to couple to the train two box cars standing upon the siding at Durham,—one of which belonged to the defendant, and another to a different company,—and that, when the train backed towards the train on the siding, he saw that the pin, which he had adjusted with a stick in the drawhead of the car standing on the track, would not go down into the link of the drawhead in the moving car, which he had also arranged with his stick, unless he should use his hand to push it down, and in this emergency he rushed in between the cars, as the conductor had ordered him to do whenever he failed in the effort to couple with a stick. After getting between the standing and the moving car, he discovered for the first time that there were no bumpers on either car. Bumpers are blocks of wood fastened to the end of a box car, above and below or on either side of the drawhead, and usually protrude about eight or ten inches, so that they serve the double purpose of preventing drawheads from being broken by a collision, and of protecting brakemen who may be between the cars. Drawheads have springs in them, and give way when they come into collision with each other, so that they cannot be made to subserve the purpose, like bumpers, of holding the cars apart. In *Gottlieb v. New York, L. E. & W. R. Co.*, 100 N. Y. 467, where the facts were that a brakeman was injured in coupling two cars belonging to another company, the bump-

ers being only three inches long, the court said: "The defendant was under obligation to its employes to exercise reasonable care and diligence in furnishing them safe and suitable implements, cars, and machinery for the discharge of their duties. . . . The defect was an obvious one, easily discoverable by the most ordinary inspection, and it would seem to be the grossest negligence to put such cars into any train, and especially into a train consisting of cars of different gauge. But these two cars did not belong to the defendant. They belonged to other companies, and came to it loaded, and it was drawing them over its road. . . . It is not bound to take such cars if they are known to be defective and unsafe. Even if it is not bound to make tests to discover secret defects, and is not responsible for such defects, it is bound to inspect foreign cars just as it would inspect its own cars. . . . When cars come to it which have defects visible or discoverable by ordinary inspection, it must either remedy such defects, or refuse to take such cars. So much, at least, is due from it to its employes. The employes can no more be said to assume the risk of such defects in foreign cars than in cars belonging to the company. . . . The defect here complained of was obvious, easily discoverable by the most ordinary inspection, and it seems it could have been easily remedied by simply nailing or fastening additional strips of wood to the ends of the cars, so as to give the bumpers sufficient width to afford the protection needed and intended." The case being exactly in point, it seems not inappropriate to reproduce the language of *Judge Earl* from this elaborate opinion, instead of discussing the same question at greater length for ourselves. The general rule is that, where freight cars are obviously so defectively made, whether by a failure to attach bumpers at all, or to make them sufficiently long to protect a person standing between the cars when in motion, or in consequence of any other fault in construction, that the slightest indiscretion on the part of an operative may endanger his life, the company is liable for any injury resulting from such defects. *Toledo, W. & W. R. Co. v. Fredericks*, 71 Ill. 294; *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492, 8 Am. Rep. 661; *Wedgwood v. Chicago & N. W. R. Co.* 41 Wis. 478. In *Gottlieb's Case*, *supra*, it will be observed that stress was laid upon the fact that the want of a bumper would have been discovered by an ordinary inspection, and in our case, as well as in that, the brakeman was suddenly called upon to pass between two cars, of the condition of which he could not have previously informed himself. Before daylight on a dark morning the duty devolved upon him of attaching a car, which it may be was never north of Wilmington, until brought by some freight train with which plaintiff had no connection on the day before to the station where he found it. In *Johnson v. Richmond & D. R. Co.*, 81 N. C. 459, where the injury to the plaintiff was caused by a defective rod, which he had had no reasonable opportunity to inspect, *Chief Justice Smith*, speaking for the court, said: "Had the proper inspection been made by the defendant, and the rod repaired and strengthened, the accident would not have occurred; and hence it must be ascribed to the 18 L. R. A.

defendant's own dereliction of duty. The fault lies with the company, and it must bear the consequences." The defendant ought to have examined its own car and, upon discovering its condition, bumpers could have been placed upon it at comparatively trivial cost, and the same duty of inspection devolved upon it when the other car was tendered to it; but upon examination it had the option, as will appear from the authorities already cited, of refusing to receive it at all or of repairing it, so as to make it safe, after it was received.

So, apart from the special contract which is pleaded as a defense, the defendant is *prima facie* liable to answer in damages because of its negligence, when its officers ought to have known of the defect, and to have remedied it, and it has not relieved itself of this apparent liability by showing that the plaintiff knew, or had opportunity to know, the condition of the particular cars on the siding; but, on the contrary, the only testimony on the subject is that of plaintiff, to the effect that he did not see the car till he had put himself in danger, and then, in the imperfect light, discovered that there was no bumper on either of those between which he was already caught. *Crutchfield v. Richmond & D. R. Co.* 76 N. C. 322; *Pleasants v. Raleigh & A. A. R. Co.* 95 N. C. 195; *Shearm. & Redf. Neg. §§ 92, 94, 95*; *Cooley, Torts*, 561. Leaving the agreement, designated as Exhibit A, out of view, if there is any testimony tending to show contributory negligence, there was certainly no admitted state of facts which justified the court in withdrawing the case from the jury, and holding that, in any aspect of the evidence, the injury was caused by the fault of the plaintiff. In *Crutchfield's Case*, *supra*, it was expressly declared that, though the servant assumed the risks of accident incident to his service, he did not contract to excuse the negligence of the company, unless he knew of the danger to which he was exposed by its want of care, or might, by reasonable diligence, have known of it, and failed to give notice to his employer, so that the defect might be remedied.

The case at bar is not one in which the plaintiff was injured by the fault of a fellow servant, but by the negligence of the master in carelessly retaining on the line, and receiving from other carriers, palpably defective conveyances; the master being presumed to know of the danger, which could have been discovered by ordinary inspection, while the servant had no opportunity to know, until it was too late to avoid it. The dangerous condition of the car was not, as in *Pleasants' Case*, *supra*, known to both employer and employe, but only to the former. Where the rolling stock or machinery of a company is so defective in its construction that by an ordinary inspection the company could discover its condition, unless it appear that, notwithstanding such want of care on its part, the supervening negligence of the servant was the proximate cause of the injury complained of, the company is liable. *Wedgwood v. Chicago & N. W. R. Co.* and *Hudson v. Charleston, O. & C. R. Co. supra*; *St. Louis & S. E. R. Co. v. Valirius*, 56 Ind. 511; *Gottlieb's Case, supra*. Another case precisely in point is *King v. Ohio & C. R. Co.*, 14 Fed.

Rep. 277, in which Judge Gresham, of the circuit court, held that a brakeman in coupling cars had a right to assume that they are in good and safe condition, and is not negligent in running between cars without stopping to examine and see whether the drawheads are properly adjusted or not. No more is it his duty to examine bumpers on a dark night before essaying to couple cars.

The cars being palpably defective, and it appearing plainly that the company might, by ordinary care in inspecting them, have known their condition, the defendant still insists that, though the plaintiff may not have been negligent in knowingly incurring risk that he might have avoided, still he was violating a rule of the company of which he had express notice when he passed between the cars to adjust the coupling, and his want of care was therefore the cause of the injury. The authorities which we have cited fully sustain the position that, in the absence of such an agreement, the company would be deemed negligent and the plaintiff would be held free from blame. In addition to those authorities, we can fortify our position more strongly still by recurring to the principle that, notwithstanding any real or supposed negligence of an injured plaintiff, a railway company is liable in damages if but for its own want of care the injury could have been avoided. *Deans v. Wilmington & W. R. Co.* 107 N. C. 686; *Clark v. Wilmington & W. R. Co.* 109 N. C. 480, 14 L. R. A. 749. If, therefore, we were to concede that the plaintiff was culpable in exposing himself to danger, the carelessness of the defendant would nevertheless be deemed in law the proximate cause of the injury.

Mr. Beach, citing with approval 71 Ill. 294, *supra*, says: "But when the cars are so constructed, the bumpers being of different heights, or being in any respect so made that the slightest indiscretion on the part of the operative will prove fatal to him, it has been held that when the injury results from such causes the company is liable." Beach, Contrib. Neg. § 865. But the case of *Cowles v. Richmond & D. R. Co.*, 84 N. C. 809, 87 Am. Rep. 620, it would seem, is so strikingly analogous as, upon principle, to be decisive of that at bar. If, then, the company was held to be wanting in ordinary care because the cars provided did not so fit each other that the bumpers would keep them apart and prevent collisions, it would seem, where the failure to place any bumpers at all on cars is the proximate cause of a collision in which a brakeman is injured, there would be still more palpable proof of negligence. Justice Ruffin stated the fact to be, as appeared from the plaintiff's testimony on the trial, "that the brakeman was under the immediate direction and order of one Garrison, who was the engineer and conductor of the defendant's freight train," and that while executing the order of the conductor, as in our case, the brakeman "was injured in the manner complained of, by a collision of two cars, which collision resulted from the fact that the cars were so constructed that their bumpers did not correspond or fit one another as they should have done, in order to prevent the cars coming in too close contact, which defect was unknown to plaintiff, and but for which he

would not have been injured." This court held that the defects in the cars were such as to establish negligence on the part of the defendant, because the defect was so obvious as to be seen on inspection, and to make it incumbent on the company to show that some subsequent carelessness of the plaintiff was the proximate cause of the injury. The statement as to the relations of the conductor and brakeman was much more meager, it is true, than in *Patton v. Western N. C. R. Co.*, 96 N. C. 455, since there the superior, discharging himself the same double duties of conductor and engineer, was expressly shown to have the power to employ and discharge the laborers subject to his orders.

The question involved in all such cases is whether the subordinate feels constrained to obey the orders of his superior, though apparently obedience will be attended with peril, rather than run the risk of defying his authority. The fact that the conductor has the power to employ and discharge brakemen on his train is but evidence to show that the brakemen fear to disobey his commands. The existence of such authority, in the very nature of things, cannot be made the invariable test of the servant's culpability. If the servant never knows or communicates with a higher official than the conductor, and receives every order upon which he acts in the line of his duty from him as a superior,—as it is a matter of universal knowledge is the true state of facts on all railroads,—is it not reasonable for the laborer to conclude that the conductor has power to waive the requirement of the rule that he has signed, and that, if he refuses to couple cars in accordance with his direction, and thereby delays the departure of a train, he may at least be reported for inefficiency and discharged from the service of the company? If the servant acts upon a well-grounded fear of losing his place, the reason of the rule would be met and he should be declared free from culpability, unless the plaintiff recklessly exposed himself to manifest peril, or chose to subject himself to danger when another safe mode of discharging his duty was open to him, as in *Chambers v. Western N. C. R. Co.* 91 N. C. 475. The elaborate opinion of Justice Field in *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 877, 28 L. ed. 787, in which he reviews the question, Who are servants engaged in a common employment?—in the light of all the previous decisions in America and England, contains the clearest and most philosophical discussion of the subject to be found in any authority to which we have had access. He announces the conclusion of that court as follows: "A conductor, having the entire control and management of a railway train, occupies a very different position from the brakemen, the porters and other subordinates employed. He is in fact and should be treated as the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure care in the selection of such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part and prompt and unhesitating obedience to his

Orders. . . . We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned." "The true view," says Wharton (Law of Negligence, § 232), "is that, as corporations can only act through superintending officers, the negligences of those officers with respect to other servants are the negligences of the corporation." The command of the conductor to the brakeman to go between the cars, when he could not couple them otherwise, was one to which unhesitating obedience was expected and demanded. The giving of such an order by the conductor ought, upon the plainest principles of right and justice, to be declared a waiver of the regulation by an officer who is the representative of the corporation. That a brakeman feels impelled to obey the orders of the conductor no observant person can deny; and since we can take judicial notice of a relation so common and well understood, it would be a voluntary preference of fiction to fact were we to adhere to an arbitrary rule, founded in a supposed reason that we know does not exist. A brakeman does not contract to incur the risk of serving under a conductor who will order him to disobey the regulations of the company, and leave him to choose on the instant between observing the rules and obeying his superior.

The Supreme Court of Georgia, in *Central R. Co. v. De Bray*, 71 Ga. 406, held that, while neither a conductor nor any other officer had a right to order an employé to get on or off a moving train, and the employé was not bound to obey it, yet where the conductor did give the order, and the brakeman obeyed it, the act of the conductor was the act of the corporation, and the corporation could not escape responsibility for its own wrong. The court held in that case that it was immaterial what the rules of the company were, and so in our case, where the brakeman was ordered to jump between cars, instead of from the top of a car, the same principle should prevail.

The Supreme Court of South Carolina held, in *Boatwright v. Northeastern R. Co.*, 25 S. C. 129, that "the conductor of a train is the representative of the company, and not a fellow servant with other employés operating the same train under his orders." That case was exactly in point, as the conductor had ordered the brakeman to go between cars because of uneven couplers on freight cars. The same principle is decided in *Coleman v. Wilmington, C. & A. R. Co.*, 25 S. C. 446, 60 Am. Rep. 516. It has been repeatedly held that an engineer in charge of a train, discharging the duties usually devolving on a conductor, in addition to managing the engine, is not a fellow servant of a brakeman. *Louisville & N. R. Co. v. Brooks*, 83 Ky. 129. The American rule, as distinguished from the English, is that a servant intrusted with the general management of the master's business, or of those in a particular department or on detached service, in charge of the train or body of laborers, is not a fellow servant of those who are employed under him and subject to his orders. *Augusta Factory v. Barnes*, 72 Ga. 217, 53 Am. Rep. 888; *Douling v. Allen*, 74 Mo. 13, 41 Am. Rep. 298; *Chicago*

& A. R. Co. v. May, 108 Ill. 288; *Chicago, St. P. M. & O. R. Co. v. Lundstrom*, 16 Neb. 254; *Burlington & M. R. Co. v. Crockett*, 19 Neb. 188; *Shearm. & Redf. Neg. § 226*.

It will be conceded that, though the owner and manager of a manufacturing establishment should make a rule, and cause every employé to sign it, to the effect that the employé would not pass between certain machines, go into an engine room, or expose himself to any specified danger connected with the machinery of the mill, and would hold the owner discharged in advance for any liability growing out of such exposure, yet if the manager should, in the face of the rule, order the servant who signed it to disobey it, and his obedience to orders should expose him to a danger caused by defects in the machinery that on an ordinary inspection would have been obvious to the master, though not so readily discoverable to the servant, acting instantly on the order, it would scarcely be contended that the superior who had made the regulation would not thus waive its observance. A corporation is usually governed by its directors, but they may shift its responsible management by such a variety of orders, by-laws, and regulations as to make it impossible to discover a real, tangible, directing head. If, as authority and reason clearly dictate, we consider a conductor in charge of a train as representing the untangible head of the company, then his order is as much a waiver of a regulation as that of the owner and head of a mill.

But, speaking for a minority of the court only, it seems that there should be but little difficulty in arriving at the same conclusion by the relation of another question, whether, in consideration of receiving employment, a brakeman can, by written agreement, "waive the liability" of the company incurred by furnishing cars without bumpers, and which cannot be coupled with a stick, in the event that he shall be injured in the attempt to fasten the couplings of such cars, under the command of the conductor in charge of the train, with his hands, instead of using his stick, as the rule of the company requires. It is settled as the almost universal rule in America that, though a common carrier of freight by contract upon consideration may relieve itself of the full measure of responsibility as an insurer, no limitation can in that way be placed upon its liability for its own negligence. *Smith v. North Carolina R. Co.* 64 N. C. 285; 4 Lawson, Rights, Rem. & Pr. § 1840; Lawson, Cont. §§ 29-67. The same rule applies to agreements made by common carriers of passengers, purporting to restrict their liability for injuries caused by their own negligence. Such contracts are void as against the public policy of the law. 4 Lawson, Rights, Rem. & Pr. § 1913. This stringent rule of liability is said to rest upon the duty of the government to give unrestricted protection to the lives and limbs of its citizens. Lawson, Cont. §§ 212-220. It would seem that the government owes it to the servant of a carrier to give to him the same protection of life and limb as to the passenger, by declaring void an agreement, in consideration of being employed, to excuse the company for negligence even when it causes death; and it has been so held, as far as our investi-

gations have extended, in all of the courts except the Supreme Court of Georgia. *Lake Shore & M. S. R. Co. v. Spangler*, 44 Ohio St. 471; *Kansas Pac. R. Co. v. Peavey*, 29 Kan. 169, 44 Am. Rep. 630; *Little Rock & Ft. S. R. Co. v. Eubanks*, 48 Ark. 460; *Memphis & C. R. Co. v. Jones*, 2 Head, 517; *Roesner v. Hermann*, 10 Biss. 486, 8 Fed. Rep. 782; 1 Lawson, Rights, Rem. & Pr. § 318. It is difficult to draw a distinction between contracts affecting only the safety of goods or animals or those affecting the lives and limbs of passengers, and those which vitally concern another large class of human beings. If public policy prohibits the recognition of the validity of a contract limiting liability for a paying passenger, or, as most authorities in this country maintain, even one riding on a free pass, upon what principle can the court refuse to extend the same protection to a class of people who are much more exposed to danger, and much more liable to be influenced to sign such agreements?

For the reasons given, we think that the court below erred in holding that the plaintiff could not recover. The case should have been left to the jury, and the judgment of nonsuit will be set aside, and a new trial granted.

Burwell, J., dissents.

Shepherd, Th. J., concurring:

I concur in the conclusion reached by the court, but not on the ground that the regulation in question was an unreasonable one. It was not a stipulation against negligence, in the ordinary sense of the term, and, as long as it remained in force, the defendant did not owe to the plaintiff the duty of providing bumpers for its cars. The essential element of negligence is a breach of duty; but, in order to recover, it is not enough for the plaintiff to show a simple breach of duty, but he must also show that the defendant owes the duty to him. 1 Shearm. & Redf. Neg. § 8; Beach, Contrib. Neg. § 6; *Emry v. Roanoke Nav. & W. P. Co.* (N. C.) (decided at this term,) 16 S. E. Rep. 18. In the decisions cited, where a recovery was had for negligence in not furnishing bumpers, there was either no regulation like that in the present case, or such regulation had been waived. I cannot understand how it was the duty of the defendant to provide against an accident which could not possibly have happened but for a violation of its reasonable regulations. However negligent, then, as to others, the defendant may have been in not seeing that the cars were provided with bumpers, such negligence was not actionable by this plaintiff if his injuries were caused by his disobedience of an existing regulation, known and agreed to by him, forbidding him from going between the cars, under any circumstances, for the purpose of coupling them, etc. The evidence, however, tended to show that there was a waiver of the regulation by the conductor in charge of the train, and, in view of the authorities cited, and the convincing reasons given in the opinion, I think that such a waiver was, for the purposes of this action, binding on the defendant. It is upon this ground that I concur in the disposition made of the appeal.

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BOARD OF EDUCATION OF BLADEN COUNTY, Appt.,

BOARD OF COMMISSIONERS OF BLADEN COUNTY.

(.....N. C.....)

A special tax by county commissioners to supply a deficiency in the amount necessary to keep the public schools open for at least four months in the year, as required by Const., art. 9, § 3, is not a tax "for a special purpose," under art. 5, § 6, which limits the amount of county taxes to double the state tax "except for a special purpose and with the approval of the General Assembly."

(Avery, J., dissents.)

(December 12, 1892.)

APPPEAL by plaintiff from a judgment of the Superior Court for Bladen County in favor of defendant in an action brought to compel it to make provision for keeping open the public schools. *Affirmed.*

The facts are stated in the opinion.

Messrs. Batchelor & Devereux for appellant.

MacRae, J., delivered the opinion of the court:

The questions presented for our consideration are precisely the same as those which were determined in the case of *Durkdale v. Sampson County Comrs.*, 93 N. C. 472, where in it was held that, while it is the duty of the county commissioners, under article 9, § 3, of the Constitution of North Carolina, to keep the public schools open for at least four months in every year, yet, in discharging this duty, they cannot disregard the limitations imposed by article 5, § 1,* as to the amount of tax to be levied; and that section 23, chap. 174, Laws 1885, which requires the commissioners, if the tax levied by the state for this purpose shall be insufficient to carry it into effect, to levy annually a special tax to supply the deficiency, is unconstitutional, because it is not such a special tax for county purposes as is provided for by article 5, § 6,† of the

*That section is as follows: "The General Assembly shall levy a capitation tax on every male inhabitant of the state over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at three hundred dollars in cash. The commissioners of the several counties may exempt from capitation tax in special cases on account of poverty and infirmity, and the state and county capitation tax combined shall never exceed two dollars on the head."

†That section is as follows: "The taxes levied by the commissioners of the several counties for county purposes shall be levied in like manner with the state taxes, and shall never exceed the double of the state tax, except for a special purpose, and with the special approval of the General Assembly."

NOTE.—The constitutional restrictions on taxation are, in recent years, the subject of so many vigorous discussions by counsel and courts, and of such increasing interest to citizens, that the above case is deemed a valuable contribution to the subject although it is primarily based on the particular terms of the North Carolina Constitution.

Constitution. The subject has been so recently and thoroughly discussed in the opinion delivered by *Chief Justice Smith* for the court, and in the dissenting opinion of the then *Associate Justice Merrimon*, with all the authorities on both sides, that we deem it unnecessary to recite the reasons upon which a conclusion was then reached by a majority of the court.

We have been induced to give the questions a careful reconsideration, and have listened with interest to the able argument of counsel, who have sought to induce us to put a different construction upon the Constitution than was announced in the decision above referred to, and to hold that it is the duty of the county commissioners to obey the mandate of the Act of 1885, and levy the additional tax sufficient to make up the deficiency, caused by the failure of the General Assembly to provide funds to maintain the schools for at least four months in the year. But we are constrained by the principle involved in the maxim *stare decisis*, in which is bound up the stability of judicial decision, on which depends, not only respect for law, but knowledge of law, so necessary to be possessed by those whose duty and business it is to advise the people on all matters concerning their interests, to abide by the decisions of the court, unless it be made to appear that there was palpable error or mistake. When there is room for construction, and reasons may be adduced on both sides of a matter in controversy, the certainty of a rule is of more importance, often, than the reason of it. In saying this we do not wish it to be understood that, were the question before us an open one, we should reach a different conclusion upon it than has been declared by the court. The subject of taxation, general and special, by state and counties, has been considered in a long line of judicial decisions, beginning almost immediately upon the adoption of the Constitution of 1868. It is well settled that for the ordinary expenses of government, both state and county, the first section of article 5 of the Constitution places the limit of taxation, and preserves the equation between the capitation and the property tax,—the capitation tax never to exceed \$2, and the tax upon property valued at \$800 to be confined within the same limit. It is also settled in the same manner that by article 5, § 6, the counties may not exceed the double of the state tax, within the equation, except for a special purpose, and with the special approval of the General Assembly. It appears from an examination of the authorities that no case has ever come before the courts involving the exercise of this special power of taxation by the counties except upon special or private acts for local objects, until the Act of 1885 was brought to our attention, wherein, in a public Act ("An Act to Amend the Public School Law,—chapter 15 of the Code") it is sought by section 23 to require a special tax in the county to supply the deficiency in the sum raised by general taxation and appropriation for public school purposes, under the requirements of article 9 of the Constitution, in section 2 of which "the General Assembly . . . shall provide by taxation and otherwise for a general and uniform system of public schools wherein tuition shall be free of charge to all the children of

the state between the ages of six and twenty-one years." It was held in *Barksdale's Case*, *supra*, which we are now asked to review, that this section 23 of the Act of 1885 was not warranted by section 6, art. 5, of the Constitution, because it was not such a special tax for local objects as was contemplated in the last-named section. We see no reason to doubt the correctness of the decision of the court upon this question, if it were now open to us for revision. The reasons are given and cases cited in the opinion of the chief justice, in the case referred to, and it would be but cumbering the books for us to reproduce them here. Were the question presented to us of the power of the General Assembly to deal with the matter and provide adequate means for the necessary expenses incident to the maintenance of the public schools under the requirement of article 9, by general taxation, unfettered by any limitation of article 5, § 1, in the same manner as they may provide for a casual deficit, or for the payment of the public debt or interest on the same, or for the suppression of insurrection or invasion, we might possibly find a solution of the apparent difficulty which has resulted in a failure in some counties to maintain the schools for at least four months in every year; but, as the question may never arise, we will not discuss it.

We are content to abide by the decision of the court in *Barksdale's Case*, and declare that in the judgment of his honor below, following that decision, *there is no error*.

Avery, J., dissenting:

Entertaining the most profound respect for the views of my brethren, I feel, nevertheless, constrained to give expression to the reasons that have impelled me to the conclusion that a most important provision of the organic law has been misconstrued, and the will of the people, as embodied therein, has been thwarted, by restricting the right of the Legislature to delegate to the counties the taxing power to levy tax for the maintenance of public schools. If the court has fallen into error, it is a misconception that vitally concerns the public welfare. In the face of this constitutional inhibition, the Legislature is no longer left free to enact and enforce uniform and liberal laws for sustaining our schools, and elevating and educating the ignorant classes of our people. Experience and observation have shown that education and morality advance hand in hand, while ignorance and vice are, as a rule, as constant companions. Acting upon the enlightened and philanthropic idea that crime could be best combated and happiness promoted by the refining influences of religion, morality, and learning, the framers of our fundamental law dug deep, and made mandatory public education one of the bedstones upon which the Constitution rests. The provisions which apply specifically to this subject are sections 1-3 of article 9, the material portions of which are as follows: "(1) Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. (2) The General Assembly, at its first session under this Constitution, shall provide, by taxation and otherwise, for a general and

uniform system of public schools, wherein tuition shall be free of charge to all children of the state. (8) Each county of the state shall be divided into a convenient number of districts, in which one or more public schools shall be maintained at least four months in every year, and, if the commissioners of any county shall fail to comply with the aforesaid requirements of this section, they shall be liable to indictment." This, like many other expressions of the sovereign will embodied in the Constitution, is not only addressed to and obligatory upon the Legislature, but likewise appeals to and deals directly with its agencies for local government,—the counties,—and arms the courts with power to stimulate the commissioners to diligence. Starting out with the announcement, as solemn and binding and as clear and comprehensible as any fundamental principle transplanted from *Magna Charta* into our Declaration of Rights, that knowledge, as the handmaiden of religion and morality, is essential to the perpetuity of good government, two conventions of the people have deliberately and solemnly ordained that the system which "shall be maintained" must meet this necessity by compliance on the part of the Legislature with certain requirements of the instrument, and that the aid of the criminal law also shall be invoked, if necessary, to insure the enforcement of the constitutional mandate.

1. It was made the duty of the Legislature without delay, at its first session, both after the ratification of the Constitution in 1868 and in its amended form in 1876, to provide for a "general and uniform system," by taxation or otherwise.

2. The county commissioners were required to fix the bounds of the districts in which one or more schools were to be maintained four months, etc.

8. The county commissioners are declared liable to indictment for an offense created by the Constitution, to wit, the failure to comply with this section, not only by neglecting or refusing to lay off the limits of the districts, but by omitting to keep up the schools.

How could the law-making power provide a general and uniform system of schools, so that the counties, as public agencies, should have the power, which they were liable to punishment for not exercising, of keeping up public schools for four months in the year in localities designated by them? Section 5, art. 9, appropriates to the school fund of the counties the clear proceeds of penalties and forfeitures collected, and all fines for breaches of penal or military laws, paid within their respective borders. The state system must be uniform, "but the funds necessary for the support of the public schools are not derived exclusively from the state," said the late *Chief Justice* Merrimon in *Greensboro v. Hodgins*, 106 N. C. 187. "The Constitution plainly contemplates and intends that the several counties, as such, shall bear a material part of the burden of supplying such fund." In a subsequent portion of the same opinion, in construing section 4, art. 9, the court says: "It is likewise required that the funds supplied by the counties shall supplement that of the state, and be distributed in the counties supplying the

same, as pointed out above," viz. so as to insure the maintenance of a school for four months in the several districts. Obviously it is impracticable for the Legislature to so adjust the state taxation and distribution of the fund arising from it that the same per centum of tax, with fines, forfeitures, and penalties superadded, shall provide anything like uniformity in the duration or character of the schools. The division of the fund raised by state taxation according to the number of children within the school age under the general law providing for its distribution has been declared uniform and constitutional. *Greensboro v. Hodgins*, *supra*. But it is manifest that, unless the local authorities of the several counties may exercise the power delegated to them by the Legislature to make a sufficient supplement, the share of one county may maintain schools for ten months, while that allotted to another, where school children are not numerous, and are scattered over a sparsely settled region, and where the amount paid in the shape of penalties is insignificant, may not prove sufficient to keep the schools open for one month in the whole year. The only criminal offense created and defined by the Constitution itself is that mentioned in section 8. It is difficult to understand why this wide departure from the usual course was made, unless we interpret it as emphasizing the intent of the framers of the Constitution that the officers held subject to this unusual liability should have power coextensive with their accountability. The Legislature, in enacting the law under which the tax was levied, manifestly placed this interpretation upon the sections which we have quoted; and in the construction of laws great respect should be shown to the opinion of the law-making power, and statutes solemnly enacted by the Legislature should be declared unconstitutional only when they are plainly repugnant to the provisions of the organic Act.

Counties and towns are created by the Legislature for public convenience, and may be destroyed at any moment by the authority that gave them existence. *Lilly v. Taylor*, 88 N. C. 489; 10 Myer's Fed. Dec. §§ 2424-2426. The only limit upon the law-making power is to be found in the restrictive clauses of the Federal and state Constitutions. 1 Dill. Mun. Corp. 3d ed. §§ 65, 68, *et seq.*; *Barrington v. Neuse River Ferry Co.*, 69 N. C. 165. Duties and burdens may be devolved upon the governing officers of counties against their will, and, in the absence of a restraining provision in the organic law, counties may be even compelled to assume the liabilities of towns lying within their borders. *Cooley*, Const. Lim. 4th ed. pp. 295, 296, * 241; 1 Dill. Mun. Corp. §§ 60 (35) to 65 (38); *Granville Comrs. v. Ballard*, 69 N. C. 18; *Currituck County Comrs. v. Dare County Comrs.* 79 N. C. 565; *Dare County Comrs. v. Currituck County Comrs.* 95 N. C. 189. The Legislature may devote the streets or other property of a town to a public purpose, or, if such action does not violate the rights of creditors, it may modify or repeal a tax levy already laid by its authorities, or modify its action in any other respect. 1 Dill. Mun. Corp. §§ 70 (42) to 77 (45); *Washington Toll-Bridge Co. v. Beaufort Comrs.* 81 N. C.

491; *Carrow v. Washington Toll-Bridge Co.* 61 N. C. 118.

The statute which has been pronounced invalid (Laws 1885, chap. 174, § 25) is amendatory of Code, § 2590, and requires the county commissioners, where the tax levied by the state proves insufficient to maintain one or more schools in each school district for four months in the year, to levy annually "a special tax to supply the deficiency for the support and maintenance of said schools for said period of four months or more." It is obvious that, if there were no constitutional restriction upon the power of the Legislature, it was authorized and expressly required to pass just such a law as that enacted. Was its power exceeded in passing it? The Constitution of 1868 (art. 7, § 2) provided that it should be the "duty of the commissioners to exercise a general supervision and control of the penal and charitable institutions, schools, roads, bridges, levying of taxes, and finances of said county, as may be prescribed by law." The Amendment of 1875, which took effect January 1, 1877 (art. 7, § 14), provided that "the General Assembly shall have full power by statute to modify, change, or abrogate any and all of the provisions of this article, and substitute others in their place, except sections 7, 9, and 18." The Acts of 1876-77, chap. 141, were passed in the exercise of the power given under section 14, art. 7, and, after providing for the election of county commissioners, and the levying of taxes with the assent of the justices of the peace, declares, in section 6, that they "shall have and exercise the jurisdiction and powers vested in the board of commissioners now existing, and also those vested in and exercised by the board of trustees, etc., except as may be hereafter provided by law." Construing the Constitution of 1868 together with the Amendment of 1875 and the Act of 1876-77, it is manifest that before 1875 there was this further recognition of the right and duty of the county commissioners to overlook the schools as a part of the ordinary and necessary county government, and that the Act of 1876-77, passed in pursuance of the Amendment of 1875, left this power and obligation still intact. But, despite all of these constitutional and statutory grants of power and injunctions of duty, it is contended that section 1, art. 5, of the Constitution limits the levy for ordinary purposes to not more than \$2 on the poll, or 66 $\frac{2}{3}$ cents on every \$100 in value of land; that the education of the people of a county is not a county purpose; and the Act of 1876-77 does not provide for levying a "special tax," though the Legislature expressly so denominated the tax to be levied in every instance when there should be a deficiency in the appropriation by the state. Is education a county purpose? No one has ever contended that a tax providing for the support of the penal and charitable institutions of a county, or for building bridges across streams at the public crossings in its limits, is not a county purpose, or, if such a position has ever been assumed, it will no longer be insisted on in view of the decisions of this court, and the constant practice of the Legislature. *Barrington v. Neuse River Ferry Co.*, *supra*. When we find the word "schools" sandwiched between charitable institutions and

roads in the constitutional definition of the duties of commissioners, who are the embodiment of the municipal corporation, it would seem unreasonable to insist that an answer to an alternative mandamus, which stated that a levy of twenty cents on the hundred for support of prisoners in the jail and the poor, ten cents to make up the deficiency in school appropriation, and five cents for payment of damage assessed for public roads opened by order of the commissioners, raised the tax in the aggregate, with that levied by the state, to the constitutional limit, would not be deemed sufficient to relieve the commissioners from attachment for contempt. *Fry v. Montgomery County Comrs.*, 83 N. C. 804. The distinction between taxes levied under a power which associated schools with roads and bridges, and between those devoted to one purpose or the other, seems to me to be clearly arbitrary and unreasonable. When the Constitution declares that knowledge is "necessary to good government," and that particular agents of the state—the county commissioners—shall be indicted for failure to provide the means of acquiring it, I cannot yield my assent to the proposition that it is a part of the appropriate public duty of those officers to protect the health of the people of the county by levying a tax for the purpose of constructing hospitals, if need be, or for opening new roads or erecting bridges, while the Legislature cannot even clothe them with authority, by a special Act applicable to all of the counties in the state, to levy and collect any sum for the intellectual betterment of the people of the county. It seems to me that the framers of the Constitution not only intended that the commissioners should be empowered and required, as a part of their regular duty, to open roads, and provide for the payment of the expense of punishing criminals, but that, above all these other functions, should be that of furnishing the means and facilities for acquiring knowledge.

If the maintenance of schools is a county purpose, then the remaining question is whether it is competent for the Legislature to pass an Act providing for the levy, under certain specified circumstances, of a "special tax" by any county in the state; or whether it is essential, in order to authorize the levy for the very same purpose, to pass a separate act specifically applicable to each county. I do not think that the organic law requires any such vain and useless proceeding. I believe that the Legislature construed the Constitution properly in enacting that all counties, under certain clearly specified circumstances, should have the power delegated to them to lay a special tax for the particular purpose of making up a deficiency in the appropriation for the maintenance of schools for four months of the year, and, incidentally, of relieving themselves of their liability to indictment for failure to provide such schools for the requisite period. A careful scrutiny of the cases cited by the court in *Barksdale v. Sampson County Comrs.*, 93 N. C. 476, will show that the court had never, prior to the announcement of the doctrine in that case, held that the taxation provided for in section 6, art. 5, should be so far local, as well as special, as to deprive the Legislature of the power to pass a special stat-

ute applicable to all counties alike under certain specified circumstances. The court in the case at bar have advanced a step further than did *Chief Justice* Smith in *Barkdale's Case*, in declaring that the maintenance of schools is not a county purpose. Assuming that I have shown that the Constitution so characterizes it, it is difficult to conceive of a plausible reason for so limiting the power of the Legislature that it could not pass a special Act applicable to a class of counties where a certain state of affairs already existed, or might arise in the future, instead of declaring in the case of each individual county, by a separate Act, that, if the appropriation of the next year should not be sufficient to accomplish a certain end, the commissioners should be authorized to make a levy to supplement it. But it would seem to have been intended, in framing the Constitution, to place the maintenance of public schools, like the payment of debts of the state, far above constitutional restrictions applicable to ordinary expenditures for state or county purposes. If the simple declaration of broad generalities in reference to preserving the public credit is sufficient to override the constitutional limit of taxation in order to meet the obligations of the state, whenever created, and if the commissioners are required, without any special statutory warrant for their conduct, to levy a tax in excess of the limit, also to meet a debt of the county, created before the limit was imposed (in 1868), it would seem to me altogether more reasonable to hold that the provision of the Constitution which subjected the commissioners to indictment for failure to keep the schools open for four months gave them by implication, without the aid of an express statute, the power to disregard the restriction, whenever it became essential to do so in order to meet the express requirement of section 3, art. 9. It is true that, in so far as section 1, art. 5, impaired the remedy of a pre-existing creditor, it was void, because it was repugnant to the Federal Constitution. But in *University R. Co. v. Holden*, 63 N. C. 410, all of the justices concurred in the opinion that the Legislature had the power, in order to meet the interest on the public debt, or to repel invasion, or in any great emergency to disregard the limit. *Justice* Settle pointed out expressly the sections of article 9 which we have quoted as enjoining the duty and giving the power to provide for public education without regard to the per centum of tax on property or the rate on the poll. There was a *consensus* of opinion in that case as to the principle that the General Assembly had the power to determine whether there was a necessity for transcending the restriction applicable only in ordinary cases. It seems clear to me that the Legislature not only has the power to determine when there is a necessity for exceeding the limit imposed upon the tax levy for ordinary expenditures in order to furnish the necessary school facilities, but whether the end can be attained by a general legislative levy only, or by empowering the counties to supplement the state appropriation, should

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it become manifestly necessary to do so. This view finds support in the fact, to which I have already alluded, that it is impossible for the Legislature to calculate what *per capita* rate and corresponding per centum on property will raise the sum necessary, when distributed according to the number of children, and added to the local yield from fines and penalties, to maintain schools, some of which cost \$40 and some \$10 per month for the prescribed period. In view of all of these uncertain elements entering into the estimate, which we must suppose were in contemplation of the delegates who ordained the provisions of the Constitution in reference to education, it seems to me impossible to give effect to all of the provisions of the organic law without granting to all county commissioners power commensurate with their allotted duty and their liability for failure to discharge it. It is not practicable in any other way to devise a system that will operate uniformly, and at the same time furnish the requisite educational advantages; and it is essential to a compliance with all of the sections that it should so accomplish the end. *People v. Coleman*, 4 Cal. 46, 60 Am. Dec. 581. Uniform laws are not necessarily universal in their operation, but a special law may affect alike all persons who may become in any way subject to it. *People v. Judge of Twelfth Dist.* 17 Cal. 548; *McAunich v. Mississippi & M. R. Co.* 20 Iowa, 338. The question of uniformity in this case bears a striking analogy to that raised under the Bankrupt Law by reason of the inequality of exemptions in the different states, all of which were allowed by an amendment to the Federal law, yet it was expressly declared a uniform law. *Bump, Bankr.* p. 875, § 14. The uniformity contemplated in framing article 9, § 2, was in the minimum duration of schools, and that can be secured only by the intervention of the counties in their governmental capacity.

The doctrine of *stare decisis* can be invoked and insisted on only where, by acquiescence in a decision for a long time, it has become a rule of property; but inadvertent decisions, which can be corrected without disturbing titles, should be overruled at the earliest possible moment. *Sedgw. Stat. & Const. L.* 254; *Long v. Walker*, 105 N. C. 90; *Gaskill v. King*, 84 N. C. 223.

Upon reviewing the dissenting opinion of the late *Chief Justice* Merrimon in *Barkdale's Case*, *supra*, I have been so greatly impressed with the strength and force of the argument that it seems almost useless to have done more than refer to it as an embodiment of my reasons for differing with my brethren. This was, indeed, the *magnum opus* of a grand tribune of the people whose heart responded to the sentiment which imbedded in the Constitution the obligation to educate the youth of the land, and lend a helping hand to those whose lot might be cast in the humble walks of poverty, but whose worth and talent might warrant them in aspiring to the highest positions.

PENNSYLVANIA SUPREME COURT.

Re ESTATE OF Samuel S. TAYLOR, Deceased.

APPEAL OF C. Wealey RUFFELL, Admr. d. b. n. of Samuel S. Taylor, Deceased.

(.....Pa.....)

1. One to whom a check is given merely for the purpose of making a gift *causa mortis* to a third person to whom he gives a due-bill for the amount, is not incompetent by reason of interest to testify in a controversy between the donee and the donor's administrator as to the validity of the gift.
2. A check drawn upon a bank for the full amount of a deposit with intent to make a gift of the money may constitute a valid gift although the donor dies before the check is paid.

(February 6, 1893.)

APPEAL by the administrator *de bonis non* of the estate of Samuel S. Taylor, deceased, from a decree of the Orphans' Court of Philadelphia County awarding the balance of said Taylor's estate to the administrator of

the estate of Theresa J. Taylor, deceased. *Affirmed.*

Samuel S. Taylor died May 25, 1890. Theresa J. Taylor, his stepmother, presented to the register of wills a petition upon which letters of administration were granted to her. Before settling the estate the administratrix died and letters of administration were obtained upon her estate by Charles M. Williamson, who filed an account showing a balance on hand of \$398.20. This sum was claimed by the administrator, *d. b. n.*, of Samuel S. Taylor as part of his estate and also by Williamson as administrator of Theresa J. Taylor as a gift alleged to have been made by Samuel S. Taylor to Theresa J. Taylor.

The further facts appear in the opinion of the auditing judge which was as follows:

Samuel S. Taylor died intestate May 25, 1890, unmarried and without issue. His sole surviving next of kin is one sister, Louisa Rabe, who is of full age.

Letters of administration to his estate were issued to Theresa J. Taylor, his stepmother. She died on or about November 14, 1890, and thereupon letters of administration *de bonis non* to the decedent's estate were granted to C. Wealey Ruffell.

NOTE.—Gift of checks.

"The law seems to be in a very curious state," says the opinion of the court in *Rolls v. Pearce*, L. R. 5 Ch. Div. 730, 46 L. J. Ch. 791, when speaking of the gift of checks, and a comparison of the conflicting statements of text-books on the subject shows that the "curious state" still continues.

In several cases it has been held that an unaccepted bank check which is not paid during the life of the drawer will not constitute a valid gift by him *causa mortis*. *Detroit Second Nat. Bank v. Williams*, 13 Mich. 291; *Simmons v. Cincinnati Sav. Soc.* 31 Ohio St. 457, 27 Am. Rep. 521; *Hewitt v. Kay*, L. R. 6 Eq. 198, 37 L. J. Ch. 470; *Beak v. Beak*, L. R. 13 Eq. 489, 41 L. J. Ch. 470.

In *Simmons v. Cincinnati Sav. Soc.*, *supra*, the intent to make the gift was clear. The bank gave the donee a blank check to be filled up for the purpose of the gift, but the check, when made, was not presented to the bank during the donor's life.

In *Beak v. Beak*, *supra*, the check was accompanied by the donor's pass-book, but this was held to make no difference.

The main case has a ground of distinction from those above cited in that the check was drawn for the full amount of the donor's deposit and therefore might be regarded as an assignment of the fund even by courts which do not allow such effect to a check for a part only of a fund on deposit.

But some of the cases which have denied the validity of such a gift have expressed dissatisfaction with the rule.

In the *Waynesburg College's App.*, 111 Pa. 130, 56 Am. Rep. 252, the delivery of a check made payable six months after the maker's death to a payee named therein as trustee was held not to be a valid gift.

In *Rolls v. Pearce*, *supra*, a check intended as a gift *causa mortis* was held valid although not presented to the bank on which it was drawn until after the donor's death, but it was given in a foreign country where it was put into a bank by the donee who was the donor's wife and money ob-

tained by her thereon was used, in part to pay the donor's debts. The court held that the donor must have anticipated from the circumstances of the case that the check would pass through various hands before reaching the bank on which it was drawn; and therefore must have intended it to be valid even if he died before it was paid.

This case recognizes the importance of the donor's intent and seems to be inconsistent with the cases first cited above which deny the validity of such a gift even where the donor's intention is unquestioned, although it is distinguishable from them in the fact that it had passed into the hands of third persons who had paid the money upon it.

In *Bouts v. Ellis*, 17 Beav. 121, a gift of the donor's check to a third person for the donor's wife which was paid before the donor's death was held a valid gift although a check given by the third person to her was worthless because unstamped and post dated, where a valid check was given her in exchange therefor after the donor's death. This case was affirmed in 4 DeG. M. & G. 249.

In *Tate v. Leithead*, 1 Kay, 658, the question was as to a check which had been collected before the maker's death and it was held not to be a gift *causa mortis* but a trust by virtue of certain memoranda on the check showing that intent.

In some of the old English ecclesiastical cases checks were held valid as legacies. Thus in *Bartholomew v. Henley*, 3 Phillim. 317, checks were upheld as codicils to a will where for some of them entries were made in the donor's check-book saying that they were given for fear anything might happen before he could make a codicil, and in one case where the entry was "this draft to be paid from my banker's in case I should die."

So in *Gladstone v. Tempest*, 2 Curt. Ecol. Rep. 650, checks were held to be codicils where they were delivered in sealed packages and it appears that the donor intended that they should not be presented until after his death.

So in *Walsh v. Gladstone*, 1 Phill. Ch. 298, checks in sealed packages were held to be legacies but to be revoked by subsequent will.

The present account is of the sum of \$650, which was on deposit in bank in the name of decedent, at the time of his death. The balance thereof amounts to \$372.20 and constitutes the fund for distribution. This balance was claimed on the one hand by the administrator *d. b. n.* as the custodian of the decedent's estate; and on the other by the administrator of the estate of the deceased accountant, on the double ground: First, that it was the subject of a gift to the accountant by the testator in his lifetime, and, second, that it was part of her share in the proceeds of sale of certain real estate owned jointly by her and the decedent, which he had sold in his lifetime.

To award the fund to the administrator *d. b. n.* would relieve the auditing judge of considerable present labor, and would conform to customary procedure. But this estate is small, and at the distance of two years from his death the administrator *d. b. n.* admitted that but one claim against the decedent had been brought to his notice. Nothing, therefore, will be lost and delay and expense will be saved by passing at this time upon the questions which otherwise must be postponed until the filing and auditing of a final account, and which are now as ready for determination as they would be then. So far as the single creditor other than the deceased accountant is concerned, it is

worthy of note that letters *de bonis non* were taken out at his instance. The creditor in question was Dr. Beatty, and his claim was duly presented at the audit in the sum of \$150 for medical attendance upon decedent. The testimony in its support, however, furnished no data from which either the length of the service or its value could be computed and it is therefore rejected.

Against the claim of the stepmother it was urged that it was offered by her neither as creditor, legatee, nor next of kin, and was therefore under *McBride's App.*, 72 Pa. 480, and later cases, outside the jurisdiction of the orphans' court. The answer is that by bringing the money into the account, she has treated it as an asset of the decedent's estate; and she has a right to show, like any creditor, that under a contract or promise decedent transferred its ownership to her. Nor is she estopped from claiming as an individual a fund which as administratrix she holds as the property of another. In the present instance she administered to the estate in order to bring the fund before the court and there prosecute her demand. The auditing judge thinks that the claim is cognizable in this proceeding, and the question is as to the character in which if at all it may be sustained. If it rested upon the title of the stepmother to one half of the real

Check or draft on person other than banker.

In *Lawson v. Lawson*, 1 P. Wms. 441, a draft by a husband intended as a gift *causa mortis* drawn upon his goldsmith in favor of his wife was held good as an appointment although it was not paid during the donor's life.

But in *Harris v. Clark*, 8 N. Y. 98, 51 Am. Dec. 832, the donor's own draft upon a third person in favor of the donee is held not a valid gift *causa mortis*.

And in *Gerry v. Howe*, 130 Mass. 350, a written order or direction to one having charge of the donor's funds in a bank to draw a certain amount and hand it to a certain person, is held not a sufficient gift where the direction is not obeyed.

Gift of third person's check.

The gift of a third person in the possession of a donor would seem to be like a promissory note or any other transferable security and the decisions are to this effect. Thus in *Burke v. Bishop*, 27 La. Ann. 485, 21 Am. Rep. 597, it is held that the gift of a check by the payee with his indorsement is not defeated by the death of the donor before it is paid.

So in *Clement v. Cheeseman*, 27 Ch. Div. 681, it is held that a check payable to the donor or his order may be given *causa mortis* without indorsement.

In *Rhodes v. Childs*, 64 Pa. 18, it was held that a check payable to bearer received by the donor in payment of a debt could be transferred by him as a valid gift *inter vivos* by mere delivery to the donee.

In *Reddel v. Dobree*, 10 Sim. 244, the gift of the checks of a third person in a box was held not to be valid, but the ground of the decision was that there had not been a sufficient delivery of the box and its contents.

In *Jones v. Look*, L. R. 1 Ch. App. 23, 11 Jur. N. S. 918, 14 Week. Rep. 149, the validity of a gift was denied on similar grounds. A check payable to the donor was put by him into the hands of his infant son with the declaration that it was a gift but the donor then locked it up saying he would put 18 L. R. A.

it away for the child and 'give him more with it, and the court held that it was a question of fact as to his intention, and that it did not appear that he meant to put the check out of his own power of disposal.

Gifts inter vivos.

Some of the cases in the division immediately preceding are cases of gifts *inter vivos*, as are the following also:

In *Hemphill v. Yerkes*, 132 Pa. 545, which the main case so much relies upon, there was no gift involved but a check for the whole of a special fund held by a beneficiary was held valid as an assignment.

In *Bromley v. Brunton*, L. R. 6 Eq. 275, the gift of a check *inter vivos* was held valid although it was not paid before the donor's death, where it had been presented and payment delayed merely to ascertain the genuineness of the signature.

In *Tate v. Hilbert*, 2 Ves. Jr. 111, a bill in chancery to enforce the gift of a check drawn to self or bearer and intended as an immediate gift was dismissed without prejudice to a suit at law, the Lord Chancellor said: "I do not think it so clear as it seems to have been taken that an action will not lie by the holder against the executor;" but it does not appear that the counsel in the case had much hope of being able to maintain any suit at law.

In *De Pouilly's Succession*, 22 La. Ann. 97, the gift of one's own check is held to be that of a corporeal movable, and to constitute a manual gift, needing no other formality than delivery, under La. Civil Code, art. 1538.

The enforcement of a gift against the donor himself is denied in *Cloyes v. Cloyes*, 36 Hun, 145, where a check was given by husband to wife as a wedding present and after its dishonor she brought an action against him thereon.

A similar decision was made in *Easton v. Pratchett*, 1 Crompt. M. & R. 808, where the enforcement of a gift of a bill of exchange against the donor who indorsed it was denied.

R. A. R.

estate out of which the money was derived, it would involve a question of title which the orphan's court cannot consider; and if upon an agreement which was alleged to have been made by the decedent to the effect that his stepmother was to have one half of the proceeds of sale, the promise, if made, was merely executory and without consideration, and the fund for distribution was not shown by any satisfactory evidence to have been part of those proceeds. Was it a gift *inter vivos*? The proof was that the decedent shortly before he died sent for a Mr. Hubbert, in order that he might fix up the decedent's affairs. He said that he wanted to give to his stepmother \$650, which he had in bank. Mr. Hubbert drew up or caused to be drawn up a check on decedent's bank for that amount and the decedent signed the check by his mark. One check was drawn to the order of Hubbert, and he in turn gave his due-bill in the same sum to the stepmother as a receipt. When he presented the check at the bank payment was refused because the decedent's mark was not attested by subscribing witness. The presentation seems to have been made before the decedent died; after his death the bank officers suggested that an administrator should be appointed. Mr. Hubbert gave the check to the stepmother and received back his due-bill. He was, of course, a competent witness to prove these facts. The check was drawn to his order simply to enable him to secure its payment, and he had no beneficial interest in the claim. Whether he was competent or not his evidence both as to the declaration of the decedent and the making of the check was corroborated by the testimony of other and disinterested witnesses. To state the evidence more at large, Mr. Nichols testified that he saw the decedent the night before he died and told him he thought he should settle his matters up. The decedent replied that he would like to have Mr. Hubbert settle everything up, and that he wanted Mrs. Theresa Taylor to have everything. Mr. Hubbert testified that he was sent for and was present just before the decedent died and was told by the decedent that he wanted Mr. Hubbert to fix up his matters for him; that he wanted to give his stepmother \$650 which he had in bank; that he wanted her to have it. The witness added: 'Mr. Taylor was very sick. I suppose he was in condition to do business from the way he talked. I made the proposition to him to give the check so that there should be no delay. He said he wanted something drawn up so that his stepmother could have the money. I could just about hear him speak that was about all. I had to support him while he put his hand to the mark.' The auditing judge after some reflection thinks that the gift may be upheld as a gift *inter vivos*. It is true that a check is not ordinarily an appropriation of the fund upon which it is drawn; and that it is rather an order upon the banker to pay, which like any other order may be revoked at the will of the maker as it will be revoked by his death. The presentation having in this case been made before the death and payment having been refused, the holder may perhaps have an action for damages against the bank, but that would be no criterion of her right to claim against the estate (*Jordan's App.* 10 W. N. C. 87; 18 L. R. A.

Kuhn v. Warren Sav. Bank, 20 W. N. C. 230), but this and kindred cases are separated from the present case by a very clearly defined distinction. The decedent's check was not drawn upon a general fund nor meant to withdraw therefrom a sum of money which was not earmarked; on the contrary it covered the whole fund, and was meant as a specific transfer of that fund. The testator's language was that "He wanted to give his stepmother \$650 which he had in bank;" and the check was suggested to him as the readiest instrument by which the gift could be effected. It is impossible to doubt, from what he said and did, that he intended to assign his title to the fund, then and there; and there is little room to doubt that if he had made a formal assignment, his interest would have passed. But the delivery of the check worked the same result, because it had the same purpose. "Whenever the party has the power to do a thing (statutory provisions being out of the way) and means to do it, the instrument he employs shall be so construed as to give effect to his intention (*Bond v. Bunting*, 7 Pa. 210). This distinction has been recognized in a number of cases. In *Clemson v. Davidson*, 5 Binn. 898, Tilghman, Ch. J., said: "Any order, writing, or act which makes an appropriation of a fund, amounts to an equitable assignment of that fund." In *Greenfield's Estate*, 24 Pa. 232, an order to pay was held not to be an assignment because it was drawn generally upon trustees without specifying the fund, whether principal or interest, from which it was to be paid. In *Loyd v. McCuffrey*, 48 Pa. 410, a check was held invalid for the same reason. In *First Nat. Bank of Mt. Joy v. Gish*, 72 Pa. 18, however, a check was undoubtedly held to be an appropriation. There a note for \$6,000 was discounted with the understanding that \$1,000 was to be retained by the discounting bank out of the loan. In pursuance thereof a check for \$1,000 was drawn on the bank by the maker of the note and was retained by the bank. The check was held to be part of the original transaction and to have reduced the loan to \$5,000. *Hemphill v. Yerkes*, 132 Pa. 545, is nearer the point under discussion. "It is true," says Paxson, Ch. J., "as a general principle, that a check drawn in the ordinary form vests no title to the general funds of the drawer in the bank upon which it is drawn. . . . The check (in dispute) was not drawn against the general fund of Monaghan (the maker); it was drawn against the whole of a specific fund which in equity belonged to the payee, and, as before observed, passed the legal title to the fund even as against the drawer." In that case the check was drawn by a master, who was the custodian of the money, in favor of a distributee who had been awarded a share in the fund, and in this case a check was drawn by the owner of the fund. But in all other respects the cases are parallel. By the delivery of the check, with words of absolute and present gift, the donor parted with the specific money in bank and vested the title thereto in the donee as irrevocably as he could possibly have done by an assignment formally executed and delivered. If the proof of irrevocability is not sufficient to make this a good gift *inter vivos*, it will at least sustain it as a valid gift *causa mortis*.

Whether the check under the circumstances attending its issue could have been probated as the last will of the decedent is a question which was not brought forward at the audit and does not require to be considered.

The account shows an amount for distribution amounting to . . . \$372 20
 Add by credit not proved, dis-
 allowed 20 00

\$392 20

The said balance is awarded to Charles M. Williamson, administrator of the estate of Theresa J. Taylor, deceased, in settlement of the claim of that decedent.

Exceptions were taken to the adjudication of the auditing judge, which were dismissed and the adjudication confirmed, whereupon Ruffell appealed to this court assigning for error the admission in evidence of the testimony of George W. S. Hubbert, and the awarding of the balance to Williamson and not to Ruffell.

Mr. J. Willis Martin, for appellant:

The testimony of George W. S. Hubbert, the payee in the check, was incompetent.

The exception in the enabling Act of 1887 provides for cases where any party to a thing or contract in action is dead, and the law renders any surviving party to the thing or contract incompetent.

Fross' and Loomis' App. 105 Pa. 258; *Graves v. Griffin*, 19 Pa. 176; *Bailey v. Knapp*, Id. 192; *Hatz v. Snyder*, 26 Pa. 512.

In distribution in the orphans court no one can claim but through the decedent as creditor, legatee or next of kin.

McBride's App. 72 Pa. 480, 484; *Braman's App.* 89 Pa. 78, 84; *Gravenstine's App.* 2 Pennyp. 61; *Winton's App.* 111 Pa. 387.

There was neither a gift *inter vivos* nor *de mortis causa*, and no action could lie against the bank at the suit of the payee or Theresa Taylor.

A check which has not been accepted by the bank on which it is drawn does not operate as an assignment to the payee of the sum for which it is drawn.

Morse, Banks and Banking, 275.

The holder of a bill of exchange is not the owner of the money or property remitted by the drawer for the payment of the bill.

Hopkins v. Bebe, 26 Pa. 85.

Agreeably to the weight of authority, a check is essentially a bill of exchange and will not, therefore, operate as an equitable transfer or an appropriation.

1 Lead. Cas. Eq. vol. II. pt. 2, 1653; *Loyd v. McCaffrey*, 46 Pa. 410.

An essential element to gifts *inter vivos* and *causa mortis* is the delivery of the thing given. Though the delivery of the check itself was complete, it does not follow that this was equivalent to a delivery of the gift. Had it been payable on demand, it seems clear upon reason and authority that it would not have been. It would not have operated as an assignment of the fund, and had there been sufficient funds to meet it, and payment been refused, there would have been no right of action against the bank.

Waynesburg College's App. 111 Pa. 180, 66 Am. Rep. 253; Morse, Banks & Banking, 85, 18 L. R. A.

275; *Greenfield's Estate*, 24 Pa. 232; *First Nat. Bank of Mt. Joy v. Gish*, 72 Pa. 13; *National Bank of the Republic v. Millard*, 77 U. S. 10 Wall. 152, 19 L. ed. 897; *Saylor v. Bushong*, 100 Pa. 23.

The gift of such a check is only the gift of a promise (Morse, 382), and is but a parol executory promise, without consideration to make a gift which would not be executed until the check was accepted or paid; the death of the drawer before acceptance or payment would revoke it and the gift would therefore fail.

Yard v. Patton, 18 Pa. 284, 285; *Campbell's Estate*, 7 Pa. 100, 47 Am. Dec. 503; *Simmons v. Cincinnati Sav. Soc.* 81 Ohio St. 457, 27 Am. Rep. 521; *Detroit Second Nat. Bank v. Williams*, 13 Mich. 291; *Hewitt v. Kaye*, L. R. 6 Eq. 198; *Nicholas v. Adams*, 2 Whart. 24.

In *Walsh's App.*, 1 L. R. A. 535, 122 Pa. 177, 190, the delivery of a saving fund book, accompanied by the declaration that the donee was to have the money, was held not to be a complete gift.

Mr. Arthur M. Burton, for appellee:

Mr. Hubbert, being a naked trustee, was a competent witness.

Ryeres v. Blossburg Presby. Cong. 83 Pa. 117, and cases therein cited; *Fross' App.* 105 Pa. 258.

The auditing judge and the orphans' court were right in holding that the claim of Theresa J. Taylor was cognizable in this proceeding.

Marshall v. Hoff, 1 Watts, 440; *Miller's App.* 84 Pa. 391; *McBride's App.* 72 Pa. 480; *High's Estate*, 136 Pa. 286; *McDermott's App.* 106 Pa. 358, 51 Am. Rep. 526; *Gaffney's Estate*, 146 Pa. 49; *Stewart's Estate*, 187 Pa. 175.

Whether the giving of the check of Theresa J. Taylor should be considered as a gift *inter vivos* or as a *donatio mortis causa*, or as an executed declaration of trust, it was sufficient to vest in her the property in the fund in decedent's lifetime.

Bond v. Bunting, 70 Pa. 210; *Hemphill v. Yerkes*, 132 Pa. 545.

If the check is drawn for the whole deposit, this is a special fact which readily determines it to be an assignment.

Morse, Banks & Banking, § 492.

Judge Sharswood, in *note (1)* to *Byles on Bills*, 21, says: "In cases, also, where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund, and after notice to the drawee, it binds the funds in his hands."

As between the drawer and the payee (or holder), there is no doubt that the delivery of the check constitutes an assignment of the amount.

Dan. Neg. Inst. § 1638 (1), and cases cited in *note*.

In *Bromley v. Brunton*, L. R. 6 Eq. 275, a check was given by A. to B., and presented without delay. The bankers had sufficient assets of A., but refused payment because they doubted the signature. The next day A. died, the check not having been paid.

Held, a complete gift, *inter vivos*, of the amount of the check.

See also *Rhodes v. Childs*, 64 Pa. 18, 24; *Gourley v. Linsenbiger*, 51 Pa. 845; *Com. v. Orompton*, 187 Pa. 147; *Basket v. Hassell*, 107 U. S. 602, 27 L. ed. 500.

A check is held to be an appropriation or assignment of the specific money called for.

Stoller v. Coates, 88 Mo. 514; *Fonner v. Smith*, 11 L. R. A. 528, 81 Neb. 107; *Roberts v. Corbin*, 26 Iowa, 815, 96 Am. Dec. 146; *Fogarties v. State Bank*, 12 Rich. L. 518, 78 Am. Dec. 468; *Munn v. Burch*, 25 Ill. 815; *German Sav. Inst. v. Adas*, 1 McCrary, 501.

The giving of the check to Mr. Hubbert in the presence of the donee and the execution of a due-bill by him to her at the same time made it an executed trust in favor of Theresa Taylor which did not require any consideration to support it.

Crawford's App. 61 Pa. 52, 100 Am. Dec. 609; *Smith's Estate*, 144 Pa. 428; *Helfenstein's Estate*, 77 Pa. 328, 18 Am. Rep. 449.

It is not essential to the validity of a trust of personal property that it should be irrevocable; indeed, a right of revocation may be expressly reserved.

Dickerson's App. 115 Pa. 198; *Lines v. Lines*, 142 Pa. 149.

The notion that a gift which would be valid if made through a declaration of trust, will fail if put in the form of an assignment, was repudiated in *Richardson v. Richardson*, L. R. 3 Eq. 686.

An instrument executed as a present and

complete assignment is equivalent to a declaration of trust.

Kekewich v. Manning, 1 DeG. M. & G. 176; *Clemson v. Davidson*, 5 Binn. 398; *Neemith v. Drum*, 8 Watts & S. 9.

A reserved right of revocation is not inconsistent with the creation of a valid trust.

Dickerson's App. supra.

Per Curiam:

We think the testimony of the witness George W. S. Hubbert was properly admitted. He had no interest in the matter in controversy. He was not a party in any sense of the term. He was at most a mere conduit through which the sum in controversy was to pass to Mrs. Taylor. Nor do we think it was error to award the fund to the administrator of Mrs. Taylor. The check was drawn upon the bank for the full amount on deposit, under circumstances which showed that it was intended as an assignment of the fund. It did not come within the principle of that class of cases which hold that a check drawn in the ordinary form vests no title to the general funds of the drawer in the bank upon which it is drawn. It more nearly resembles *Hemp-hill v. Yerkes*, 183 Pa. 545.

Judgment affirmed.

OREGON SUPREME COURT.

J. L. BERNARD, *Respt.*,

v.

Joseph TAYLOR, *Appt.*

(.....Or.....)

1. Wagers being inconsistent with the established interests of society and in

conflict with the morals of the age are void as against public policy.

2. Money deposited with a stakeholder as a wager on a foot race by one who knows that the race is to be bogus and has been fixed in advance may be recovered by him on demand before the race has been run.

(January 16, 1898.)

NOTE.—Legality of wagers; betting.

A wager is something hazarded on the issue of some uncertain event, as a bet. *Cassard v. Hinman*, 1 Bosw. 207.

To constitute a wager there must be a risk on both sides. *Quarles v. State*, 5 Humph. 561.

A wager is a contract by which two or more parties agree that a certain sum of money or other thing shall be paid for delivered to one of them on the happening or not happening of an uncertain event. 2 Bouvier, Dict. 647.

It is an agreement having all the requisites of a legal contract, the consideration being the mutual promise of each to pay or to deliver in case he loses the money or thing wagered. 1 Parsons, Cont. 5th ed. 448.

The bet or wager is none the less gambling because it is made to assume the form of a contract. *Irwin v. Willfar*, 110 U. S. 511, 28 L. ed. 230; *Beadles v. McElrath*, 85 Ky. 243.

The facts and circumstances surrounding a contract alleged to be a wager may be shown for the purposes of determining its real character, whatever its form. *Mohr v. Miesen*, 47 Minn. 223.

The burden of proving that a contract is void as a wager rests upon the party asserting its invalidity. *Mohr v. Miesen, supra.*

At common law all wagers were recoverable except such as were prohibited by law, were against public policy, or calculated to affect the interest, character, or feelings of third parties. *Johnson v. Fall*, 6 Cal. 859, 65 Am. Dec. 513; *Smith v. Brown*, 3 Tex. 360, 49 Am. Dec. 748; *Jeffrey v. Ficklin*, 3 Ark. 18 L. R. A.

227; *Bunn v. Riker*, 4 Johns. 427, 4 Am. Dec. 292; *Petlamberdass v. Thackoorseydass*, 7 Moore, P. C. C. 230; *Moon v. Durden*, 2 Exch. 23; *Hasket v. Wootan*, 1 Nott & McC. 180; *Johnston v. Russell*, 37 Cal. 670; *Wheeler v. Spencer*, 15 Conn. 26; *Winchester v. Nutter*, 52 N. H. 507, 13 Am. Rep. 93; *Stoddard v. Martin*, 1 R. L. 1.

Bell, J., in *Monroe v. Smelly*, 25 Tex. 586, 78 Am. Dec. 541, said: "The rule and the exceptions taken together are founded upon a principle which enables the law to adapt itself to the changing circumstances and conditions of communities and states. . . . In a merely political sense a thing may be said to be contrary to public policy in one generation which is not so in the next. And when the law institutes an inquiry into the morality or immorality of a particular thing the inquiry does not proceed upon abstract principles so much as upon the received and common opinion of the great body of the people constituting the great body of the people upon which the law has its operation."

One of the earliest cases was that of *Andrews v. Herne*, 1 Lev. 33, reported in 1 Keb. 56, as *Walcot v. Tappin*, where a wager had been laid that Charles Stuart would be king of England within twelve months then next ensuing. The action was maintained. *Justice Buller* alluding to this case in *Good v. Elliott*, 3 T. R. 693, said: "I presume no one will say that an action could now be maintained on any bet of that kind."

In *Gilbert v. Sykes*, 16 East, 156, the case of a wager on the life of Bonaparte, *Lord Ellenborough*

A PPEAL by defendant from a judgment of the Circuit Court for Multnomah County in favor of plaintiff in an action brought to recover money which had been bet upon a foot race and deposited with defendant as stakeholder. *Affirmed.*

The facts are stated in the opinion.

Measrs. McGinn, Sears & Simon, for appellant:

A wagering contract upon an indifferent subject is valid by the common law, and except where prohibited by statute. It is valid by the laws of Oregon except in respect to those matters which come within the inhibition of the statute relating to gambling. This statute does not prohibit bets upon foot races.

Hill, Or. Laws, § 3526 *et seq.*

The enumeration of the unlawful games excludes all other games from the illegal category.

That the rule is as stated at common law, see—

Good v. Elliot, 8 T. R. 698; *Allen v. Hean*, 1 T. R. 56-60; *Atherfold v. Beard*, 2 T. R. 610; *Da Costa v. Jones*, 2 Cowp. 729; *Ramloll Thackoorseydas v. Soojumnull Dhondmull*, 6 Moore, P. C. C. 800-810, 12 Jur. 815; *Harding v. Walker*, 1 Hempst. 53; *Sackett v. Davis*, 8 McLean, 101; *Pope v. St. Leger*, 1 Salk. 844; *March v. Pigot*, 5 Burr. 2802; *Jones v. Randall*, 1 Cowp. 17, 87; *Brandon v. Hibbert*, 4 Campb.

87; *Moon v. Durdan*, 3 Exch. 23; *Campbell v. Richardson*, 10 Johns. 406; *Bunn v. Riker*, 4 Johns. 427; *Walker v. Armstrong*, 54 Tex. 609; *Harris v. White*, 81 N. Y. 544; *Kirkland v. Randon*, 8 Tex. 10; *Dunman v. Strother*, 1 Tex. 59; *Johnson v. Fall*, 6 Cal. 859, 65 Am. Dec. 518; *Bass v. Peevey*, 22 Tex. 295; *Devees v. Miller*, 5 Harr. (Del.) 847; *Trenton Mut. L. & F. Ins. Co. v. Johnson*, 24 N. J. L. 576; *Morgan v. Pettit*, 4 Ill. 529; *Smith v. Smith*, 21 Ill. 344, 74 Am. Dec. 100; *Beadles v. Bless*, 37 Ill. 820, 81 Am. Dec. 281; *Hasket v. Wootan*, 1 Nott & McC. 180; *Stoddard v. Martin*, 1 R. I. 1; *Phillips v. Ives*, 1 Rawle, 49.

Then the stakeholder had the right to retain the funds until the happening of the event. If the wager is legal neither party has the right to rescind the contract and claim the money.

2 Parsons, Cont. 626; *Brandon v. Hibbert*, 4 Campb. 87; *Bland v. Collett*, Id. 157; *Murray v. Keyes*, 85 Pa. 884; *Parks v. Kleeber*, 37 Pa. 251; 3 Bishop, Married Women, § 806; *Smith v. Sherwin*, 11 Or. 269.

If according to the wager the parties have appointed judges on the event it can be ascertained only by the decision of the judges.

Devees v. Miller and *Kirkland v. Randon*, *supra*.

The findings show that the agreement of the parties was not an ordinary wager, but

said: "Wherever the tolerating any species of contract has a tendency to produce a public mischief, or inconvenience, such a contract has been held void."

Le Blanc, J., in the same case said: "It has often been lamented that actions upon idle wagers should have been maintained in courts of justice. The practice seems to have prevailed before that full consideration of the subject which has been had in modern times, and it is now clearly settled that the subject-matter of a wager must at least be perfectly innocent in itself, and must not tend to immorality or impolicy."

In *Da Costa v. Jones*, 2 Cowp. 729, Lord Mansfield stating as a case a wager that an unmarried woman has a bastard, said: "Would you try that? Would it be endured? Most unquestionably it would not, because it is not only an injury to a third person, but it disturbs the peace of society, and the party to be affected by it would have a right to say, 'How dare you bring my name in question?'"

This case arose about a bet upon the sex of the Chevalier D'Eon, on the first trial the plaintiff obtained a verdict; but on motion for arrest for judgment which was heard the next year, and after the case had been considerably discussed throughout Europe, it was said that it would be a disgrace to judicature to sustain the action, and that physicians, servants, and confidential friends could not be required to give evidence on such a question.

In the case of *Henkin v. Gerss*, 2 Campb. 408, Lord Loughborough refused to try an action for a wager whether a person could be held to bail on a special original for a debt under forty pounds. This was approved by the court of king's bench in *Henkin v. Guerss*, 12 East, 247.

Brown v. Leeson, 2 H. Bl. 43, was the wager concerning the manner of playing an illegal game. The court refused to sustain an action concerning a prohibited game. Lord Loughborough said in addition: "This was a mere idle wager, and I have no hesitation in saying that I think a court or a jury ought not to be called upon to decide such wagers."

18 L. R. A.

In 1824 Lord Chief Justice Abbott refused to try the case of a wager upon a dog fight.

In Scotland the courts have refused to entertain actions on wagers. Bruce v. Ross, 3 Paton, 107.

By 8 & 9 Vict. all contracts and agreements, whether by parol or in writing, by way of gambling or wagering are declared to be null and void.

In Massachusetts the English law has never been adopted, and it has been declared that all wagers are unlawful. *Bail v. Gilbert*, 12 Met. 397; *Sampson v. Shaw*, 101 Mass. 145; *Love v. Harvey*, 114 Mass. 82.

A party who receives money from a stakeholder after notice has been given to the latter not to pay it over is liable to the loser for money had and received. *Love v. Harvey*, *supra*; *McKee v. Manice*, 11 Cush. 367.

And money lost and voluntarily paid to the winner on a wager on a dog-fight may be recovered back in an action for money had and received. *Grace v. McElroy*, 1 Allen, 568.

But where a party to a bet had declared that he was the winner and demanded that the stakeholder pay over the stakes to him, but did not ask for the return of his deposit, he was held to be *in part delicto* and not in a position to recover from the winner after the stakes had been paid over. *Patterson v. Clark*, 128 Mass. 531.

In Maine all wagers are void. *Lewis v. Littlefield*, 15 Me. 238; *Stacy v. Foss*, 19 Me. 335.

In Pennsylvania an action to recover money lost upon a wager or bet cannot be maintained. *Edgell v. McLaughlin*, 6 Whart. 176, 36 Am. Dec. 214; *Phillips v. Ives*, 1 Rawle, 37; *Pritchett v. Insurance Co. of N. A.* 3 Yeates, 453.

Nor in Vermont. *Collamer v. Day*, 2 Vt. 144.

In *Phillips v. Ives*, 1 Rawle, 37, the defendant bet that Napoleon would escape or be removed from St. Helena within two years; and if he died defendant would lose the bet. Within two years Napoleon died. But the bet was held not recoverable; and it was further held that no bet about a human being was recoverable in a court of justice.

The winning party to a wager cannot recover the stakes in a court of law. *Johnston v. Russell*, 37

that it had in contemplation a "job race;" that is, it was a corrupt, criminal, and criminally illegal agreement. It was in advance "fixed" that one of the parties should win and that certain persons should lose their money. This put the plaintiff *in pari delicto* with the defendant, and the rule is in such cases, *potior est conditio possidentis*.

Davis v. Holbrook, 1 La. Ann. 176; *Sutphin v. Croser*, 32 N. J. L. 463; *Murdock v. Kilbourn*, 6 Wis. 468; *Winchester v. Nutter*, 52 N. H. 507, 13 Am. Rep. 98.

Messrs. Miller & Miller, with *Mr. John MacMillan*, for respondent.

Lord, Ch. J., delivered the opinion of the court:

This was an action to recover the sum of \$560 deposited with the defendant as a wager on the result of a foot race. The case was tried without the intervention of a jury, and the material facts, as found by the court, are that the plaintiff deposited with the defendant the sum of \$560 in gold, for the benefit of one George Grant, and as a wager upon a foot race which said Grant and one Anderson were to run the next day, at a place agreed upon; that, at the time the said money was so deposited, it was understood by Grant and the defendant, Taylor, and the plaintiff, that the money should be paid back to the plaintiff, on

his demand of the same, at any time before the race should be run, which the defendant agreed to do; that before such race was run the plaintiff, on two occasions, demanded said money of the defendant, who refused to pay it back, but pretends that said race was run, and that Anderson was the winner, and to whom he paid the money before the commencement of this action; that the race agreed to be run was not run, but that Grant, at the appointed time, refused to run, and Anderson ran over the course alone, and was declared by the defendant to be the winner; that said pretended race was never intended to be a fair and honest race, and that plaintiff knew at the time he deposited his money with the defendant that the race was to be a "bogus race;" that the parties engaged in getting it up, namely, Grant, Anderson, and the defendant, wanted to "rope in" somebody; that it was understood that Grant was to win the race; that the plaintiff furnished the money, and deposited it with the defendant, as a stakeholder, for the benefit of Grant, in whom he had confidence at the time, but afterwards, before the time appointed for the race to come off, became suspicious that he would lose the money, and thereupon, by reason of such suspicion, and by virtue of the agreement with the defendant, demanded of the defendant the return of said money; and that said Grant, then and there, before the time of running the

Cal. 672; *Hill v. Kidd*, 48 Cal. 615; *Gridley v. Dorn*, 57 Cal. 73, 40 Am. Rep. 110; *Waterman v. Buckland*, 1 Mo. App. 46.

In *Rice v. Gist*, 1 Strobb. L. 32, *Judge O'Neill* said: "I am prepared hereafter to declare all wagers unlawful on their clear immoral tendency, and thus to sweep from our courts the whole body of wagers great and small."

One cannot maintain an action to recover on a wager, to decide which the court must inquire into the conduct of an independent department of the government, the parties having no interest other than that created by the wager. *Smith v. Brown*, 8 Tex. 380, 49 Am. Dec. 743.

By statute in Arkansas all contracts by way of wagering are void. *Gantt's Dig.* § 2367.

The winner of a bet on a horse-race cannot recover from the stakeholder more than his own deposit. *McLain v. Huffman*, 30 Ark. 429.

Wisconsin Rev. Stat., chap. 169, § 16, makes all wagers, bets, or stakes made to depend upon any race, or contingent event, unlawful.

In New York it is declared that "all wagers, bets, or stakes made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever shall be unlawful;" and that "all contracts for or on account of any money or property or thing in action so wagered, bet, or staked, shall be void." 1 Rev. Stat. 662, § 8.

Under this statute, money knowingly lent to be bet or staked cannot be recovered back. *Ruckman v. Bryan*, 8 Denio, 340; *Peck v. Briggs*, 3 Denio, 107.

Even though the bet was not made. *Morgan v. Groff*, 5 Denio, 364, 49 Am. Dec. 373.

In *Denniston v. Cook*, 12 Johns. 346, where a bet was made on an election and the principals had deposited checks for the amount of their bets, and one, after the result of the election was known, but before the official canvass, withdrew all his money from the bank, supposing the wager lost, it was held that the other principal, to whom the check had been delivered by the stakeholder, could

not recover on the check, nor for money had and received.

Where one borrowed money to bet on an election, and deposited it with the lender as a stakeholder and lost the bet, and the stakeholder paid it to the winner on his agreeing to return it in case the loser would not repay, it was held that the agreement was binding. *Peck v. Briggs*, 3 Denio, 107.

By Pub. Stat. (Rev. Stat. chap. 245, § 16) it is provided that "all bonds, notes, judgments, mortgages, deeds, or other securities as well as promises given, or made for money . . . won at any game or by betting at any race or fight . . . shall be utterly void." This has been held to apply to wagers on the result of a game made by others than the players, as well as to wagers made by the players themselves. *McGrath v. Kennedy*, 15 R. I. 209.

In *Beadles v. Bless*, 27 Ill. 320, 51 Am. Dec. 231, it was said that a wager that a railroad would be completed by a given time had no immoral, indecent, illegal, or pernicious tendency. To the same effect, see *Johnson v. Fall*, 6 Cal. 359, 65 Am. Dec. 518.

The effect of a wager that a railroad would not be completed within a certain time upon the progress of the work is a question of fact. *Johnson v. Fall*, *supra*.

Horse-racing in Texas is not unlawful, and wagers made upon them are recoverable. *Walker v. Armstrong*, 54 Tex. 614; *Pierce v. Randolph*, 19 Tex. 235; *Armstrong v. Parchman*, 42 Tex. 188; *Dunman v. Strother*, 1 Tex. 39, 46 Am. Dec. 97.

In *Gridley v. Dorn*, 57 Cal. 73, 40 Am. Rep. 110, a wager on a horse-race was held void. *Ross, J.*, delivering the opinion, said: "If the question were a new one in this state, we should be inclined to hold all wagers contrary to good morals and sound public policy, and therefore invalid."

In Minnesota a bet on the result of a horse-race is illegal. *Wilkinson v. Tousley*, 16 Minn. 290, 10 Am. Rep. 139.

By Tenn. Code, § 4870, it is made a misdemeanor

race had arrived, demanded of the defendant the repayment of the money to the plaintiff, etc. Substantially upon such findings, the court found, as a conclusion of law, that the plaintiff was entitled to judgment for the sum of \$560 and interest, and for costs, etc. From this judgment the appeal has been brought to this court.

The first contention for the defendant is that wagers or wagering contracts upon indifferent subjects are valid in this state, by force of the common law, except when prohibited by statute. There can be no doubt that wager contracts upon indifferent matters were valid at common law. *Good v. Elliot*, 8 T. R. 698; *Jones v. Randall*, 1 Cowp. 37; *Da Costa v. Jones*, 2 Cowp. 784; *Bunn v. Riker*, 4 Johns. 427, 4 Am. Dec. 262. But all wagers which tended to a breach of the peace, or to injure the feelings, character, or interests of third persons, or which were against the principles of morality or of sound policy, were void at common law. 4 Kent, Com. 466; *Greenhood Pub. Pol.* 226. And all wagers in contravention of the positive provisions of any statute are also void. Of late years, by legislation and judicial decision, the hostility to wagers of every nature has been marked. This is doubtless due to the increase of betting, and the evil consequences resulting therefrom. As O'Neill, J.,

said: "Every bet tends directly to beget a desire of possessing another's money or property without an equivalent. Men acted upon by such influences easily become gamblers, and then the road to every other vice is broad and plain." *Rice v. Gist*, 1 Strobb. L. 84. And the tendency of judicial opinion in repudiating all kinds of wagers is well illustrated in *Love v. Harcey*, 114 Mass. 82, wherein Gray, Ch. J., says: "It is inconsistent with the policy of our laws, and with the performance of duties for which courts of justice are established, that judges and juries should be occupied with every frivolous question upon which idle or foolish persons may choose to lay a wager." Equally emphatic is Belford, J., in *Eldred v. Malloy*, 2 Colo. 321, wherein he says: "If we enter upon the work of settling bets made by gamblers in one case, . . . we may despair of ever finding time for the dispatch of those weightier matters which affect the person and property rights of the respectable people in this territory. If the gate is once opened for this kind of litigation, it is more than probable we may be overrun with questions arising out of bets. The spirit of our laws discourages gambling." Wagers are inconsistent with the established interests of society, and in conflict with the morals of the age; and, as such, they are void, as against public policy. In view of

to "make any bet or wager for money or any other valuable thing."

By section 4881 horse-racing "upon a track or path kept for that purpose" is exempted from the provisions of the statutes against gaming. The betting of money upon a horse-race on an unlicensed track within the state has been held to be gambling within section 4870. *Huff v. State*, 2 Swan, 279.

Betting on races run in another state is unlawful, within section 4870. *Edwards v. State*, 8 Lea, 412; *Daly v. State*, 13 Lea, 228; *State v. Blackburn*, 2 Coldw. 236.

Betting money on a horse-race is gaming and in violation of law. *Tatman v. Strader*, 23 Ill. 494; *Shaffner v. Pinchback*, 133 Ill. 410; *Garrison v. McGregor*, 61 Ill. 473.

In Colorado horse-racing is gaming within Colo. Gen. Stat., § 850. *Boughner v. Meyer*, 5 Colo. 71.

And a wager on a horse-race is a gaming contract. *Corson v. Neatheny*, 9 Colo. 212.

Betting on elections.

Betting on elections is utterly prohibited by the laws of Kansas. *Reynolds v. McKinney*, 4 Kan. 94, 39 Am. Dec. 603.

In *Hickerson v. Benson*, 8 Mo. 8, a bet on the result of the vote in the electoral colleges was held against public policy and void at common law.

A wager made in Canada by citizens of Vermont on the result of a presidential election was held illegal. *Tarleton v. Baker*, 18 Vt. 9.

In *Allen v. Hean*, 1 T. R. 56, a wager made, before the opening of the poll, between two voters, as to the result of an election for member of parliament, was held illegal, as being corrupt, and against the fundamental principles of the British Constitution.

All wagers on the event of an election are void, though made after the election is closed, if before the canvass is complete. *Rust v. Gott*, 9 Cow. 169, 18 Am. Dec. 497; *Brush v. Keeler*, 5 Wend. 250.

In Mississippi a bet made on the result of an election, after the election, is an indictable offense. *Miller v. State*, 33 Miss. 356.

In West Virginia it is provided that "if any person

bet or wager money or other thing of value on any election held" in the state he shall be punished as therein prescribed. It was held in *State v. Griggs*, 34 W. Va. 73, that this covered bets made after the election as well as those made before. To the same effect, *State v. Snider*, 34 W. Va. 83.

The statute in Indiana provides for the punishment of "any person who shall bet or wager any money or other valuable property upon the result of any election." 2 Rev. Stat. 1876, 468.

In *Morgan v. Pettit*, 4 Ill. 529, a wager between two citizens of Illinois on the result of an election in Kentucky was held not illegal.

Smith v. Smith, 21 Ill. 244, is to the same effect. This was upon the ground that the persons making the bet were not in a position to exercise any "dangerous or controlling influence over the result."

In *Gregory v. King*, 58 Ill. 169, 11 Am. Rep. 56, which overruled all previous conflicting cases in Illinois, it was held that a wager made between two citizens of Illinois as to the result of a presidential election in Pennsylvania was void.

But the provision of the Texas Penal Code regarding betting on elections, refers only to bets on elections held within that state, and an indictment under this statute is not supported by evidence of bets on the result of a presidential election in another state. *Covington v. State*, 23 Tex. App. 225.

In *Lucas v. Harper*, 47 Va. 409, hogs had been delivered to the defendant who converted them to his own use, and agreed to pay for them at a specified rate per pound when H. G. should be elected. H. G. was defeated, and an action was brought under the Act of 1831, to recover the value of the hogs. The transaction was held a wager and recovery was allowed.

In *Harper v. Crain*, 47 Va. 409, the facts were similar. C. delivered to H. a horse for which the latter was to pay a specified sum when G. should be elected president. Before the election H. wished to rescind the agreement, and tendered the horse to C. who refused to receive it. G. was elected and C. demanded payment of H. who refused, but held himself ready to return the horse. The transaction was held a wager and C. was denied recovery. This case differed from *Lucas v. Harper*, in that

these considerations, we do not think that such transactions, though upon indifferent subjects, are valid in this state.

The next contention for the defendant is that the alleged agreement was corrupt, illegal, and criminal, in this, that it was in advance "fixed" that one of the parties should win, and that certain persons should lose their money. In other words, that the agreement had in contemplation "a job race." This, it is claimed, put the plaintiff *in pari delicto* with the defendant, and, as a consequence, entitled to the benefit of the rule, *potior est conditio possidentis*. The general rule is that the law will not interfere in favor of either party *in pari delicto*, but will leave them in the condition in which they are found, from motives of public policy. There is no doubt, where money has been paid on an illegal contract, which has been executed, and both parties are *in pari delicto*, the courts will not compel the return of the money so paid. But the cases show that an important distinction is made between executory and executed illegal contracts. While the contract is executory, the law will neither enforce it nor award damages; but, if it is already executed, nothing paid or delivered can be recovered back. So that, while the contract is executory, the party paying the money or putting up the property may rescind

the contract and recover back his money. This arises out of a distinction between an action in affirmance of an illegal contract and one in disaffirmance of it. In the former such an action cannot be maintained, but in the latter an action may be maintained for money had and received. The reason is that the plaintiff's claim is not to enforce, but to repudiate, an illegal agreement. Whart. Cont. § 354. In such case, there is a *locus penitentis*. The wrong is not consummated, and the contract may be rescinded by either party. In *Edgar v. Fowler*, 8 East, 215, Lord Ellenborough said: "In illegal transactions the money has always been stopped while it is *in transitu* to the person entitled to receive it." As Lord Justice Mellish said: "To hold that the plaintiff is entitled to recover does not carry out the illegal transaction, but the effect is to put everybody in the same situation as they were before the illegal transaction was determined upon, and before the parties took any steps. If money is paid or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither can he maintain an action. The law will not allow that to be done."

there was in this case no proof of conversion, and the contract was rescinded before the election.

A bet on an election is against public policy and void. Like v. Thompson, 9 Barb. 315; Willis v. Hoover, 9 Or. 418; Vischer v. Yates, 11 Johns. 21; Thomas v. Cronise, 16 Ohio, 54; Lucas v. Harper, 24 Ohio St. 323; Harper v. Crain, 38 Ohio St. 338; Jeffrey v. Ficklin, 3 Ark. 227; Cooper v. Brewster, 1 Minn. 94.

By statute in Indiana money lost by betting on a game may be recovered. Burroughs v. Hunt, 13 Ind. 178; Frybarger v. Simpson, 11 Ind. 59; Alexander v. Mount, 10 Ind. 161.

But an election is not a game within the meaning of this statute. McHatton v. Bates, 4 Blackf. 63; Woodcock v. McQueen, 11 Ind. 14; Woodcock v. Palmer, 12 Ind. 482; State v. Henderson, 47 Ind. 127; Smoot v. State, 18 Ind. 19; Schlosser v. Smith, 96 Ind. 64.

A bet on an election is not gaming. State v. Smith, Meigs, 99, 33 Am. Dec. 132.

Liability of stakeholder.

A stakeholder who pays all the money deposited with him to one party to a wager before the time when the wager can be decided is liable to the other party for the amount deposited by him. Brewer v. Gobble, 32 Ill. App. 115.

If a contract be executed and both parties *in pari delicto*, neither can recover. But if the contract continues and the party is desirous of rescinding it he may do so and recover back the deposit. Comyn, Contracts, 30, 46.

Money bet upon an illegal wager can be recovered by the loser of the stakeholder, if before paying it over the loser has notified the stakeholder not to pay it but to return it to himself. Wilkinson v. Tousley, 16 Minn. 299, 10 Am. Rep. 139; Ball v. Gilbert, 12 Met. 397; Sutphin v. Crozer, 30 N. J. L. 267; Huncke v. Francis, 27 N. J. L. 55; Moore v. Trippe, 20 N. J. L. 233; Morgan v. Beaumont, 121 Mass. 7; Cleveland v. Wolff, 7 Kan. 137; Hutchings v. Stilwell, 18 B. Mon. 776; Cotton v. Thurland, 5 T. R. 405; Smith v. Bickmore, 4 Taunt. 474; Hasletow v. Jackson, 8 Barn. & C. 221; Laoussade v. White, 7 T. R. 536; Stacy v. Foss, 19 Me. 335; McAllister v. 18 L. R. A.

Hoffman, 16 Serg. & R. 147, 16 Am. Dec. 556; Atkins v. Flemming, 29 Iowa, 122; Thrift v. Redman, 18 Iowa, 25; Shannon v. Baumer, 10 Iowa, 210; Gilmore v. Woodcock, 69 Me. 118, 31 Am. Rep. 255.

Even though the stakeholder was an infant. Lewis v. Littlefield, 15 Me. 233.

An illegal wager is revocable at any time before the event happens. This rule is founded on the justice and policy of allowing each party a *locus penitentis* while the contract remains executory. Tarleton v. Baker, 18 Vt. 9.

A demand by one of the parties to a betting transaction of the whole amount from the stakeholder on the ground that the wager has been won by him, is not a revocation of the wager. O'Kerson v. Crittenden, 63 Iowa, 298.

Money received by a third person may be recovered as money had and received to the plaintiff's use before it is paid over; and where an illegal wager has been laid, either party may notify the stakeholder not to pay it to the winner, and may recover back the amount of his stake. And it is immaterial whether the event has happened or not. Wheeler v. Spencer, 15 Conn. 27; Hale v. Sherwood, 40 Conn. 332, 16 Am. Rep. 37; Conner v. Ragland, 15 B. Mon. 634.

A stakeholder who pays over the stakes to the winner after notice not to do so, even if it is given after the result of the bet is known, is liable to the party who gave the notice for his deposit. Logue v. McCuish, 21 N. S. 75.

An infant may repudiate a bet he has made; but he may not recover the amount from the stakeholder after the latter has by his directions paid over the money to the winner. McLean v. Wilson, 36 Ill. App. 657.

In pari delicto is not a maxim of universal application; for where money has been paid on a contract which is illegal, merely because it is in violation of a rule which has for its object the protection of weak and necessitous men, it may be recovered back; and for the very reason that the rule itself would be frustrated by any other construction. McAllister v. Hoffman, 16 Serg. & R. 147, 16 Am. Dec. 556.

In this case the defendant was stakeholder and

Taylor v. Bowers, L. R. 1 Q. B. Div. 291. In *Hastelov v. Jackson*, 8 Barn. & C. 221, which was an action by one of the parties to a wager on the event of a boxing match, commenced against the stakeholder after the battle had been fought, Littledale, J., said: "If two persons enter into an illegal contract, and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterwards." *Smith v. Bickmore*, 4 Taunt. 474; *Tappenden v. Randall*, 2 Bos. & P. 487; *Lowry v. Bourdieu*, 2 Dougl. 452; *Munt v. Stokes*, 4 T. R. 561; *Utica Ins. Co. v. Kip*, 8 Cow. 20; *Merritt v. Millard*, 48 N. Y. 288; *White v. Franklin Bank*, 23 Pick. 181; *O'Bryan v. Fitzpatrick*, 48 Ark. 490. "And this rule," says *Mr. Justice Woods*, "is applied in the great majority of the cases, even when the parties to an illegal contract are *in pari delicto*, because the question which of two parties is the more blamable is often difficult of solution, and quite immaterial." *Congress & E. Spring Co. v. Knowlton*, 103 U. S. 60, 26 L. ed. 850. The object of the law is to protect the public, and not the parties. This is upon the principle that it best comports with public policy to arrest the illegal transaction before it is consummated. *Stacy v. Foss*, 19 Me. 335, 36 Am. Dec. 755.

It only remains to apply these principles to the facts. These show that the plaintiff was cognizant that the race had been fixed in advance; that one of the parties should win, and that certain other persons should lose their

money; that it was a bogus race, and the arrangement based upon it corrupt, and designed to cheat and defraud the other parties; but at the same time they show that he repented, and repudiated the contract before it was consummated, by demanding the return of his money the evening of the day before the race, and on the day of the race, but before it was to come off, and that the defendant refused to pay it back, and that he afterwards forbade the defendant to pay said money to any other person than himself. He availed himself of the opportunity which the law affords a person to withdraw from the illegal contract before it has been executed. He repented before the meditated wrong was consummated, and twice demanded to withdraw his money, and thereby rescinded the contract. To allow the plaintiff to recover does not aid or carry out the corrupt and illegal transaction, but the effect is to put the parties in the same condition as they were before it was determined upon. By allowing the party to withdraw, the contemplated wrong is arrested, and not consummated. This the law encourages, and no obstacle should be thrown in the way of his repentance. Hence, if the plaintiff retreated before the bet had been decided, his money ought to have been returned to him, and, in default of this, he is entitled to recover.

There was no error, and the judgment must be affirmed.

Rehearing denied.

had been notified by the plaintiff, after the result of the election on which the bet was made was known, not to pay the money to the winner. The money was, however, paid over; it was held that recovery could be had.

Where B, the agent of A, made a bet with C on the event of the approaching election for governor and the sums were deposited with D, it was held that A, the loser, might recover the money from D after the event of the election was known, the money not having been paid over to the winner. *Vischer v. Yates*, 11 Johns. 23.

But in *Yates v. Foot*, 12 Johns. 1, the case of *Vischer v. Yates*, *supra*, was reversed.

In N. Y. Rev. Stat., 662, § 9, it is provided that if the money or property has been paid, delivered, or deposited, it may be recovered back from the winner, and whether the wager be lost or not; and it may be recovered from the stakeholder, notwithstanding he may have paid it over to the winner.

It was held in *Morgan v. Groff*, 4 Barb. 525, that the policy manifested by that section favored the recovery back of money placed in the hands of an agent to be wagered with a particular person, which wager had not been placed.

So the form of action must be that given by the statute, which is debt and not assumpsit. *McKeon v. Caherty*, 3 Wend. 494.

And the action is one upon a statute which under the Statute of Limitations must be brought within three years. *Fowler v. Van Surdam*, 1 Denio, 560.

The action may be brought by the person who made the bet, although he was simply acting as the agent for others. *Haywood v. Sheldon*, 18 Johns. 68.

Even under a statute permitting recovery back 19 L. R. A.

from the winner, it is no defense to an action against the stakeholder that the money has been paid over to the winner. *Simmons v. Borland*, 10 Johns. 468.

At least if a demand was made upon him by the loser before such payment. *Allen v. Ehle*, 7 Cow. 496.

The cases of *Vischer v. Yates*, and *Yates v. Foot*, have been reviewed by the courts of several of the states and the doctrine deduced by the former case declared sound and correct and more consonant with good morals and better sustained by principle and authority than the latter case. *Wheeler v. Spencer*, 15 Conn. 283; *Wood v. Duncan*, 9 Port. (Ala.) 231; *Perkins v. Hyde*, 6 Yerg. 298; *Willis v. Hoover*, 9 Or. 422; *Whitwell v. Carter*, 4 Mich. 323; *Alford v. Burke*, 21 Ga. 46, 68 Am. Dec. 449.

But the case of *Johnston v. Russell*, 37 Cal. 670, approved the case of *Yates v. Foot* and declared that there was no satisfactory reason for the distinction made by the English cases.

By Ky. Gen. Stat., chap. 47, § 5, it is provided that the stakeholder of any money or other thing that may be staked on any bet or wager shall, when thereto notified, return the same to the person making the stake or deposit, and for failing to do so the amount of value of the stake may be recovered from him by the party aggrieved.

Wis. Rev. Stat., chap. 139, § 17, provides that the money wagered may be recovered of the stakeholder "whether the same shall have been paid over by such stakeholder or not, and whether any such wager be lost or not."

These provisions were not repealed by Gen. Laws 1858, chap. 117. *Simmons v. Bradley*, 27 Wis. 689.

A. P. W.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the Second Quarter of the Judicial Year Beginning with Oct. 1, 1892, Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS.
- V. FIDUCIARIES AND REPRESENTATIVES.
- VI. TORTS; NEGLIGENCE; INJURIES; NUISANCES.
- VII. PROPERTY RIGHTS; LIENS; GIFTS; WILLS.
- VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

Passage of Statute.

The debated question as to the conclusiveness of the proper enactment of a statute duly enrolled and signed is raised in a Kentucky case which holds that such presumption is not conclusive as against facts admitted by demurrer which show that constitutional requirements have not been complied with. (Ky.) 556.

Regulation of Private Business.

The claim that the business of a livestock exchange is subject to regulation as a public one on the ground that it does business at the largest market in the world is not upheld, at least so far as to give the courts any power to declare the business impressed with a public use where the Legislature has not done so. (Ill.) 190.

Legislative Power.

The power of the Legislature to provide for a rehearing in the supreme court is denied in North Carolina as the court is established by the Constitution, and the legislative, executive, and judicial departments are required to be kept separate. (N. C.) 547.

The validity of a legislative divorce is denied in Alabama on the ground that it violates a constitutional provision against the suspension by the Legislature of any general law for the benefit of any individual. (Ala.) 95.

The constitutionality of a statute making a railroad company liable for fires on its right of way or set by its engines is upheld after extensive discussion and against dissent in a South Carolina case. (S. C.) 440.

Due Process.

The removal of a wooden building erected in violation of an ordinance can be made without any judicial proceeding. (Mo.) 590.

Regulations of Commerce.

The Indiana Act requiring a blackboard at each railroad station where there is a telegraph office on which a report shall be made whether trains are on time is extensively considered in a case upholding the act and declaring that it is not a regulation of commerce although the information to be given is received by tele-

graph from agents in another state. (Ind.) 502.

A state statute requiring seed sold to be marked with the year in which it was grown except when sold by farmers to other farmers or gardeners in open bulk is held void as to original packages from another state. (C. C. E. D. N. C.) 549.

A contract with a foreign corporation to canvass for its sewing machines which it agrees to sell on credit and a bond as security for payment are held in an Arkansas case to constitute a part of the interstate commerce carried on by the sale of the machines and therefore unaffected by a statute restricting business by foreign corporations. (Ark.) 206.

Appropriations.

An appropriation by a state Legislature for a state exhibit at the world's fair is for a public purpose. (Ky.) 556.

A constitutional prohibition against legislative gifts to individuals is violated by an appropriation for the benefit of sufferers from flood. (Cal.) 744.

A statute allowing a county treasurer to pay bounties and be credited by the state with the amount is held a violation of a constitutional provision against payment of public money except upon appropriations by law and warrants drawn by the proper officer. (Colo.) 396.

Conflict of Laws.

The rule that the place where an injury was received determines the liability for causing it is applied to a case in which the injury resulted from the negligence of a co-employé which transpired in another state which was the domicile of the parties and the place where the contract of employment was made. (Ala.) 438.

See also *infra*, VII., WILLS.

Officers.

The suspension of an officer under the Florida Constitution is held not to affect his right to qualify and hold office for the succeeding term. (Fla.) 594.

The power of the governor in Florida to suspend an officer and that of the courts to interfere is fully discussed in an extensive opinion by the supreme court of that state. (Fla.) 410.

That a notary public is a civil officer who cannot be also receiver of public money is decided in Nevada. (Nev.) 818.

The limitation of the power of officers to make contracts extending beyond their term is applied in an Illinois case to the employment of a poor-house keeper. (Ill.) 447.

Railroad Commission.

The powers of the railroad commission of North Carolina are discussed and construed in a case from that state which holds also that equal facilities need not be given by a railroad company to express companies. (N. C.) 398.

Attorneys.

A bad or fraudulent motive is held necessary to justify the disbarment of an attorney, and the interlineation in a decree, after it was signed by the judge, of immaterial words, when done in good faith, is not ground of disbarment. (Fla.) 401.

License.

The license tax required of an attorney by the Florida laws must be paid by each member of a firm of attorneys. (Fla.) 409.

A license for "doing a business of selling at retail" is required from a farmer or planter who sells goods and liquors to his employés exclusively. (La.) 596.

Civil Rights.

A statute requiring equal but separate accommodations for white and colored persons on railway trains is held not to be unconstitutional. (La.) 639.

Eminent Domain ; Taking Property.

An owner is deprived of property without compensation by a statute denying compensation for improvements upon it after a map of a proposed street is filed although the property may never be taken for that purpose. (N. Y.) 543.

The crossing of one railroad by another is the taking of the latter's property within the constitutional provision as to compensation. (Ala.) 166.

A very close distinction which seemed to perplex the lower courts is brought out in a New York case deciding that a railroad company's liability to abutting owners for an embankment which cuts off their access and which practically closes the street to them does not extend to abutters on another street in which a similar embankment is made to make the necessary change of grade at the intersection of the streets. (N. Y.) 768.

The use of the word "damage" which is now found in many state constitutions in a provision for the protection of private property from public interference is discussed in a Washington case which grants an injunction against changing the grade of a street until compensation is made for damages to the abutting owner. (Wash.) 161.

A special tax on part of a lot which is not taken for the amount of compensation due the owner for the part which has been taken for a public alley and for damages to the latter is held equivalent to confiscation and in violation 18 L. R. A.

of the constitutional provision for just compensation. (Ill.) 487.

A steam railroad on the established grade of a street under municipal authority is not in Missouri regarded as an additional servitude. (Mo.) 389.

Jurisdiction.

The effect of a decision on a jurisdictional question in respect to the estate of a deceased person is presented in a New York case, which holds that where a testator was an inhabitant of the state, a surrogate's decision that he was an inhabitant of the county is conclusive on collateral attack. (N. Y.) 342.

Equity Jurisdiction.

The jurisdiction of equity in cases of boundary, which is extended by the Oregon statute to all cases of confused or uncertain boundaries, is held to be limited by the Constitution to the mere ascertainment of boundaries and an adjudication fixing such boundaries does not bar a claim to the land by adverse possession. (Or.) 361.

Taxes.

The validity of a tax on mortgages is discussed on both sides by the judges of the California Supreme Court. (Cal.) 465.

The right to tax property out of the state is discussed in a New York case concerning collateral inheritance taxes which decides that personal property but not real property outside the state is subject to such tax, and that the tax is a tax on the right of succession rather than upon the property. (N. Y.) 709.

The subject of the taxation of railroad property is very extensively considered in an Indiana case which decides among other things that such proportion of the rolling stock of a company as the length of the track within the state or any county bears to the whole length of the road may be taxed in such state or the county and that the assessment of railroad property by a state board in the first instance while other property is assessed by local boards is not unconstitutional. (Ind.) 729.

The exemption of educational institutions with the grounds attached "necessary for their proper occupancy, use, and enjoyment and not leased or otherwise used with a view to profit" is construed in Minnesota to include houses occupied by professors without rent but not to include unimproved lands intended to be used but not yet used as a place of recreation. (Minn.) 278.

The exemption of religious and similar corporations from the collateral inheritance tax under the New York laws applies only to domestic corporations although it in terms applies to "any" corporation of the classes specified. (N. Y.) 718.

Schools.

A tax to make up the deficiency necessary to keep the public schools open for the time required by the Constitution is held not to be a "special tax" within the meaning of the North Carolina Constitution limiting the amount of county taxes. (N. C.) 850.

The duty of providing and maintaining a city hall for the use of city officers is held to be a public and governmental use in the performance of which a city is not liable for negligence of servants or agents. (Minn.) 151.

The liability of a city for negligence of its own employes whereby a street is rendered unsafe is applied to a case in which an excavation was made by the waterworks department on request of a contractor who had agreed to connect a private house with the city waterworks. (N. Y.) 449.

A municipal corporation cannot be a trustee merely to collect separate sums of money due to its citizens. (Conn.) 256.

The right to enjoin a county board from making an illegal contract or appropriation is denied in an Illinois case which reviews the decisions at length. (Ill.) 832.

The power of a village to purchase a cremating furnace for garbage, etc., is upheld under the general authority to abate nuisances. (Wis.) 45.

The same case holds that the fact of a patent on the mode of constructing such furnace will not make the contract void where the contract

is let to the lowest bidder on the patentee's promise to furnish the use of the patent and supervise the construction for any contractor at a fixed price. (Id.)

The subject of extra compensation to councilmen is discussed at large in a Washington case which limits the right to such compensation to services outside the duties of his office. (Wash.) 872.

Vote.

The invalidity of a vote by a common council because of the interest of a councilman may be cured by a subsequent ratification when he is not a member. (Ind.) 867.

Ballots.

An elaborate review of the decisions on the question of marking ballots is presented in a Florida case which holds that certain printed words on the face of the ballots did not constitute an unlawful marking. (Fla.) 721.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

A note given as a forfeit in case of the non-performance of a parol contract which is void under the Statute of Frauds is also void. (D. C.) 142.

Bills and Notes.

The dishonor of the first of several notes given for the same consideration is held no notice to a subsequent bona fide purchaser of the other notes. (C. C. App. 5th C.) 201.

The liability of a stranger to a promissory note who writes his name across the back before its delivery is held in Kansas prima facie to be that of a guarantor, but subject to parol proof of intention of the parties. (Kan.) 83.

Attorney's Fee.

The validity and effect of a stipulation for attorney's fee is considered at length in an Illinois case which holds that an indorsee is entitled to enforce such agreement and that it may be done by a separate suit when so stipulated. (Ill.) 428.

Assignment.

The assignability of a cause of action extends to a claim for money paid by a purchaser of land unlawfully sold for taxes. (S. Dak.) 847.

Each part of a coupon ticket over several lines is transferable in the absence of any words to the contrary although the ticket was purchased at a reduced rate. (Or.) 55.

The effect of an assignment of an insurance policy with the consent of the insurer is held to be a creation of a new contract unaffected by prior causes of forfeiture unknown to either party. (Mich.) 185.

Carriers.

See also, as to assignment, *supra*, and as to negligence, *infra*.

The rule that a common carrier cannot limit its liability is declared in an Arkansas case even where the limitation does not extend to loss from negligence if opportunity is not given the shipper to make the shipment under a common-law contract. (Ark.) 527.

The discrimination by a carrier between shippers in car-load lots is held unlawful by 18 L. R. A.

an Indiana case which also holds that payment of an overcharge of freights is not voluntary so as to prevent recovering it back. (Ind.) 105.

On the other hand, the right of a common carrier at common law to discriminate in rates is affirmed in a California case. (Cal.) 221.

The doctrine that a conductor is not obliged to take a passenger's statement as to his right to ride, in the absence of any other evidence, is applied in a Michigan case to one who has failed to take a transfer on changing street-cars. (Mich.) 335.

The right of a railroad company to collect demurrage for cars not unloaded within the time allowed is fully discussed and upheld in a Georgia case. (Ga.) 323.

Insurance.

See also, as to assignment, *supra*.

The effect of notice to an insurance company of prior insurance as an estoppel against enforcing a condition against other insurance is fully discussed in a Rhode Island case. (R. I.) 496.

The neglect of an insurance agent to write upon a policy a permission for incumbrances which he has granted in the exercise of his authority is held not to defeat the rights of the insured. (Mich.) 481.

The failure to furnish proofs of loss within the time prescribed is held in a Michigan case not to avoid the policy although it expressly provides that no suit shall be maintained until after full compliance with the requirements of the policy where a forfeiture was expressly declared for failure to comply with many other provisions but not in respect to the proofs. (Mich.) 85.

The doctrine of joint tenancy and survivorship is applied to a mutual benefit certificate payable to two persons named without any direction for dividing the benefits. (Wis.) 249.

Sale.

A contract to sell a certain number of "merchantable brick" to be sorted from a kiln does not pass the title although the price is paid. (Wash.) 419.

Usury.

A loan to a member by a building and loan association is held to be not usurious where the excess over legal interest is contingent on the prosperity of the association. (Ark.) 129.

Lease and License.

The distinction between a lease and a license is the subject of an Indiana case in which an instrument for an exclusive right for one year in a sand-bar is held to be a lease. (Ind.) 491.

Implied Covenant.

The claim of an implied covenant of title by recitals in a quit-claim deed and by the use of words of conveyance is rejected in a Georgia case which extensively reviews the subject. (Ga.) 343.

The rule that there is no implied warranty that premises leased for a dwelling are in

habitable condition is not changed by the California Code requiring the lessor to put the premises in that condition. (Cal.) 264.

Wager.

The illegality of a wager is declared in an Oregon case which nevertheless holds that even if the wager was made with intent to defraud by a bogus race it can be recovered back if demanded before the race has been run. (Or.) 859.

Termination of Contract.

The effect of a stipulation employing a person to carry on a business for a specified time to the employer's "satisfaction" is held to give the employer a right to discharge him whenever he is in good faith dissatisfied. (Minn.) 644.

III. CORPORATIONS AND ASSOCIATIONS.

What constitutes a *de facto* corporation which will prevent partnership liability of the members is illustrated in a Minnesota case. (Minn.) 778.

The by-laws prescribing reasonable qualifications of the directors of a corporation are valid and may declare one who is an attorney against the corporation in a suit, ineligible. (W. Va.) 582.

What constitutes the principal office or place of business of a corporation is a question presented in an important Wisconsin case. (Wis.) 853.

The power of one corporation to purchase the stock of another is denied in a case where one corporation purchased all the shares of another in another state for the purpose of controlling its business. (Tenn.) 252.

IV. DOMESTIC RELATIONS.

The doctrine of the supreme right of the state to guardianship of children is clearly declared in an Indiana case. (Ind.) 431.

The power of a wife to become her husband's partner is denied in a Wisconsin case following the weight of authority under modern statutes. (Wis.) 512.

A married woman has power to become a partner in a firm of which her husband is not a member under statutes giving her power to carry on business on her separate account. (Mich.) 515.

Antenuptial pregnancy is held no ground

for the annulment of the marriage where it was known to the husband although he was induced by false representations to believe that he was the only person with whom the wife had been guilty of illicit intercourse. (Cal.) 875.

The rule that an agreement to facilitate a divorce is void is applied to an agreement by a husband made the day after a decree of divorce in his favor to pay monthly alimony to the wife in consideration of her covenant not to move for a new trial. (Mo.) 850.

As to legislative divorce, see *supra*, I.

V. FIDUCIARIES AND REPRESENTATIVES.

Drummers.

Implied authority to indorse checks in the name of his principal is denied to a commer-

cial traveler who makes collections. (Tenn.) 863.

VI. TORTS; NEGLIGENCE; INJURIES; NUISANCES.

As to municipal corporations, see *supra*, I.

Joke.

The defense in an action of tort that the act was done by way of a joke is held to raise a question for the jury as to whether the parties had been engaged in practical jokes so that defendant had a right to believe plaintiff would accept the act as a joke. (N. J.) 44.

False Imprisonment.

The liability for false imprisonment of one who acts in good faith in causing a criminal prosecution is denied in a Minnesota case. (Minn.) 356.

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Carrier's Negligence.

A carrier's strict duty to keep its track and road all safe is held not to apply to a canal bridge which a street railway company is obliged to cross but over which it has no control. (N. Y.) 764.

The liability of a railroad company to furnish necessary care for a feeble passenger is affirmed in a Minnesota case provided the carrier voluntarily accepts such passenger without an attendant. (Minn.) 602.

That a railroad train need not be held for passengers to get seated or for a person who entered to assist them in getting on to leave

the train, unless his purpose to get off is known to the trainmen is affirmed in a Missouri case. (Mo.) 599.

Electric Shock.

The liability of an electric street railway company for injuries to a passenger from an electric shock is upheld in a Wisconsin case. (Wis.) 479.

Explosion.

The liability of a gas company for explosion caused by a leak in its pipes is discussed in a Pennsylvania case. (Pa.) 759.

Bathing Resort.

The keeper of a bathing resort is held liable for lack of reasonable care to keep the bottom of his bathing resort free from things which might injure the bathers. (Utah) 509.

Master and Servant.

Injuries received by a servant by the use of machinery for purposes not contemplated, although it was defective, is held to create no liability against the master. (Cal.) 124.

Railroad Injuries.

There being no statute requiring railroad companies to fence stock off their right of way in Arkansas, a railroad company is held not liable for the death of a colt which got on the right of way through gaps in a barbed-wire fence and when frightened off the track by a train whistle ran into the fence and was killed. (Ark.) 110.

The failure of an engineer to give signals at a highway crossing is held not to constitute a neglect of duty by the railroad company as matter of law where the statute is directed to the engineer and makes his failure to give the signals a crime. (N. Y.) 771.

The command of a conductor on a freight train to a brakeman to go between cars if he cannot couple them otherwise is held to waive a regulation of the company, prohibiting brakemen to go between cars under any circumstances. (N. C.) 845.

The increased hazard of coupling cars with different coupling apparatus coming from other roads is held to be assumed by a brakeman, and the hauling of such cars is not negligence. (Ala.) 260.

Fellow Servants.

A series of Missouri cases on the subject of the law of fellow servants is presented in this

number with elaborate annotation, by one of the foremost members of the legal profession in that state. (Mo.) 792, 802, 817, 823, 827.

As to the negligence of a railroad company in making flying switches, see (Me.) 60, (Ky.) 68.

The negligence of a railroad company in respect to a flying switch on one of the principal streets of a city is held to be so gross where no watchman was at the crossing or any lookout on the front of the cars which were being pushed that ordinary negligence of a boy injured at the crossing was held not to preclude his recovery. (Ky.) 68.

Proximate Cause.

Negligence in leaving a street unsafe is held in an Illinois case reviewing the conflicting decisions to be the proximate cause of an injury although it would not have occurred except for the running away of a horse which was due to an accident. (Ill.) 750.

The doctrine of proximate cause is discussed in a West Virginia case in its relation to an injury received by a traveler at a railroad crossing where his own negligence contributed to the injury. (W. Va.) 519.

The doctrine of proximate cause as applied to the contributory negligence of a fellow servant where the master's negligence is one of the causes, is well illustrated in a case in which both the master and a fellow servant were negligent as to the cutting off of a supply of oil by the igniting of which a servant was injured. (Ill.) 215.

On the question of the proximate cause of an injury in a highway it is held that a defect in the highway which is safely passed by the traveler does not give him a cause of action where it contributes to his injury which results from the frightening of his horse by an independent cause whereby he becomes uncontrollable, wheels suddenly around and goes back to the place of the defect. (Pa.) 100.

A somewhat peculiar case as to the cause of the frightening of a team at a railroad crossing decides that a freight train unlawfully obstructing the crossing may be a concurrent cause with the noise, smoke, and steam of another train which it conceals from view and thereby render the railroad company liable for the resulting damages. (Mich.) 154.

As to nuisances, see, *infra*, VIII.

VII. PROPERTY RIGHTS; LIENS; GIFTS; WILLS.

Occupying Claimants.

The Occupying Claimant's Law of Nebraska is construed by the Federal court of appeals to make the occupying claimant and the owner of the fee cotenants where each fails to pay the other the amount of his interest in the property. (C. C. App. 8th C.) 266.

Persons not in Esse.

The power of a court to cut off the rights of persons not *in esse* is affirmed in case of a suit to compel the execution of a deed by those having the whole estate subject only to the contingency that others may be born who would have an interest therein. (N. Y.) 831.

Adverse Possession.

The right to acquire title to a portion of a street by adverse possession is upheld by a Nebraska case. (Neb.) 146.

braska decision which notes the conflict of decisions on the subject but declares the weight of authority to be in favor of the decision. (Neb.) 146.

Coal and Gas.

Considering the multitude of coal mines and of gas and oil wells which have existed in the same territory, it is very strange that it has remained until now an unadjudicated question whether the surface owner who has sold the coal may drill oil or gas wells through it. This right is affirmed in a Pennsylvania case subject to restrictions as to injuring the owner of the coal. (Pa.) 702.

Easements.

An abandonment of an easement created by grant is not shown by mere nonuser without

anything to indicate an intention to abandon. (N. Y.) 535.

Judicial Sale.

The doctrine of *cateat emptor* is applied to a purchaser on foreclosure sale although he is wrongly informed by the sheriff and clerk that he will obtain by the purchase a title free from incumbrances, as it is his duty to examine the title. (Neb.) 88.

Civil Death.

That sentence to imprisonment for life is not death for the purpose of descent of property is decided in Texas. (Tex.) 82.

Dedication.

The user by the public of one side only of a dedicated street having two tracks is held an acceptance of the whole dedication. (Cal.) 510.

Ice.

Prescriptive rights to ice on the whole surface of a pond are held to be acquired by an exercise of the right to cut at any place desired without objection for the time long enough to give prescriptive rights where the right was claimed under a deed which gave the right to fowage by which the pond was created. (Mich.) 89.

Ponds.

An exceedingly exhaustive and valuable discussion of the law concerning the ownership of ponds and other waters is made in an opinion by *Chief Justice* Dow in a New Hampshire case. (N. H.) 679.

Lakes.

The grant of public lands bordering on non-navigable lakes extends to the centre, and the question whether the waters are public or private is to be determined by the law of the state. (Minn.) 670.

The test of the navigability of inland lakes to determine their public character is held to be a capacity for any public use. (Minn.) 670.

Wharves.

The right of a riparian owner to build wharves out to navigable water is upheld in a Connecticut case although the land required had been designated under the statute for the cultivation of oysters. (Conn.) 668.

Tenancy by Entirety.

The doctrine of tenancy by the entirety is held by a New York decision not to extend to a mortgage given to husband and wife for moneys of which each contributed part. (N. Y.) 829.

Dower.

The rights of a widow to dower in lands which were depreciated in value after conveyance by her husband either by natural causes or mere neglect are held both at common law and under the Alabama statute to extend only to an assignment by metes and bounds and not to compensation according to the value of the land at the time of conveyance. (Ala.) 425.

The inchoate contingent interest called the dower right which is given by Minnesota statutes to husband or wife in the real estate owned by the other is not divested by a sale on execution under a judgment against the owner. (Minn.) 80.

The effect to defeat dower of a conveyance made by the husband with the express purpose of defeating it is discussed in a Georgia 18 L. R. A.

case, which holds that dower will be thereby defeated if the sale is real but not if it is only colorable except for the purpose of a division among the vendor's children after his death. (Ga.) 75.

The rule that a wife's inchoate right of dower is defeated by dedication of the land to a public use is applied in Missouri to a voluntary conveyance of a right of way to a railroad company executed by her husband alone without consideration. (Mo.) 68.

Trusts.

A woman is held to be a trustee of lands purchased with moneys which she obtains by fraud from a man under a promise to marry him and hold the land in lieu of dower. (N. C.) 204.

Another case on the subject of spendthrift trusts from Mississippi sustains as against creditors a trust for the support of a person to whom quarterly payments of the income are to be made during his life. (Miss.) 49.

The indestructibility of a real estate trust which is valid in its creation under the New York laws is affirmed by a decision denying the power of any court to compel the trustee to consent to a destruction of the trust. (N. Y.) 745.

Liens.

A purchase money mortgage which would otherwise have been prior to mechanics' liens being postponed by agreement to another mortgage which would otherwise have been inferior to such liens, the court transfers the priority of the purchase money mortgage *pro tanto* to the other mortgage and then holds the mechanics' liens superior to the balance of the mortgage indebtedness. (Minn.) 753.

Contractors supplying laborers and teams are not themselves laborers or employes within the Kentucky lien statutes. (C. C. App. 6th C.) 805.

Mortgages.

A mortgagor in possession is to be regarded as the owner of the land for all purposes of establishing and opening highways. (Kan.) 118.

Chattel Mortgages.

A very extensive discussion of the validity of chattel mortgages accompanied by agreements for the sale of mortgaged goods is furnished by a Washington case, in which the invalidity is held to depend upon the actual fact of fraud. (Wash.) 604.

See also *infra*, VIII., *Trover*.

Gift.

The death of a person who has given his check as a gift is held not to defeat the gift although the check is not paid before his death. (Pa.) 855.

A case of great importance on the subject of gifts *causa mortis* is decided by the Supreme Court of Appeals of Virginia in which the fact that the whole of donor's personal estate amounting to a large sum was given is held not to defeat the gift. (Va.) 170.

Wills.

The rule that a testamentary disposition of property is invalid everywhere if invalid at the domicile of the owner is held in a New York case not to defeat a trust to be executed in a

foreign country in which it is valid because such a trust would be invalid at the testator's domicil. (N. Y.) 458.

The Wyoming statute allowing holographic wills to be proved like other private writings

is held not to dispense with the necessity of witnesses to such wills as are required for other wills by Wyo. Rev. Stat., § 2237. (Wyo.) 588.

VIII. CIVIL REMEDIES: RULES AND PRINCIPLES.

Mistake in Payment.

Whether a payment is made by a mistake of law or of fact will give no right to recover it when made by an indorsee in the mistaken belief that he was legally bound by his indorsement. (Mass.) 144.

Parties.

The necessity of making beneficiaries under a trust parties to a suit against the trustees is much discussed in an Illinois case, which denies the necessity on the ground that the trustees hold the title in fee. (Ill.) 881.

Election of Remedies.

A satisfied judgment for one week's wages is held not a bar to the recovery of wages thereafter accruing where the plaintiff had been previously discharged wrongfully and his employment was for one year at a weekly salary. (Md.) 53.

An attempt by the vendor in a conditional sale to enforce a note for the purchase price is held in a Connecticut case fatal to his right thereafter to retake the property. (Conn.) 187.

Exemptions.

The statutory exemption of wages is extended to wages under the debtor's control though temporarily in the hands of another. (Idaho) 586.

Private Action for Nuisance.

The denial of a remedy to a private person for an injury common to the public is applied to an injury to a public fishery although the person's nets were damaged and fish that he had caught were killed in one instance by the garbage which damaged the fishery. (Wis.) 558.

Estoppel.

The use of a process in burning brick which generates noxious gases to the injury of the crops of another on adjacent land is a nuisance and the lease of the land for brick-making does not estop the owner from claiming such damages. (Kan.) 756.

The recovery of pay for services of a physician is held in a West Virginia case to estop the defendant from bringing an action for malpractice only where he appeared to defend in the former suit. (W. Va.) 627.

Judgment Nunc pro Tunc.

The right to enter judgment *nunc pro tunc* is denied where no judgment was entered for two years after trial and verdict in a justice's court although an execution had been issued at the time of the verdict reciting an entry of judgment. (W. Va.) 684.

Ejectment.

The nature of a title which will support ejectment is discussed in a Pennsylvania case, which holds that a conveyance of the exclusive right of interment in burial lots is not a sufficient title for that purpose. (Pa.) 781.

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Trover.

A mortgage on chattels afterwards manufactured does not give the mortgagee a sufficient title to sustain an action for conversion. (N. Y.) 298.

Attachment.

A creditors' bill is held unsupported by a judgment for money only where the jurisdiction was obtained only by attachment of property. (N. Y.) 240.

The effect of a bond for dissolution of an attachment as an appearance in the action is denied in a case where the defendant was not a party to the bond. (Mich.) 486.

Service.

A peculiar case in the Illinois Appellate Court decides that knowledge by an attorney of an attempted service upon him of a notice of motion to place a case upon the short-cause calendar by leaving a copy with the co-occupant of the same office operates in effect as a valid notice. (Ill. App.) 500.

Mailing a summons to the defendant by a person on whom it was served by mistake is not a sufficient personal service. (Minn.) 498.

Time.

In computing the time for appearance the day of service of a summons is to be excluded and the return day included, in Michigan. (Mich.) 837.

Limitations.

The right of a foreign corporation to plead the Statute of Limitations is discussed in an Iowa case which sets up a distinction between those like railroad companies which must have agents within the states and others such as manufacturing companies. (Iowa) 524.

The loss of a valid cause of action by mere lapse of time pending a suit to enforce it is shown in a suit to establish the priority of the lien of a judgment. (Ind.) 211.

New Trial.

A new trial for the disqualification of a juror related to the parties is upheld by a Maine decision. (Me.) 478.

Damages.

Damages for the sale of poisonous coloring matter for ice cream are not limited to the value of the cream spoiled by its use but may include compensation for a resulting loss of business. (N. Y.) 885.

The right to damages sustained after the commencement of a suit in case of a continuing nuisance is denied in Illinois where the nuisance complained of was a roof and eave-trough which cast water during rains on plaintiff's house. (Ill.) 390.

The limitation of the amount of damages for conversion of notes to their actual as distinguished from their face value is affirmed in a New York case in which this rule was sharply contested. (N. Y.) 120.

The right of a defendant in an injunction

RÉSUMÉ OF DECISIONS.
(CRIMINAL LAW AND PRACTICE.)

erroneously granted to recover damages is denied in the absence of an undertaking unless the injunction constituted a malicious prosecution. (N. Y.) 275.

Tender.

The effect of a condition to defeat a tender is illustrated in the case where a demand was made for the surrender of notes. (Minn.) 850.

Evidence.

Extrinsic evidence is held admissible to show that indorsements before delivery by persons named as directors as well as the signature of persons named as president and secretary of a corporation on a note reading, "We promise," etc., were made for and bind only the corporation. (Kan.) 538.

The decision in New York, in 18 L. R. A. 499, against the admissibility of opinions as to what the value of land would have been if a railroad had not been built is disapproved in an Oregon case which admits evidence of what the value would have been if a railroad had been built. (Or.) 815.

Presumption.

The presumption of due care on the part of a person found killed by a train just as it started is held not sufficient to raise a presumption of negligence on the part of the railroad company where the manner of death does not appear. (Mo.) 599.

The presumption that there is no promise to pay a child for services to a parent is clearly

defined in a New York case which limits it to a case in which there is no evidence of any agreement. (N. Y.) 37.

Set-off.

As against a trustee in insolvency as well as the insolvent a debt of the latter to a decedent's estate may be set off against his distributive share therein. (Md.) 158.

Assignment by Insolvent.

An important case concerning assignments for creditors decides that an assignment of part of the debtor's property is governed by the Illinois statute and is valid as to that part but is enlarged by the statute so as to operate in favor of all creditors. (Ill.) 281.

Right to Jury.

An exhaustive review of the jurisdiction of equity to abate nuisances and of the right to a jury in such cases is given in a New Hampshire case, which holds that there is no right to a jury in a suit to abate a nuisance, and that equity jurisdiction cannot be defeated on the ground that the proceeding is for the punishment of a criminal offense. (N. H.) 646.

Amicus Curia.

An attorney-general is held to be merely an *amicus curia* when invited by the court to appear in a case involving a constitutional question brought in the name of the state by a relator to enforce a private right, and therefore he is not entitled to ask for a rehearing either as a party or as intervenor. (Ind.) 567.

IX. CRIMINAL LAW AND PRACTICE.

Irresistible Impulse.

The defense of irresistible impulse in a criminal case and the doctrine of partial insanity is fully discussed in a West Virginia case. (W. Va.) 224.

The test of a knowledge of right and wrong as to the particular act done is reaffirmed in an Illinois case in respect to the defense of insanity. (Ill.) 287.

Insanity.

The effect of drunkenness producing temporary insanity under the Texas statute may reduce the degree of a homicide and also the penalty therefor. (Tex.) 421.

Anti-trust Law.

Foreign insurance companies are held subject to the provisions of the Kansas Act against combinations in restraint of trade where they combine to increase rates, and such business is 18 L. R. A.

held not to be interstate commerce. (Kan.) 657.

Sunday Newspapers.

Selling Sunday newspapers is held not to come within the exception of a Sunday law as to works of necessity or charity. (Pa.) 761.

Error Coram Nobis.

Relief from a plea of guilty and a sentence thereon is granted in a Kansas case in an action in the nature of a writ of error *coram nobis* where the plea was induced by threats of mob violence. (Kan.) 838.

The constitutional provision against cruel and unusual punishments is not violated by a statute authorizing imprisonment from two to ten years and a fine not exceeding \$2,000 for conspiracy to do an unlawful act in the nighttime or to do such act while wearing white caps, masks, or other disguises. (Ind.) 774.

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GENERAL INDEX

TO

OPINIONS, NOTES AND BRIEFS.

(Separate Index to Notes precedes this.)

ACCRETIONS. See WATERS, NOTES AND BRIEFS.

ACTION OR SUIT. See also CONFLICT OF LAWS, NOTES AND BRIEFS; JUDGMENT, 7.

1. The maxim *de minimis non curat lex* does not apply to the positive and wrongful invasion of another's property. The right to maintain an action for the value of property of which the owner is wrongfully deprived is never denied. *Wartman v. Swindell* (N. J. Err. & App.) 44

2. The living owners of an estate in whom is vested the whole estate subject only to the contingency that other persons may be born who will have an interest therein represent the whole estate for all purposes of any litigation in reference thereto and affecting the jurisdiction of the courts to deal with the same, and stand, not only for themselves, but also for the persons unborn. *Kent v. St. Michael's Church* (N. Y.) 331

3. The exercise of an option by the vendor in a conditional sale, to enforce payment of a note given for the purchase price, defeats his right under the contract to retake the property upon default, although he is unable fully to collect the note because of the purchaser's insolvency. *Crompton v. Beach* (Conn.) 187

4. A contract between a city and a railroad company, by which the former consents to the closing of certain streets upon the consideration that the latter shall pay certain damages to thirty-five different property-holders, if enforceable at all, can be enforced only by such property-holders. *New Haven v. New Haven & D. R. Co.* (Conn.) 256

5. The issue of a woman has not a vested interest in real estate devised in trust during her life to apply the income to her use, and upon her death to convey to her issue if she leaves any surviving, in such shares as she shall appoint, otherwise to them in equal shares *per stirpes*, and if she leaves none then to other persons, which will make such issue necessary parties to a suit against the trustees, as the latter take the title in fee. *Green v. Grant* (Ill.) 381

6. Creditors whose attachments have been dissolved by an assignment for benefit of creditors may intervene under Wash. Code 1881, § 1997, in proceedings for the foreclosure of a chattel mortgage on the debtor's property, to contest the right to foreclose such mortgage 18 L. R. A.

as against their rights. *Ephraim v. Kelleher* (Wash.) 604

ADMIRALTY.

The admiralty and maritime jurisdiction of the United States courts extends to controversies arising out of contracts for the shipment of merchandise upon the high seas between ports of the same state. *Cowden v. Pacific Coast Steamship Co.* (Cal.) 221

ADVERSE POSSESSION.

1. Actual, visible, exclusive, and uninterrupted possession of a portion of a street in a city under a claim of right for the statutory period, vests an absolute title in the occupant. *Meyer v. Graham* (Neb.) 146

2. Possession or intrusion upon land by mistake in consequence of confusion or uncertainty as to the true boundary, without any intention to claim title beyond one's lawful boundary, is not adverse. *King v. Brigham* (Or.) 361

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1. A writ of error is the proper remedy to review the overruling of a motion to quash an attachment after the entry of judgment in 877

favor of the attachment creditor. *Pierce v. Johnson* (Mich.) 486

2. The constitutional right of appeal under Ala. Const. art. 14, § 7, from any preliminary assessment of damages, by viewers or otherwise, in condemnation proceedings, is violated by Ala. Code 1886, § 1582, which merely provides for the appointment by a probate judge of three arbitrators and the recording of their award, without any provision for appeal, as the general statutes provide for an appeal only from a final judgment, order, or decree of the judges of probate. *Memphis & C. R. Co. v. Birmingham, S. & T. R. R. Co.* (Ala.) 166

8. An unnecessary recital by the clerk of a charge to the grand jury does not make it a part of the record. *Hobbs v. State* (Ind.) 774

4. It will be presumed on appeal that the jury followed an erroneous instruction allowing interest for a greater period than demanded in the petition, although the verdict is much less than the damages demanded. *Winney v. Sandwich Mfg. Co.* (Iowa) 524

5. The decision of the trial court as to impaneling a jury to inquire into the sanity of a prisoner will not be reversed, if at all, unless it manifestly appears that the decision was wrong or that the court abused its discretion. *State v. Harrison* (W. Va.) 224

6. The denial of a continuance is not a cause for reversal unless it was plainly erroneous and an abuse of discretion. *Id.*

7. The appellate court is not limited, upon appeal from an order granting a new trial, to an exclusive consideration of the grounds upon which the new trial was allowed, although all other grounds relied on were distinctly overruled; but all the grounds embraced in the motion, excepting an allegation of insufficiency of evidence to justify the verdict, will be examined and the order sustained if justified by any of them, irrespective of the ones mentioned by the trial court. *Kauffman v. Maier* (Cal.) 124

8. The refusal of the court to allow a witness on his re-examination to answer a question whether or not he had recovered a judgment against the defendant, where on cross-examination he had been asked if he had not a controversy with the defendant, sufficiently protects the defendant's rights as against an objection to the question. *Kentucky C. R. Co. v. Smith* (Ky.) 63

9. The refusal to open the case after the trial had closed, on the ground of the discovery of important testimony, is not error where the witnesses had been previously summoned, except one who was an employé of the party moving to open the case. *Id.*

10. Only where the evidence, by whomsoever introduced, with all fair and legitimate inferences thereupon, is so insufficient to sustain a verdict for the plaintiff that the court must set it aside if rendered, will the court be justified in directing a verdict for the defendant. *Pullman's Palace-Car Co. v. Laack* (Ill.) 215

11. The refusal to send the jury to view premises at a particular time during the trial

and before the close of the testimony cannot be complained of, where the place had been fully described and they were sent to make the view at the close of the testimony. *Kentucky C. R. Co. v. Smith* (Ky.) 63

12. The attorney general is only an *amicus curiæ* when invited by the court to appear in an action involving an important constitutional question, which is brought in the name of the state on the relation of a person who seeks thereby to enforce a private right; and he is not a party or intervener who is entitled as such to file a petition for a rehearing. *Parker v. State, Powell* (Ind.) 567

13. A rehearing cannot be considered if no brief is filed in its support. *Id.*

14. One to whom the decision is not adverse cannot petition for a rehearing. *Id.*

15. The right to file a petition to rehear a case in the supreme court, given by N. C. Code, § 986, does not extend to the right to require the court to consider the rehearing contrary to its rules. *Herndon v. Imperial F. Ins. Co.* (N. C.) 547

APPORTIONMENT. See ELECTION DISTRICTS, NOTES AND BRIEFS.

APPROPRIATIONS.

1. A legislative appropriation for the benefit of sufferers from a flood is in violation of Cal. Const. art. 4, § 81, prohibiting the gift of any public money or thing of value to any individual. *Patly v. Colgan* (Cal.) 744

2. A statute providing for the payment of bounties by a county treasurer for the destruction of certain wild animals or poisonous weeds and for planting trees, the amount to be credited in his settlement with the state treasurer, violates a constitutional provision that "no money shall be paid out of the treasury except upon appropriations made by law and on warrant drawn by the proper officer." The fact that the money has not actually reached the treasury does not prevent the application of this provision to money belonging to the state. *Institute for Edu. of Mute & B. v. Henderson* (Colo.) 398

3. An appropriation to exhibit the resources and progress of the state at the World's Columbian Exposition is for a public or governmental purpose. *Norman v. Kentucky Bd. of Managers of World's Col. Expo.* (Ky.) 556

4. The state auditor has not only the right, but the duty, to question the validity of a legislative appropriation on the ground that it is unconstitutional, when he is called upon for a warrant upon the treasurer under such appropriation. *Id.*

NOTES AND BRIEFS.

Appropriations; validity of. 744

ASSESSMENT. See PUBLIC IMPROVEMENTS.

ASSIGNMENT. See also CARRIERS, 5 NOTES AND BRIEFS.

The right of a purchaser at a wrongful, unlawful, or erroneous tax sale, to have his

money refunded under the provisions of Dak. Comp. Laws, § 1629, is assignable so as to sustain an action by the assignee in case of refusal to refund the money. *Erickson v. Brookings County* (S. D.) 847

ASSOCIATIONS.

A court of chancery will not undertake to force a member upon a corporation which is not engaged in commercial business, but merely furnishes to its members facilities for carrying on business, against the will of those whose duty it is to pass upon applications for membership. *American Livestock Commission Co. v. Chicago Livestock Exch.* (Ill.) 190

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Associations; right to transfer of membership. 190

ASSUMPSIT.

1. Payment of an overcharge of freight to a railroad company engaged as a common carrier of goods is not voluntary so as to prevent recovering it. *Louisville, E. & St. L. Consol. R. Co. v. Wilson* (Ind.) 105

2. Payment of the amount due on an instrument by one who indorsed it, which is made and accepted in the mistaken belief of both parties that such indorser was legally liable, where the matter was equally open for the inquiry and judgment of both parties, cannot be recovered back whether the mistake is to be considered one of fact or of law. *Alton v. Webster First Nat. Bank* (Mass.) 144

3. A payment of salary in excess of the lawful amount, by order of a municipal council, to one of its members, is not within the rule which precludes recovery of money voluntarily paid. *Tacoma v. Lillis* (Wash.) 372

4. Payments for services outside the scope of his official duties, rendered by a city councilman, and which could have been appropriately performed by a private individual, under a contract which is contrary to public policy, cannot be recovered back by the city, in the absence of corruption or fraud. *Id.*

5. A city cannot recover back money paid to a councilman for his services in pursuance of a vote or resolution, on the sole ground that it had failed to pass an ordinance authorizing the payment, if it had legal authority to compensate him. *Id.*

ATTACHMENT. See also APPEAL AND ERROR, 1; LABORERS; LEVY, NOTES AND BRIEFS.

1. No debt is created on the part of a bank by the sale of its draft on another bank for cash, which can be levied on under attachment against the purchaser, so long as the draft remains outstanding without default thereon. *Capital City Bank v. Parent* (N. Y.) 240

2. The right of attachment debtors to move to quash the attachment is not waived by the fact that a bond was given to the sheriff for the retention of the chattels attached, by a stranger to the suit in whose possession they were. *Pierce v. Johnson* (Mich.) 486

3. Attachment of the debtor's property to secure a debt not due is not authorized by Mich. Pub. Acts 1889, No. 149, where the facts alleged in the affidavit as a basis for the attachment are consistent with an honest purpose on the part of other creditors to secure their just claims. *Id.*

3. A judge should personally hear the evidence in a proceeding for the disbarment of an attorney, and should not delegate the taking of the evidence to a commissioner or anyone else. *Id.*

ATTORNEY-GENERAL. See APPEAL AND ERROR, 12.

ATTORNEYS.

1. A bad or fraudulent motive must be shown to justify the disbarment of an attorney, although the acts charged against him are proved to have been committed. *State, Fowler, v. Finley* (Fla.) 401

2. The interlineation into a decree, after it has received the judicial signature, of immaterial words patently omitted therefrom through clerical oversight, is not ground for disbarring an attorney, where he acted without any bad or fraudulent motive. *Id.*

3. A judge should personally hear the evidence in a proceeding for the disbarment of an attorney, and should not delegate the taking of the evidence to a commissioner or anyone else. *Id.*

4. Charges preferred against an attorney for the purpose of disbarring him should be clear, specific, and circumstantial, and should be stated with great particularity. *Id.*

5. Each member of a firm of practicing lawyers must pay a license tax and fee prescribed for lawyers practicing their profession, by Fla. Act June 10, 1891 (Fla. Rev. Stat. p. 929, *et seq.*), and must take out the required license, before he can lawfully practice his profession. *Blanchard v. State, Cathoun* (Fla.) 409

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Attorneys; necessity of bad or fraudulent motive to justify disbarment. 401

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ATTORNEYS' FEES. See BILLS AND NOTES, 1-8; USURY, 1.

BALLOTS. See VOTERS AND ELECTIONS.

BANKS. See ATTACHMENT, 1; ESTOPPEL, 3.

BATHING RESORT.

One maintaining a bathing resort on the shore of a natural body of water, to which he invites the public, must use reasonable care to keep the bottom under the section of water which the bathers use free from everything which might injure their feet, failure to do which, resulting in injury, is actionable negligence. *Boyce v. Union P. R. Co.* (Utah) 509

BETTING.

1. Money deposited with a stakeholder as a wager on a foot race, by one who knows that the race is to be bogus and has been fixed in advance, may be recovered by him on demand before the race has been run. *Bernard v. Taylor* (Or.) 859

2. Wagers, being inconsistent with the es-

established interests of society and in conflict with the morals of the age, are void as against public policy. *Bernard v. Taylor* (Or.) 859

NOTES AND BRIEFS.

Betting; legality of wagers; on elections; liability of stakeholder. 859

BILLS AND NOTES. See also ATTACHMENT, 1; COURTS, 8.

1. The indorsement of a negotiable note passes with it to the assignee the right to enforce a stipulation in the note for an attorneys' fee, to be recovered either as part of the note or by separate action. *Dorsey v. Wolf* (Ill.) 428

2. A separate suit for an attorneys' fee may be authorized by express stipulation in a promissory note. *Id.*

3. The negotiability of a note is not destroyed by a stipulation for 10 per cent attorneys' fee to be recovered as part of the note or in a separate suit, if the note is not paid when due and suit is brought thereon. *Id.*

4. Dishonor of the first to mature of several notes given upon the same consideration, but not showing that fact upon their face, is no notice to a subsequent indorsee for value before maturity of the other notes, of the equities existing between the original parties. *Bank of Edgfeld v. Farmers Co-Op. Mfg. Co.* (C. C. App. 5th C.) 201

5. A bona fide holder of a note the consideration for which has failed in part as between the original parties is not limited, by the fact that it was taken as collateral security, to recovery only of the amount for which it was valid as between the original parties, unless he had notice of the equities between them, but may recover at least the amount for which it was pledged. *Id.*

6. A note given as a forfeit in case of the nonperformance of a parol contract for the sale of land void under the Statute of Frauds is itself void. *Kraak v. Fries* (D. C.) 142

NOTES AND BRIEFS.

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BONA FIDE PURCHASER. See BILLS AND NOTES, 4, 5.

BOUNDARIES. See also ADVERSE POSSESSION, 2; EQUITY, 4; JUDGMENT, 5.

1. The common-law rule governing the construction and extent of grants of land bordering and bounded on non-navigable waters is applicable alike to conveyances bounding lands on fresh-water rivers and small non-navigable lakes or ponds. *Gouverneur v. National Ice Co.* (N. Y.) 695

2. Describing one boundary of a conveyance of land as along a certain pond will carry title 18 L. R. A.

to the center of the pond, unless a contrary intention appears. *Id.*

3. The designation of the courses and distances of the shore line, in a deed describing one boundary of the land conveyed as "along" a certain pond, will not prevent the passing by the grant of title to the center of the pond. *Id.*

4. If a meandered lake is non-navigable in fact, the patentee of riparian land takes the fee to the center of the lake. *Lamprey v. State* (Minn.) 670

BOUNTY. See APPROPRIATIONS, 2.

BUILDING AND LOAN ASSOCIATIONS. See also USURY, 2, NOTES AND BRIEFS.

A borrowing member of a building and loan association has no right to receive interest on his stock payments, or to have such payments applied in reduction of his indebtedness, unless such right is expressly reserved. *Reeve v. Ladies Bldg. Assn.* (Ark.) 129

BUILDINGS.

1. No judicial proceeding is necessary to give a city the right to tear down a wooden building erected in violation of an ordinance fixing fire limits. *Eichenlaub v. St. Joseph* (Mo.) 590

2. An ordinance prohibiting wooden buildings within fire limits, which is enacted under a charter which allows such regulations to be made only by ordinance, cannot be suspended by a simple resolution of the city council, which is not presented to the mayor and which does not constitute an ordinance; and a permit given in accordance with such resolution is void. *Id.*

BY-LAWS. See CORPORATIONS, 6, 7, NOTES AND BRIEFS.

CARRIERS. See also ASSUMPSIT, 1.

1. A railroad train may be started without waiting for a passenger to reach a seat after he has entered the vehicle, unless there is some special reason to the contrary, as in the case of a weak or lame person. *Yarnell v. Kansas City, Ft. S. & M. R. Co.* (Mo.) 599

2. Time need not be given for a person who has entered a railroad train merely to assist passengers in getting on, to leave the train, where no notice is given of his intent to get off. *Id.*

3. A railway company which voluntarily accepts as a passenger, without an attendant, a person whose inability to care for himself is apparent or made known at the time to its servants, is negligent if it fails to render such passenger the necessary care and assistance. *Oroom v. Chicago, M. & St. P. R. Co.* (Minn.) 602

4. Alighting from the train and assisting passengers to enter it is no part of the duty of the employes on a passenger train, where access to the cars is easy, a neglect of which, resulting in injury, can be the basis of an action

Yarnell v. Kansas City, Ft. S. & M. R. Co.
(Mo.) 599

5. Each portion of a "coupon ticket" issued by a railroad company for itself and also as agent for other lines to be passed over is a separate contract so far as to be transferable, although the ticket is sold at a reduced rate, where there are no words of limitation or restriction thereon as to the person entitled to use it. *Nichols v. Southern P. Co.* (Or.) 55

6. A street-railway company is not liable for injury to a passenger caused by iron falling from a canal bridge belonging to the state and over which the railroad company has no control, but which it is necessary to cross on its route, if the company has not been guilty of negligence in failing to discover the defect. *Birmingham v. Rochester City & B. R. Co.* (N. Y.) 764

7. An electric street-railway company is liable for injuries to a passenger from an electric shock received while passing from one car to another by grasping a hand rail charged with electricity because of imperfect insulation, where it has ready means of ascertaining the escape of electricity from the works of the car, and the passenger is free from contributory negligence. *Burt v. Douglas County Street R. Co.* (Wis.) 479

8. It is not, as matter of law, negligence contributing to injury from an electric shock caused by imperfect insulation, for a passenger to swing around from the step of an electric street-car to that of the trailer, when the railway company has no rule prohibiting and allows it without objection. *Id.*

9. A passenger who fails to ask or obtain any written transfer or other evidence of his right to ride in a car which he enters after leaving one in which he has paid fare may be lawfully ejected if he refuses to pay fare therein; and the conductor is not obliged to take the passenger's statement as evidence of his right to ride. *Mahoney v. Detroit Street R. Co.* (Mich.) 835

10. A carrier cannot by special contract limit its common-law liability for losses not occasioned by negligence, where it does not afford the shipper an opportunity to contract for the service required without such restriction, even if he makes the special contract without objection or demand for a different one. *Little Rock & Ft. S. R. Co. v. Cravens* (Ark.) 527

Demurrage.

11. A regulation of a carrier as to demurrage upon cars, known to its customer before its shipments are made, is binding upon him, whether mentioned in the bills of lading or not, and whether the shipments are made to the order of the consignor with instructions to notify the customer, or directly to the customer himself. *Miller v. Georgia R. & Bkg. Co.* (Ga.) 323

12. Under a regulation of a carrier providing for demurrage upon cars to be placed and remain accessible to the consignee for the purpose of unloading, the cars are to be considered accessible, where the carrier is always ready to place them in a position for unloading within, at the longest, a few hours after being notified that the consignee is ready to unload. *Id.*

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13. A carrier whose customers are allowed the option of unloading for themselves may make and enforce a reasonable regulation as to the time in which the vehicles may be unloaded free of demurrage, and may fix a reasonable rate per day at which demurrage will be charged for such vehicles so long as they remain unloaded after the expiration of such time. *Id.*

14. A carrier which has adopted a reasonable regulation regarding demurrage upon its cars is not prevented from enforcing it by the fact that it was promulgated by a board or combination of carriers. *Id.*

15. A charge of \$1 per day demurrage upon railroad cars which the consignee of freight fails to unload within a reasonable time allowed for that purpose is not as matter of law unreasonable, although cars vary in capacity and the customary rate of storage in warehouses and elevators is much lower. *Id.*

Discrimination.

16. A railroad company is not under obligation to furnish an express company with facilities for doing an express business upon its road, such as it provides for itself or some other express company, unless it holds itself out as a common carrier of express companies. *Atlantic Exp. Co. v. Wilmington & W. R. Co.* (N. C.) 898

17. A statute making it unlawful for any common carrier to give undue or unreasonable preference to any person, company, firm, corporation, or locality, does not require equal facilities to be given to express companies for carrying on business over a railroad, unless it holds itself out as a common carrier of such companies. *Id.*

18. Mere discrimination in freight rates by a common carrier against a shipper was not a wrong for which the common law gave a remedy, so as to come within the clause in the United States statute (U. S. Rev. Stat. § 711) conferring jurisdiction over maritime cases upon United States courts to the exclusion of state courts, which saves to suitors in all cases "the right of a common law remedy where the common law is competent to give it." *Cowden v. Pacific Coast Steamship Co.* (Cal.) 221
But see next case.

19. A railroad company cannot discriminate in favor of a shipper who is able to furnish a large amount of freight, over one engaged in the same business who is unable to furnish the same quantity, — at least where both ship in carload lots. *Louisville, E. & St. L. Consol. R. Co. v. Wilson* (Ind.) 105

20. A carrier cannot rightfully establish rates in order to keep on its own line material for which it has use, or to keep the price low for its own advantage. *Id.*

21. A contract with a shipper, of such character as to destroy the business of his rivals by giving him a monopoly, is unjust without regard to the consideration upon which it is based. *Id.*

22. Under the Louisiana statute authorizing a railroad conductor to assign white and colored passengers to separate coaches, a conductor is not authorized to assign a passenger to a coach to which his race does not belong;

nor is the passenger bound to accept such wrongful assignment, or the carrier exempt from liability for refusal to carry him when he disobeys such assignment. *Ex parte Plessy* (La.) 689

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CHATTEL MORTGAGE. See MORTGAGE, 2, 8, NOTES AND BRIEFS.

CHECKS. See also GIFT, NOTES AND BRIEFS.

1. A drummer or commercial traveler has no implied authority to indorse checks in the name of his principal because he has power to collect accounts and receive money and checks payable to his principal. *Jackson v. McMinnville Nat. Bank* (Tenn.) 668

2. A check drawn upon a bank for the full amount of a deposit, with intent to make a gift of the money, may constitute a valid gift although the donor dies before the check is paid. *Re Taylor's Estate* (Pa.) 855

CITIZENS. See CONSTITUTIONAL LAW, 7.

CIVIL DEATH.

Sentencing a person to imprisonment for life does not cast the descent to his estate, under statutes fixing the time at which descent shall be cast at a person's death. *Davis v. Laning* (Tex.) 82

NOTES AND BRIEFS.

Civil death; law as to, in United States. 83

CIVIL RIGHTS. See also CARRIERS, 22; CONSTITUTIONAL LAW, 2.

No badge of slavery or involuntary servitude contrary to the 18th Amendment of the United States Constitution is imposed by requiring equal but separate accommodations for the white and colored races in railroad cars by providing separate coaches or compartments. *Ex parte Plessy* (La.) 689

NOTES AND BRIEFS.

Civil rights; rights of colored passengers; statutory obligations. 639

CLERK. See INSURANCE, 10.

CLOUD ON TITLE.

1. A judgment creditor may maintain a suit in equity to have the lien of his judgment de-

clared paramount to the title of the purchaser at a sale by the administrator of the judgment debtor, where such sale was made without mention of the judgment, since a motion would not remove the obstruction to the enforcement of the judgment, and a sale upon execution would leave such purchaser's claim undetermined. *McAfee v. Reynolds* (Ind.) 211

2. The power of a court of equity to compel a vendor to execute another deed where one has been lost, so as to clothe the purchaser with the record title, has its sanction in the general jurisdiction of a court of equity. *Kent v. St. Michael's Church* (N. Y.) 331

COAL. See MINES.

COLLATERAL INHERITANCE TAX. See TAXES, 12-17.

COLORIED PERSONS. See CIVIL RIGHTS, NOTES AND BRIEFS.

COLUMBIAN EXPOSITION. See APPROPRIATIONS, 8.

COMMERCE. See also TAXES, 2.

1. A contract by which a resident of a state agrees with a foreign corporation to canvass certain territory for the sale of its sewing-machines, which the corporation thereby agrees to sell to him on credit, and a bond given to secure payment to the corporation of any sum that may become due under such contract, constitute a part of the interstate commerce carried on by the sale of such sewing-machines in accordance with said contract, and therefore cannot be affected by a state statute prohibiting business within the state by a foreign corporation which has not complied with certain requirements, such as filing a certificate to designate an agent on whom process may be served. *Gunn v. White Sewing-Mach. Co.* (Ark.) 206

2. Making a railroad company liable for fires set by its engines or on its right of way is not a regulation of commerce among the states. *McCandless v. Richmond & D. R. Co.* (S. C.) 440

3. A state statute requiring railroad companies to report, at each station at which there is a telegraph office, whether trains are on time or not, is not a regulation of interstate commerce, although the information to be noted must be received from an agent in another state, through the agency of a telegraph company engaged in interstate commerce. *Stat. v. Indiana & I. & R. Co.* (Ind.) 502

4. A state statute prohibiting the sale of seed unless the year in which it is grown is plainly marked on each package, except on a sale of seed in open bulk by farmers to other farmers or gardeners, is void as to seed brought from another state and sold in original packages. *Re Sanders* (C. C. E. D. N. C.) 549

5. The business of insurance as ordinarily conducted by insurance companies organized under the legislation of other states is not interstate commerce so as to be exempt from state legislation as to combination by insurance companies to control rates. *State v. Phipps* (Kan.) 657

NOTES AND BRIEFS.

Commerce; is interstate when. 549

COMMERCIAL TRAVELERS. See
PRINCIPAL AND AGENT, NOTES AND
BRIEFS.

COMMON SERVICE.

NOTES AND BRIEFS. 817

CONDITIONAL SALE. See SALE, 1, 2.

CONFLICT OF LAWS.

1. The law of a state in which a railroad brakeman is injured by negligence of a coemployee determines his right to recover, although such law is contrary to that of another state in which the negligence occurred and which is also the domicile of the parties and the place of the contract of employment. *Alabama G. S. R. Co. v. Carroll* (Ala.) 438

2. A gift in trust to a charity in a foreign country in which the trustees are competent to take and hold and the trust is capable of being executed and enforced is not invalid because such a trust would contravene the law of the testator's domicile in respect to the creation of trusts and perpetuities. *Hops v. Brewer* (N. Y.) 458

3. The laws of the state in which the lands lie determine the question whether the bed of waters belongs to the state or to the owners of riparian lands, where these have been granted by the United States without reservation or restriction. *Lamprey v. State* (Minn.) 670

NOTES AND BRIEFS.

Conflict of laws; as to action for injuries sustained in another state. 438

As to gifts in trust. 458

CONSPIRACY. See also INDIOTMENT.

A combination by foreign insurance companies to increase the rates of insurance is in violation of Kan. Laws 1889, chap. 257, as an unlawful trust and combination "in restraint of trade and products;" and such companies and their local agents, who attempt to and do enforce such combined rates, are subject to prosecution under that statute. *State v. Phipps* (Kan.) 657

CONSTITUTIONAL LAW. See also
CIVIL RIGHTS; HUSBAND AND WIFE, 6;
TAXES, 8, 4.

1. The rule of practical construction is of no value in construing a constitution, when it is plain that the practice has been in open violation of that instrument. *Parker v. State, Powell* (Ind.) 567

2. A statute requiring equal but separate accommodations for the white and colored races by providing separate coaches or compartments does not deny or abridge the equal privileges or immunities of citizens. *Ex parte Plessey* (La.) 689

3. Investing a railroad commission with authority to make just and reasonable rules and regulations to prevent excessive charges
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and unjust discriminations and preferences by carriers, the reasonableness and legality of which is reviewable by the courts, is not unconstitutional as a delegation of legislative power. *Atlantic Exp. Co. v. Wilmington & W. R. Co.* (N. C.) 893

4. Giving a prosecuting attorney an interest in a penalty does not prevent due process of law. *State v. Indiana & I. S. R. Co.* (Ind.) 503

5. Due process of law in the assessment of railroad property is not denied to railway companies by a law making the assessment of a state board of tax commissioners final, where it allows after assessment a correction in assessments and valuation, on the showing of a railroad company or on motion of the board itself. *Cleveland, C. C. & St. L. R. Co. v. Backus* (Ind.) 729

6. The property of a railroad company is not taken without due process of law by a statute making the company liable for fires set by its locomotives or originating on its right of way by an act of its agents or servants, but giving the company an insurable interest in the property exposed to such dangers. *McCandless v. Richmond & D. R. Co.* (S. C.) 440

7. The privileges or immunities of citizens are not abridged by a statute making railroad corporations liable for fires on its right of way or set by its engines. *Id.*

8. The police power of a state has no application in respect to the liability of a railroad company for fires communicated by its engines or originating on its right of way, as this power applies only to matters pertaining to the public health, the public morals, and the public safety. *Id.*

9. No restraints, disqualifications, or burdens are placed upon, or discriminations made against, railroad corporations, within the prohibition of S. C. Const. art. 1, § 12, by a statute applicable only to the operators of railroads, making them liable for all fires set out by their engines or on their rights of way, if it applies equally and uniformly to them. *Id.*

10. The equal protection of the law is not denied to railroad corporations by statutes making them liable for fires set by their engines or upon their right of way by the act of their agents or servants, and giving them an insurable interest in the property exposed to such loss. *Id.*

11. A railroad company is not denied the equal protection of the laws in the assessment of its property because original jurisdiction of the assessment and valuation is given to a state board of tax commissioners which has power to hear grievances and make corrections, instead of being given in the first instance to a county board, as in the case of other property, with the right of appeal to the state board. *Cleveland, C. C. & St. L. R. Co. v. Backus* (Ind.) 729

12. A law which applies alike to all persons under like circumstances and conditions does not deny to any the equal protection of the laws. *Id.*

13. Railway companies are persons within the provisions of U. S. Const. 14th amend.

§ 1, relating to due process of law and the equal protection of the laws. *Cleveland, C. C. & St. L. R. Co. v. Backus* (Ind.) 729

14. A statute requiring a report on a black-board as to whether trains are on time, at every station where there is a telegraph office is not unconstitutional as class legislation, where it applies uniformly to all persons operating railroads and to the same class of stations. *State v. Indiana & I. S. R. Co.* (Ind.) 502

NOTES AND BRIEFS.

See also CIVIL RIGHTS.

As to legislative divorces, see HUSBAND AND WIFE.

Constitutional law; validity of statute making railroads liable for fires. 440

Validity of statute imposing penalty on railroad company. 502

Protection of private rights from interference by public. 543

Equal protection of railroads. 729

CONTINUANCE. See also APPEAL AND ERROR, 6.

An affidavit for a continuance to procure a nonresident witness should state not only a bona fide belief that he can be procured, but also the grounds of such belief. *State v. Harrison* (W. Va.) 224

CONTRACTS. See also BETTING; CORPORATIONS, 11; EVIDENCE, 8; HUSBAND AND WIFE, 10, 11.

1. The absolute right to discharge an employé whenever the employer in good faith becomes dissatisfied with him is reserved by a stipulation in a contract of employment for a specified time to carry on the employer's business to his "satisfaction." *Prary v. American Rubber Co.* (Minn.) 644

2. The surrender and cancellation of a contract for the purchase of land will not prevent the purchaser from recovering the damages sustained by the breach of a contract with him for the construction of a motor railway, the purpose of which is to enhance the value of such land. *Blagen v. Thompson* (Or.) 815

3. An executory contract by a corporation to sell franchises, with a stipulation to secure and transfer additional rights of way, cannot be construed as part of the same contract with an executed sale of stock of the corporation, made by persons in their individual capacity. *Id.*

4. A contract by a stockholder who was president of a corporation, to pay one half of all liability which might be fixed upon it as the result of certain suits, which is made as part of the transfer of all its shares to another corporation which buys them for the purpose of controlling it, is unlawful and cannot be enforced, although the purchasing corporation has fully executed the contract on its part. *Buckeye Marble & F. Co. v. Harvey* (Tenn.) 252

5. The illegality of the by-laws or contract of a stock exchange as being in restraint of trade cannot be invoked by a stranger as a 18 L. R. A.

ground of compelling the members of such exchange to disobey such rules, as the law does not prohibit contracts in restraint of trade, but merely declines after they are made to recognize their validity. *American Livestock Commission Co. v. Chicago Livestock Exch.* (Ill.) 190

6. An agreement by a city not to oppose a railroad company's closing certain of its streets crossed by the latter at grade, in consideration of the making of compensation solely to private individuals, is void as against public policy. *New Haven v. New Haven & D. R. Co.* (Conn.) 256

NOTES AND BRIEFS.

Contract; when implied for services of child. 37

Validity of promissory note given as a forfeit or as collateral to an invalid oral agreement within the Statute of Frauds. 142

CONVERSION.

NOTES AND BRIEFS.

Conversion; by pledgee. 120

CORAM NOBIS.

1. Relief from a plea of guilty and a sentence thereon may be granted by an action or proceeding in the same court in the nature of a writ of error *coram nobis*, where the plea was made under well-grounded fear of mob violence. *State v. Calhoun* (Kan.) 833

2. The question of guilt or innocence of the accused is not a necessary question to be determined in an action in the nature of a writ of error *coram nobis* for relief from a plea of guilty induced by fear of mob violence, as the burden of proof cannot be shifted to the accused by reason of the fact that he was compelled through fear to plead guilty. *Id.*

3. No statute of limitations will operate against the remedy of a party while under the legal disability of imprisonment, to have his sentence reviewed by an action in the nature of a writ of error *coram nobis*. *Id.*

NOTES AND BRIEFS.

Writ of error *coram nobis*; scope of; right to; limitations; procedure. 833

CORPORATIONS. See also CONSTITUTIONAL LAW, 18; LIMITATION OF ACTIONS; TAXES, 1.

1. The requirement that articles of incorporation shall state "the name and location of such corporation" does not authorize the articles to fix the place of the "principal office." *Milwaukee Steamship Co. v. Milwaukee* (Wis.) 353

2. A corporation may be formed for the purpose of buying, owning, improving, selling, and leasing lands, tenements, hereditaments, real, personal, and mixed estates, and property, including the constructing and leasing of a building, under an Act authorizing corporations for trade or for carrying on any lawful mechanical, manufacturing, or agricultural business. *Finnegan v. Knights of Labor Bldg. Assn.* (Minn.) 778

3. A *de facto* corporation exists where there is a law authorizing the creation of corporations, an attempt to organize a corporation pursuant to it, and user as a corporation under such attempted organization. *Id.*

4. A substantial compliance with the law is not necessary to constitute a body which attempts to comply with it a *de facto* corporation. *Id.*

5. Taking subscriptions to and issuing stock, electing managers and directors, adopting by-laws, buying a lot, and constructing and leasing a building upon it, constitutes a sufficient user to constitute a *de facto* corporation which will prevent liability of the members as partners under a statute authorizing corporations for such business. *Id.*

6. A joint-stock corporation has power by by-law to declare that no person who is attorney against it in a suit shall be eligible as a director. *Cross v. West Virginia O. & P. R. Co.* (W. Va.) 582

7. Power to prescribe reasonable qualifications of its directors by by-law is included in power to make such by-laws, rules, and regulations for the management and government of the affairs of the corporation, its officers, directors, and agents, as may be deemed necessary or proper. *Id.*

8. A purchase of shares of a domestic corporation by a foreign corporation engaged in a similar business, for the express purpose of controlling and managing the domestic corporation, is *ultra vires* and therefore unlawful and void. *Buckeye Marble & F. Co. v. Harcey* (Tenn.) 252

9. A state legislature has power to prescribe the conditions upon which insurance companies of other states can do business within the state. *State v. Phipps* (Kan.) 657

10. A state statute granting powers and privileges to corporations must, in the absence of plain indications to the contrary, be held to apply only to corporations created by the state and over which it has the power of visitation and control. *Re Prime's Estate* (N. Y.) 713

11. A contract made by a railroad charter is not impaired by a statute making the company liable for fires caused by its engines or the act of its servants on its right of way, where, although the original charter, was not subject to amendment or repeal, the company accepted an amendment the effect of which, under general laws then in force, was to make the charter subject to amendment, alteration, or repeal. *McCandless v. Richmond & D. R. Co.* (S. C.) 440

NOTES AND BRIEFS.

See also LABORERS; LIMITATION OF ACTIONS.

Corporations; acts *ultra vires*. 256

Power to deal in the stock of other corporations or in its own: (1) power to deal in the shares of other corporations; taking stock in payment of debts; (2) power to deal in its own stock; taking in satisfaction of debts; donations. 252

Regulation of elections by by-laws; as to right to vote; as to proxies. 582

De facto; personal liability of stockholders. 778

COSTS.

1. An extra allowance of costs is not precluded by the fact that on a former trial of the same case an extra allowance had been granted and the costs paid as a condition of a new trial. *Bolton v. Schriever* (N. Y.) 242

2. Costs of a contest on the accounting of a husband's executors, to determine whether or not a husband and wife were tenants by the entirety in a bond and mortgage for moneys of which each contributed part, should be paid out of the estate where the question is new and the executors have acted in good faith. *Re Albrecht* (N. Y.) 329

COTENANCY. See IMPROVEMENTS, 3; INSURANCE, 1.

COUNTIES.

1. A contract for the employment of a keeper of a county poor-house for three years is not within the power of a board of supervisors, each of whom is elected for one year only, although the statute gives them power to appoint such keeper without any express limitation as to the time. *Millikin v. Edgar County* (Ill.) 447

2. A special tax by county commissioners to supply a deficiency in the amount necessary to keep the public schools open for at least four months in the year, as required by N. C. Const. art. 9, § 8, is not a tax "for a special purpose" under art. 5, § 6, which limits the amount of county taxes to double the state tax, "except for a special purpose and with the approval of the General Assembly." *Bladen County Bd. of Edu. v. Bladen County* (N. C.) 850

COURTS. See also MARKETS.

1. The Legislature cannot give the right to a rehearing in the supreme court contrary to its rules, where the Constitution creates the court and provides that the legislative, executive, and supreme judicial powers of the government shall be separate and distinct, and also that the General Assembly may regulate methods of proceeding in "courts below the supreme court." *Herndon v. Imperial F. Ins. Co.* (N. C.) 547

2. No court possesses the power to compel a trustee to consent to a destruction of a real-estate trust which the statutes prohibit him from doing any act to contravene. *Cuthbert v. Chauvet* (N. Y.) 745

3. The courts cannot interfere to arrest the action of the governor in suspending an officer, so long as he acts within the power given him by the Florida Constitution, and cannot review his decision as to the proof of the charge against an officer, that power of review being given to the Senate. *State, Attorney-General, v. Johnson* (Fla.) 410

4. Courts have no power to give any relief against erroneous assessments of boards whose assessments for taxation are made final by statute. *Cleveland, O. C. & St. L. R. Co. v. Backus* (Ind.) 729

5. Courts will presume the Legislature in-

tended a statute to be reasonable, constitutional, and just. *Cleveland, C. C. & St. L. R. Co. v. Backus* (Ind.) 729

6. The constitutionality of a statute will not be considered in a case which can be decided upon its merits without such consideration. *Parker v. State, Powell* (Ind.) 567

7. The constitutionality of a legislative apportionment Act is a judicial question, and not one which the court cannot consider on the ground that it is a political question. *Id.*

8. The general commercial law as to notice to an indorsee of a note, of the equities between the original parties, prevails in the Federal courts, rather than any particular rule established in a state by its courts or statutes. *Bank of Edgefield v. Farmers Co-Op. Mfg. Co.* (C. C. App. 5th C.) 201

9. In a suit by an occupying claimant to restrain the execution of a writ of possession, a Federal court may in its discretion refer the case to a master or appoint commissioners, instead of directing the marshal to summon appraisers in accordance with the state practice, although it is desirable to follow state practice as near as may be. *Leighton v. Young* (C. C. App. 8th C.) 286

10. That the mode of procedure in a Federal court adopted by an occupying claimant to enforce compensation for improvements placed by him on land which has been adjudged to the true owner does not conform strictly to the requirements of the state Occupying Claimants' Law will not defeat the action, if in the state statute legal and equitable rights and modes of proceeding are confounded, since the Federal courts will enforce the right but will preserve the distinction between law and equity. *Id.*

NOTES AND BRIEFS.

See also TRUSTS.

Courts; adoption by Federal courts of remedies created by state statutes; preservation of equity jurisdiction; enlargement of equitable remedies; limitation of or enlargement of equity powers; extending legal remedies; limiting equitable jurisdiction. 266

COVENANT.

No implied covenant arises out of a recital of facts, or out of the use of words of conveyance, in a quitclaim deed, in the absence of fraud or intentional misrepresentation, where the terms of the deed taken together show that the instrument is in its essence a quitclaim with no warranty intended except as against the grantors and their own acts. *McDonough v. Martin* (Ga.) 848

NOTES AND BRIEFS.

Covenant; recitals in a deed as basis of implied covenants of title. 848

CREDITORS' BILL.

A creditors' bill cannot be based upon a judgment for money only, in an action in which jurisdiction was obtained only by attachment of the property of an absconding debtor, since under N. Y. Code Civ. Proc. 18 L. R. A.

§ 707, such judgment can be enforced only against the attached property. *Capital City Bank v. Parent* (N. Y.) 240

CRIMINAL LAW.

1. A person partially insane is responsible for a criminal act, if at the time he knows right from wrong and knows the nature and character of the act and its consequences, knows that it is wrong, hurtful to another, and deserves punishment. *State v. Harrison* (W. Va.) 224

2. Mere irresistible impulse to do an act will not exempt a person from criminal responsibility therefor. *Id.*

3. Lunacy or insanity, to take away accountability, must be of such degree as to obliterate the sense of right and wrong as to the particular act done. *Hornish v. People* (Ill.) 237

4. The constitutional provision against cruel and unusual punishments is not violated by a statute authorizing imprisonment from two to ten years and a fine not exceeding \$2,000 for conspiracy to do an unlawful act in the night-time, or to do such act while wearing white caps, masks, or other disguises. *Hobbs v. State* (Ind.) 774

5. A verified plea in abatement is the only mode of raising the question that an information cannot be filed while the grand jury is in session. *Id.*

NOTES AND BRIEFS.

Criminal law; irresistible impulse as an excuse for crime; effect of disease to create irresistible impulse; impulse obliterating sense of right and wrong; kleptomania. 224

DAMAGES. See also INJUNCTION, 7, 8.

1. The rule that damages which are uncertain or contingent cannot be recovered does not apply to an uncertainty as to the value of the benefit or gain to be derived from performance, but to an uncertainty or contingency as to whether any such gain or benefit would be derived at all. *Blagen v. Thompson* (Or.) 315

2. The loss of the profits or gains of a contract for land, which the purchaser is obliged to surrender because of the failure to construct a motor railway in accordance with a contract made with him by a third person who knows that his object in the latter contract is to enhance the value of the land, may be included in the damages for breach of the contract to build the road. *Id.*

3. The measure of damage for breach of contract to build a motor railway to connect with the business portion of a city a tract of land which one of the parties has just purchased with the view of fitting and selling it for residences is the difference between the value of the land on the day the road should have been completed, not less than the agreed purchase price, and what its value would have been on that day with the road completed and in operation. *Id.*

4. For the conversion of notes by a pledgee by surrendering them to the maker in exchange for bonds without authority from the pledgor, he is liable to the latter for their actual value

only, if that is less than their face value.
Griggs v. Day (N. Y.) 120

5. Damages for injuries after the commencement of a suit cannot be given in an action for a continuing nuisance, such as a roof and eave trough so placed as to send water against plaintiff's house upon the occurrence of every rainstorm. *Joseph Schlitz Brew. Co. v. Compton* (Ill.) 890

6. The damages recoverable from one who sells poisonous coloring matter to be used in the manufacture of ice cream, representing it to be harmless, may include the value of the cream ignorantly spoiled by its use, and also compensation for loss of business by the manufacturer which results from his innocently delivering the poisoned cream to his customers. *Swain v. Schteffeln* (N. Y.) 885

NOTES AND BRIEFS.

Damages; right to recover when slight. 44

Right to recover damages caused by an injunction; right to damages for obeying a void injunction. 275

Measure of damages for breach of implied warranty. 385

For matters pending suit. 390

DANGEROUS AGENCIES. See NEGLIGENCE, 2.

DEATH. See CHECKS, 2.

DEDICATION.

User by the public of one side only of a dedicated street laid out and mapped with two tracks, having a watercourse and double row of trees between them, constitutes an acceptance of the whole dedication. *Southern P. R. Co. v. Ferris* (Cal.) 510

NOTES AND BRIEFS.

Dedication; public user as acceptance of dedicated highway. 510

DEED. See also CLOUD ON TITLE, 2.

Courts should not give a construction to a deed in direct conflict with that which the parties have themselves put upon it,—especially after a time long enough to create prescriptive rights thereunder. *Mansfield v. Place* (Mich.) 89

DEFINITIONS. See also LABORERS, NOTES AND BRIEFS; LIENS, 3.

A lien or incumbrance on land would be created by filing a map of a proposed street across it, by virtue of a statute denying compensation for any buildings subsequently erected thereon, if such statute were valid. *Forster v. Scott* (N. Y.) 548

DELEGATION OF POWER. See CONSTITUTIONAL LAW, 3.

DEMURRAGE. See CARRIERS, 11-15.

DERELICT. See WATERS, NOTES AND BRIEFS.
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DESCENT AND DISTRIBUTION.

See CIVIL DEATH.

DIVORCE. See HUSBAND AND WIFE, 6, 10, 11, NOTES AND BRIEFS.

DOWER.

1. An inchoate right of dower is destroyed by a voluntary conveyance executed by the husband alone, without payment of any consideration, of a right of way to a railroad company to be used only for railroad purposes, as this constitutes a dedication of the land to a public use. *Venable v. Wabash W. R. Co.* (Mo.) 68

2. The inchoate contingent interest of a husband or wife in real estate owned by the other, under Minn. Gen. Laws 1889, chap. 46, subc. 3, § 64, and commonly called the "dower right," is not devested by a transfer of title from the owner of the property to a purchaser at a sale on execution founded upon a judgment against such owner. *Dayton v. Corser* (Minn.) 80

3. An actual sale and conveyance, though made for the purpose of defeating the dower of the vendor's wife, will be upheld against her claim after his death, under a statute giving dower only in lands of which the husband dies seised and possessed; but it is otherwise with a mere colorable sale not intended to be operative except as a means of dividing the lands among the vendor's children after his death, while he is to remain the real owner during life. *Flowers v. Flowers* (Ga.) 75

4. The test whether an assignment of dower by metes and bounds would or would not be unjust under Ala. Code 1886, §§ 1910, 1911, is not to be determined by the interest of the doweress alone, but according to what would be just and right as between her and the present owner of the land. *Sanders v. McMillian* (Ala.) 425

5. The depreciation in the value of land which is subject to dower, after alienation by the husband, whether from natural causes or from the mere negligence of the purchaser or alienee in keeping the property in repair, is not sufficient cause for assigning compensation to the widow according to the value at the time of the alienation, instead of setting off the dower by metes and bounds. *Id.*

NOTES AND BRIEFS.

Dower; power of husband or his creditors to defeat wife's right of dower; as to lands held in common by the husband; as to lands sold under mortgage; bankruptcy; sale on execution to satisfy mechanics' lien; sale under execution against husband; adverse possession of the husband's lands; as to lands sold for taxes. 75

Effect of depreciation in value of land on a widow's right of dower therein. 425

DRUMMERS. See CHECKS, 1; PRINCIPAL AND AGENT, NOTES AND BRIEFS.

DUE PROCESS. See CONSTITUTIONAL LAW, 4-6.

EASEMENTS.

1. An easement acquired by grant cannot be extinguished by mere nonuser, without anything to show an intention to abandon it. *Weish v. Taylor* (N. Y.) 535

2. The mere existence of a gate in an alley and acquiescence therein by one having an easement by grant in the alley, but who did not use it, will not be prejudicial to his right, unless an adverse claim is brought to his knowledge. *Id.*

3. The erection of a house and fence without any opening on an alley in which the owner has an easement by grant does not show an intention to abandon the easement. *Id.*

4. The failure or refusal of a life tenant of premises to which an easement in an alley was made appurtenant by grant, to pay taxes and expenses on the alley, which she was primarily bound to do, will not show any intention of the owners of the fee to abandon the easement, unless they knew of such failure or refusal. *Id.*

5. A prescriptive right to the ice on the whole surface of a pond, and not merely to those portions of it from which ice has been cut, is acquired by those who have exercised the right, without objection from anyone, to cut and gather ice at any point or points they choose during a time long enough to create prescriptive rights under the Statute of Limitation, claiming the right under a deed which gave the right to the flowage by which the pond was created. *Mansfield v. Place* (Mich.) 39

NOTES AND BRIEFS.

Easement; effect of nonuser; mere nonuser will not extinguish; nonuse must be accompanied by adverse use of servient estate; duration of adverse use; intention of the owner as indicated by acts; public easements. 535

Way of necessity. 702

EJECTMENT.

An interest in land which will support an action of ejectment is not created by a deed conveying "the exclusive and entire right of interment or sepulture in" certain burial lots to be held "for the uses and purposes of sepulture only, and for no other use, intent, or purpose whatsoever." *Hancock v. McAvoy* (Pa.) 781

NOTES AND BRIEFS.

Ejectment; what title or interest will support; plaintiff must prove title; sufficiency of equitable title; title by patent; necessity of right of possession and interest in the land; sufficiency of possession as against mere intruder; what constitutes possession; title acquired by limitation; action by riparian owner; mining rights; fixtures; action by owner of dominant estate; land subject to the easement of a highway; interest of a mortgagee; action by tenant in common; executors, administrators, and guardians; to enforce right of dower; action by remaindermen; miscellaneous. 781

ELECTION DISTRICTS.

1. No scheme for senatorial districts can be lawfully devised in which a county having less than the unit of population for a senatorial 18 L. R. A.

district can legally be entitled to vote for two senators, where the constitutional provisions require equality in representation. *Parker v. State, Powell* (Ind.) 567

2. A county having more than the representative unit of population cannot be denied the right to a separate representative. *Id.*

3. Counties fully represented cannot be used in the apportionment of districts for the purpose of joining counties which are not otherwise contiguous. *Id.*

NOTES AND BRIEFS.

Election districts; validity of legislative apportionment. 567

ELECTRICAL USES AND APPLIANCES. See CARRIERS, 7, 8.**EMINENT DOMAIN.**

1. A statute denying compensation for any building erected on land after filing a map of a proposed street across it, although proceedings to open the street or condemn the land have not been begun and perhaps never will be, is unconstitutional as depriving the owner of property without just compensation. *Forster v. Scott* (N. Y.) 543

2. The constitutional requirement of just compensation to the owner of a lot, of which part is taken and the remainder damaged by opening an alley across the lot, cannot be complied with by charging the owner with the amount as a special tax on that part of his lot which is not taken. Such assessment would amount practically to confiscation. *Bloomington v. Latham* (Ill.) 487

3. The construction and operation of a steam railroad along a street on the established grade, under proper municipal authority, does not constitute such an application of the street to a new public use as requires payment of compensation for damages to the owner of abutting lots. *Henry Gaus & Sons Mfg. Co. v. St. Louis, K. & N. W. R. Co.* (Mo.) 339

4. A change of grade of a street, which will make the property of an abutting owner less valuable to sell or rent, is within a constitutional provision that no private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner. *Brown v. Seattle* (Wash.) 161

5. The liability of a railroad company to abutting owners for constructing an embankment for its track, which practically closes the street to such abutters for ordinary street purposes, does not extend to persons whose premises abut only on another street in which a corresponding embankment is made solely to change the grade so far as the railroad embankment at the intersection of the streets makes it necessary. *Rauenstein v. New York, L. & W. R. Co.* (N. Y.) 768

6. The crossing or intersecting of the road of one railway company by that of another is the taking of property within the meaning of constitutional provisions requiring compensation to be made. *Memphis & O. R. Co. v. Birmingham, S. & T. R. R. Co.* (Ala.) 166

7. The provision of Ala. Const. art. 14, § 21, that "every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad, and shall receive and transport each the other's freight, passengers, and cars, loaded or empty, without delay or discrimination,"—does not give a railroad company the right to cross another road without compensation. *Id.*

8. A mortgagor in possession is to be regarded as the owner of the land for all purposes of establishing and opening highways. *Goodrich v. Atchison County* (Kan.) 118

NOTES AND BRIEFS.

Eminent domain; rights of mortgagee of premises taken by: (a) as between mortgagor and mortgagee; (b) as between mortgagor and appropriator; how far mortgagee must be made a party and given notice; special circumstances under which no notice need be given; effect of failure to give notice. 118

Injury to property by change of grade of street. 161

The "taking of property" by. 166

Additional servitude in streets. 339

Liability of railroad for embankment practically closing street. 768

EMPLOYEES. See LABORERS, NOTES AND BRIEFS.

EQUITABLE CONVERSION. See WILLS, 2.

EQUITY. See also CLOUD ON TITLE.

1. Equity as a great branch of the law of their native country was brought over by the colonists, and has always existed as a part of the common law in its broadest sense, in New Hampshire. *State, Rhodes, v. Saunders* (N. H.) 646

2. A statute declaring the use of a building for either of several unlawful purposes to be a nuisance abatable in equity does not introduce an exceptional mode of trial, or change the ordinary course of procedure on questions properly triable by jury. *Id.*

3. The fact that a fisherman's nets were damaged, and fish which he had caught therein were killed, on a single occasion, by garbage deposited by a city in a navigable lake, which was driven into and upon his nets by the winds and waves, where there is nothing to show danger of a repetition of these injuries, will not give him a right to sue in equity to prevent such deposits of garbage whereby a public nuisance is created to the destruction of a common fishery. *Kuehn v. Milwaukee* (Wis.) 553

4. The jurisdiction in equity to ascertain boundaries under Or. Act 1897, although it extends to cases of confused or uncertain boundaries which involve no other ground of equity jurisdiction, does not extend to the question of title to a disputed strip of land lying between the different lines alleged by the parties to be the boundaries. *King v. Brigham* (Or.) 861

5. Jurisdiction having attached on an in-
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junction against the execution of a writ of possession in favor of an occupying claimant, the court may retain the cause and take and state accounts which are necessary to a final decree. *Leighton v. Young* (C. C. App. 8th C.) 266

NOTES AND BRIEFS.

See also COURTS.

Equity; jurisdiction in boundary cases. 361

ERROR. See CORAM NOBIS, 1, NOTES AND BRIEFS.

ESTOPPEL.

1. A person cannot be permitted to allege for one purpose that an injunction was utterly void, and in the same action deny it for another purpose. *Mark v. Hyatt* (N. Y.) 275

2. The purchaser of land from several owners is not estopped from asserting his rights therein by the estoppel only of a part of his grantors. *Welsh v. Taylor* (N. Y.) 535

3. A bank which settles in a foreign country with one who has stolen money from it, and, to enable him to make such settlement, solicits a third person to purchase from him a draft which he had procured with part of the stolen money, cannot dispute the title of the purchaser thereto. *Capital City Bank v. Parent* (N. Y.) 240

4. Owners of the fee of land are not estopped by the conduct of a life tenant of which they have no knowledge. *Welsh v. Taylor* (N. Y.) 535

5. Leasing land for the manufacture of brick does not estop the owner from claiming damages from the lessee for the use of a process in burning the brick which generates noxious gases by which his crops on adjacent land are injured. *Fogarty v. Junction City Pressed Brick Co.* (Kan.) 756

6. The unlawful issuance of a permit by city officials, authorizing the erection of a wooden building within the fire limits, although acted on, will not estop the city from enforcing its ordinance by tearing down the building. *Eichenlaub v. St. Joseph* (Mo.) 590

EVIDENCE.

Judicial notice.

1. A court takes judicial notice of and determines for itself the law. *Norman v. Kentucky Bd. of Managers of World's Col. Expo.* (Ky.) 556

2. Judicial notice will be taken of the geography of a state, and also of the enumeration of inhabitants taken pursuant to law. *Parker v. State, Powell* (Ind.) 567

3. A court judicially knows that telegraph lines are maintained, operated, and used in connection with railroads, and are necessary to their proper operation. *State v. Indiana & I. S. R. Co.* (Ind.) 502

4. It is a matter of common knowledge that the demands and exigencies of commerce require the cars of one railroad company to be hauled over the road of another. *Louisville & N. R. Co. v. Boland* (Ala.) 260

5. Judicial notice will be taken of the rela-

tion between the brakemen and the conductor of a freight train and that the brakemen feel compelled to obey the conductor's orders. *Mason v. Richmond & D. R. Co.* (N. C.) 845

6. That the breaking of bridles and harness is of frequent occurrence, and that horses otherwise tractable and gentle are liable to run away when thus freed from restraint, is a matter of common knowledge which the court may assume as a fact. *Joliet v. Shufelt* (Ill.) 750

Presumptions.

7. It will be presumed that the common law of a state is the same as that where the court is sitting, in the absence of evidence to the contrary. *Alabama G. S. R. Co. v. Carroll* (Ala.) 483

8. There is no presumption of law against an agreement by a parent to pay a child for personal services, where there is evidence tending to show such an agreement, although if there is no such evidence there is a presumption that the services are gratuitous. *Ulrich v. Ulrich* (N. Y.) 37

9. It will be presumed that chattel mortgagees who have taken possession of the mortgaged property and are proceeding to sell it acted in accordance with the provisions of the mortgage, where such provisions are not shown. *Pierce v. Johnson* (Mich.) 486

10. The presumption of negligence on the part of a railroad company cannot be based on the presumption that a person who was killed by the train as it started was in the exercise of due care, where it does not appear whether he was killed while getting off the train or while standing too near it. *Farnell v. Kansas City, Ft. S. & M. R. Co.* (Mo.) 599

Documentary.

11. An ordinance having the seal of the city attached is properly admitted in evidence without further proof of its passage, under Mo. Rev. Stat. 1879, § 4633. *Eichenlaub v. St. Joseph* (Mo.) 590

12. The assessment book is prima facie evidence, not only of the assessment of all taxes required by statute to be levied by the supervisors and to appear therein, including road and school taxes, and of their amount, but also of the fact that all forms of law in relation to the assessment and levy have been complied with, and consequently of their validity, under Cal. Pol. Code, § 3789. *San Gabriel Valley Land & W. Co. v. Witmer Bros. Co.* (Cal.) 465

13. A private entry on one's own book of accounts, which shows an intention to take at 75 cents on the dollar certain notes held as collateral which he surrenders to the maker in exchange for bonds, cannot be used by the pledgor, who did not consent to such entry or to such use of the notes, as evidence of a sale thereof to the pledgee at their face value. *Griggs v. Day* (N. Y.) 120

14. A will in which no provisions for testator's wife are made is not admissible on the question whether a conveyance of his land which he had the power to make to defeat her dower was real or only colorable and pretended. *Flowers v. Flowers* (Ga.) 75
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Parol as to writing.

15. Extrinsic evidence is admissible to show, as between the original parties to a note reading "We promise," etc., or as to one who took the note merely as collateral with notice of the facts, that the indorsement before delivery by persons described as directors, as well as the signature by persons described as president and secretary, were made by such persons solely as officers of the corporation and to bind the corporation only. *Kline v. Bank of Teacott* (Kan.) 533

16. Parol proof may be received to show the exact liability of one who writes his name across the back of a promissory note before it is delivered to the payee, by showing the agreement and understanding of the parties at the time of such indorsement. *Fullerton v. Hill* (Kan.) 33

Opinions.

17. A hypothetical question must be based upon facts which there is evidence to prove. *Russ v. Wabash Western R. Co.* (Mo.) 823

18. A hypothetical question which does not state the facts, but leaves it to an expert witness to determine the truth of testimony as to such facts, is improper. *Id.*

19. A person who is competent to prove his motives and intentions may state in general terms that he did or refrained from doing a particular thing material to the issue, on account of information received from a third person, but cannot go into details or give conversations with third persons held out of the hearing of the opposite party. *Lawson v. Conaway* (W. Va.) 627

20. One farmer who has lived near another and worked with him, both before and after the latter's arm was broken, is competent to testify to the physical ability of the latter before and after the injury. *Id.*

21. Opinion evidence as to what the value of land would have been if a railway had been constructed in accordance with a contract is admissible on the question of damages for breach of the contract. *Blagen v. Thompson* (Or.) 315

22. The opinion of an expert cannot be taken upon the question whether or not it is dangerous for a revolving shaft with a rough surface to project into a room where there are workmen who may come in contact with it; nor can it be taken as to the relative danger which would attend the removal of a towel from such shaft in comparison with one having a smooth surface. *Kauffman v. Maier* (Cal.) 124

Declarations.

23. Proof of the declarations of a cab driver that he called, "There he goes," as an officer went to arrest a person, is inadmissible. *Evers v. State* (Tex. Crim. App.) 421

24. Evidence of declarations by the donee and her companion as to the fact of the gift, made on the day of the donor's death, is admissible in support of an alleged *donatio causa mortis*, both as part of the *res gesta* and to rebut the inference flowing from testimony that in a conversation three days after the donor's death the donee made no mention of the gift. *Page v. Lewis* (Va.) 170

25. Evidence of statements by a lawyer who went to the bedside of a dying man with an offer to prepare his will, that the man made an appointment to meet the lawyer at a future time for the purpose of having his will drawn, before which time he died, is not admissible to defeat an alleged *donatio causa mortis*, where the lawyer is employed in the case and refuses to testify as to what took place at the interview between himself and decedent. *Id.*

26. A confidential conversation between an attorney and client is properly rejected in a criminal proceeding against the client, where their relation has been proved by the oral testimony of the attorney, although a deposition of the client is in evidence in which he states that the relation of attorney and client had never existed between them. *State v. Calhoun* (Kan.) 838

27. A ticket inspector's declaration, as his only reason for rejecting a ticket which he has demanded for inspection, that the holder cannot ride upon it because he is not the original purchaser, is admissible—at least where there is some evidence to show that the railroad company has recognized the issuance of such tickets as valid—for the purpose of raising an implication that the ticket was authorized originally and genuine. *Nichols v. Southern P. Co.* (Or.) 55

28. Testimony that the uncle of a boy with whom he lived said he had often warned him to quit playing on railway tracks is inadmissible in an action by the boy for personal injuries at a railway crossing, in which the question of his contributory negligence is involved. *Kentucky U. R. Co. v. Smith* (Ky.) 68

29. Threats of mob violence, made both before and after, but on the same day of, the entering of a plea of guilty, are admissible to show a real danger of such violence, in a proceeding for relief from the plea and sentence thereon, although not all of the threats were communicated to the accused before the plea was entered. *State v. Calhoun* (Kan.) 838

Relevancy; materiality; sufficiency.

30. The common consent and opinion of the legal profession as shown by their practice for a long period of time is very good evidence of what the law is. *Venable v. Wabash W. R. Co.* (Mo.) 68

31. Proof of the reputation of deceased as a dangerous man is not admissible in favor of one being tried for killing him, where at the time of the homicide deceased had done no act indicating a purpose to harm defendant. *Evors v. State* (Tex.) 421

32. As tending to show a motive for endeavoring to defeat dower without parting with dominion and real ownership, evidence of family disturbances between husband and wife and between her and one of his children by a former marriage is relevant. *Flowers v. Flowers* (Ga.) 75

33. Evidence of failure to mention an alleged *donatio causa mortis* at an interview three days after the donor's death, at which the affairs of the estate were under consideration, and that the donee said that "as there was no will she supposed all she would have"

was certain other property mentioned and not including the gift,—does not furnish a sufficient basis for even a reasonable conjecture against the gift, where the donee had not then consulted a lawyer, and had been informed by the family physician that the gift was invalid, especially where the witness giving the testimony contradicted himself on material points and had always acted adversely to the claimant. *Page v. Lewis* (Va.) 170

34. That only a few days elapsed between the execution of a chattel mortgage and taking possession of the mortgaged property is not of itself a badge of fraud. *Pierce v. Johnson* (Mich.) 486

35. A recovery for abandonment of treatment by a physician may be had under a declaration charging that he "carelessly, negligently, and unskillfully conducted himself" in the treatment, and that the injury resulted from his "careless, negligent, improper, and unskillful attention." *Lawson v. Conaway* (W. Va.) 627

36. Overruling a demurrer to a petition will not prevent the court from excluding evidence on the ground that the petition does not state facts sufficient to constitute a cause of action. *Goodrich v. Atchison County* (Kan.) 118

37. The failure of a street-railway company to discover a defective welding in an iron on a canal bridge belonging to the state, which the street railway was obliged to cross, is not evidence of negligence sufficient to go to the jury, where there was nothing to suggest to the general traveler or to the company the presence of any such defect, and it was not discoverable by one using the bridge merely for the purpose of crossing. *Birmingham v. Rochester City & B. R. Co.* (N. Y.) 764

38. One competent credible witness is sufficient to establish a gift *causa mortis*. *Page v. Lewis* (Va.) 170

39. Reasonable doubt of sanity is not a proper test of the sufficiency of evidence to convict; but the reasonable doubt must be as to the whole evidence, and not as to a particular fact in the case. *Hornish v. People* (Ill.) 287

NOTES AND BRIEFS.

Evidence; presumption as to date of indorsement of note; parol evidence to show intention of indorser. 83

By party's books of account. 120

EXECUTORS AND ADMINISTRATORS. See also JUDGMENT, 2.

As against a trustee in insolvency, as well as the insolvent, a debt of the latter to a decedent's estate may be set off against his distributive share therein. *Gomell v. Flack* (Md.) 158

NOTES AND BRIEFS.

Executors and administrators; collateral impeachmentability of findings as to jurisdictional facts on which administration of a decedent's estate is based; inhabitancy of county; existence of estates in county; administration of the estate of a living person; conflict of jurisdiction; lapse of time; miscellaneous. 249

EXEMPTION. See LABORERS, NOTES AND BRIEFS.

EXPLOSIONS.

The fact that an explosion of gas which has accumulated in a cellar by negligence of a gas company was caused by the act of a third person in lighting a match will not relieve the gas company from liability. *Koosch v. Philadelphia Co. (Pa.)* 759

EXPRESS COMPANIES. See CARRIERS, 16, NOTES AND BRIEFS.

FALSE IMPRISONMENT.

A person who in good faith and without malice merely makes complaint before a magistrate of the commission of a public offense in a matter over which the magistrate has a general jurisdiction, on which complaint the magistrate issues a warrant, is not liable for an assault and false imprisonment because of an arrest on such warrant, although the particular case may be one in which the magistrate has no jurisdiction. *Gifford v. Wiggins (Minn.)* 856

NOTES AND BRIEFS.

False imprisonment; lack of jurisdiction or of legal grounds of criminal prosecution as affecting the liability for false imprisonment of a complainant who acts in good faith. 856

FENCE. See RAILROADS, 4.

FINES.

A penalty recoverable by a civil action, although called a fine in the statute providing for it, is not a fine within the meaning of Ind. Const. art. 8, § 2, providing that "fines assessed for breaches of the penal law of the state" shall go to the common-school fund. *State v. Indiana & I. S. R. Co. (Ind.)* 502

FIRE LIMITS. See BUILDINGS.

FIRES. See COMMERCE, 2; CONSTITUTIONAL LAW, 8, 9.

FISHERIES. See also EQUITY, 8; WHARVES, 8.

An injury to a public fishery in navigable waters, which affects all alike who fish in that locality, will not sustain a private suit by a fisherman who has no special privilege or right to fish at the place affected. *Kuehn v. Milwaukee (Wis.)* 553

FLYING SWITCH. See RAILROADS, 9, 10, NOTES AND BRIEFS.

FRIGHT. See HIGHWAYS, NOTES AND BRIEFS.

GARNISHMENT. See LEVY, NOTES AND BRIEFS.

GAS. See also EXPLOSIONS; MINES; NUISANCES, 2.

1. If injury to a gas main is a natural and probable consequence of the construction of a

sewer in close proximity to it, it is the duty of the gas company, which has or ought to have knowledge of the sewer, to guard against the damage likely to be sustained. *Koosch v. Philadelphia Co. (Pa.)* 759

2. A gas company is required, not only to have pipes and fittings of such material and workmanship and laid with such skill and care as to provide against the escape of gas therefrom when new, but also to have such system of inspection as will ensure reasonable promptness in the detection of all leaks that may occur from deterioration of the material of the pipes or from any other cause within the circumspection of men of ordinary skill in the business. *Id.*

GIFT. See also CHECKS, 2; EVIDENCE, 38.

1. A gift *causa mortis* may extend to the whole of the donor's personal estate, however large. *Page v. Lewis (Va.)* 170

2. A valid gift *causa mortis*, including the valuables in the depository, is effected where a man sick in bed on the day of his death sends for securities and the keys to the depository, containing other securities, all belonging to him; and with the remark, "I am a sick man and don't know what may happen to me," picks up the securities and hands them to the donee, saying, "I give you these;" and, taking the keys, describes in a general way the contents of the depository, and, handing the keys to the donee, says, "These keys I now give you" are where the valuable papers are; "whatever you find you can have—it is yours;" and then directs the donee to place the securities and keys in her trunk and lock it, which the donee does. *Id.*

3. The mere existence, for precaution against loss or accident, in the hands of a third person, of a duplicate set of keys to the receptacle where valuable papers are kept, will not impair the validity of a gift of the papers *causa mortis* by delivery of the keys in the donor's possession. *Id.*

4. That the donor of valuables *causa mortis* in transferring them to the donee used the expression, "to be yours in case of my death," will not convert the transaction into a testamentary disposition so as to prevent its taking effect as a *donatio causa mortis*. *Id.*

5. A *donatio causa mortis* is not within the provisions of Va. Code, § 2414, providing that no gift shall be valid unless actual possession come to and remain in the donee, and that, "if donor and donee reside together at the time of the gift, possession at the place of their residence shall not be sufficient possession" within the meaning of the section. *Id.*

6. Delivery of possession of a bank pass-book in consummation of a gift *causa mortis* is not sufficient to transfer the bank deposit. *Id.*

NOTES AND BRIEFS.

Gift; sufficiency of constructive delivery to sustain gift *causa mortis*; gift of savings bank deposit; other instances. 170

Of checks; check or draft on person other than banker; gift of third person's check. *inter vivos*. 855

GOVERNOR. See OFFICERS, 7.

HIGHWAYS. See also ADVERSE POSSESSION, 1; DEDICATION; EMINENT DOMAIN, 1, 3-5, 8; INJUNCTION, 2, 3; MUNICIPAL CORPORATIONS, 9; PROXIMATE CAUSE, 2.

1. A defect in a highway does not give a cause of action to a traveler who, after safely passing it, was taken back by his horse, which became frightened at an independent cause, and uncontrollable, and turned suddenly around in the road breaking the vehicle and dragging it back to the defective portion of the highway, where the traveler was thrown out and injured. *Schaeffer v. Jackson Twp.* (Pa.) 100

2. The addition must be laid out before a city can avail itself of the right to cross land granted to a railroad company, under a reservation in the deed of the right to cross the tracks whenever it should determine to lay out an addition composed of the remainder of the tract. *Fort Wayne v. Lake Shore & M. S. R. Co.* (Ind.) 367

3. A city street cannot be extended across a railroad yard without authority from the Legislature, express, or necessarily implied, when the effect will be to destroy the use of scales erected near the point of crossing as well as of a portion of the yard, to greatly discommode the company's business and impair the value of its franchise, and it will be dangerous to life for the public to attempt to use the street if so extended. *Id.*

4. Notice to a city of a dangerous excavation in a street is not necessary to make it liable for injuries caused thereby, where the excavation was made by employes of the city under proper authority. *Wilson v. Troy* (N. Y.) 449

NOTES AND BRIEFS.

See also ADVERSE POSSESSION; DEDICATION.

Highways; effect upon right of recovery, of the fact that a horse was frightened when an accident occurred on a defective highway; where fright is caused by defect in highway; duty of town to provide for safety of runaway horse; when liability exists; illustrations; fright occurring outside of highway. 100

Liability of a railroad company for obstructing a highway crossing. 154

HOLIDAY.

The service of a summons by publication is valid, although one of the publications is made on May 30 (Memorial Day). *Malmgren v. Phinney* (Minn.) 753

HOMICIDE.

1. The fact that one who committed a homicide was temporarily insane when he formed and executed the design to kill another may be taken into consideration under Tex. Pen. Code, art. 40a, both to determine the degree of the murder and in fixing the penalty. *Evers v. State* (Tex. Crim. App.) 421

2. Insulting language which can reduce a homicide to manslaughter being restricted by statute to that for which the killing takes place immediately, it cannot have that effect

where the defendant ignored it and started to go away, and committed the homicide only after he had been called back. *Id.*

HUSBAND AND WIFE.

1. A married woman can enter as a partner a firm of which her husband is not a member, and thus bind her separate property for the undertakings of the firm, under the Michigan statutes, which give her power to carry on business or trade in her own name and upon her sole account. *Vail v. Winterstein* (Mich.) 515

2. A wife may become a partner of her husband under the Wisconsin statutes, which authorize her to make contracts in relation to her separate estate, and in certain emergencies—as, in case of her husband's desertion—giving her the power of a *feme sole*. *Fuller & P. Co. v. McHenry* (Wis.) 519

3. Tenancy by the entirety does not exist in a bond and mortgage executed to husband and wife for moneys of which each individually contributed a part; but upon the death of either, his or her share vests in his or her personal representatives. *Re Albrecht* (N. Y.) 829

4. Pregnancy of a wife at the time of marriage does not constitute physical incapacity for which the marriage will be annulled under Cal. Civ. Code, §§ 58, 82; but such incapacity must be such physical defect or incurable disease as will prevent sexual coition. *Franko v. Franko* (Cal.) 375

5. False representations by a woman to a man with whom she had had illicit intercourse and who knew her to be pregnant, that he was the only person with whom she had been incontinent, made to induce him to marry her, are not fraud for which the marriage will be annulled. *Id.*

6. A special Act of the Legislature granting a divorce is in violation of Ala. Const. art. 4, § 23, which prohibits the suspension of any general law for the benefit of any individual, since the subject of divorce is covered by general laws. *Jones v. Jones* (Ala.) 95

7. A wife's ill temper and mean disposition which make her principally responsible for an unhappy state of feeling in the household, although not a legal justification to her husband for abandoning her, may in a measure palliate his offense and abridge her claim to an allowance from his estate for her separate maintenance, on obtaining a divorce from him for abandonment. *Id.*

8. Voluntary abandonment of a wife by her husband is shown where he requires her to leave his house, and fails to provide for her support, and does not consent to her return. *Id.*

9. A wife's offensive behavior, coarse and indelicate language, and her anonymous letters foully slandering one of her husband's daughters by a former marriage, do not furnish him a legal justification for his abandonment, which will prevent her from obtaining a divorce for abandonment. *Id.*

10. An agreement made by a man on the day after obtaining a decree of divorce, to pay his former wife a monthly sum during her

life if she will not apply for a new trial, is against public policy and void as tending to promote and facilitate a divorce. *Blank v. Nohl* (Mo.) 850

11. A contract for a valuable consideration not to apply for a new trial, made by one against whom a decree of divorce has been entered after a trial at which she wholly abandoned the position assumed in her pleadings and made no defense, is on its face collusive and a fraud on the law. *Id.*

NOTES AND BRIEFS.

Husband and wife; validity of legislative divorce; granting divorces a rightful subject of legislation; how far conflicting with judicial power; construction of particular constitutions. 95

Tenancy by the entirety in personal property. 829

Validity of agreement to facilitate divorce. 850

Antenuptial pregnancy or unchastity as a ground of divorce or annulment of marriage: (1) pregnancy; (2) existence of a bastard child; (8) unchastity. 875

Partnership between. 512, 515

ICE. See also EASEMENTS, 5.

1. The total quantity of ice that may be taken by all persons from a great public pond is, as to the owners of a mill on a stream flowing from the pond, limited to what will constitute a reasonable use of the pond, which is the extent of the water right attached to the soil and invested in the owner of the basin through which the water flows. *Concord Mfg. Co. v. Robertson* (N. H.) 679

2. The right of a littoral proprietor to cut ice on a great pond belonging to the public is not exclusive, although he may have advantages over others in the right to erect stagings and platforms in front of his lot for use in filling ice-houses; and the extent of his right, as against persons owning land on a stream flowing from a pond, may be limited by the exercise of the same right by the public. *Id.*

IMPROVEMENTS. See also COURTS, 10; INJUNCTION, 4.

1. Statutes providing that the value of improvements by an occupying claimant in good faith may be adjudged to be a lien on the land, and that he may retain possession until he has been paid the value thereof, are valid. *Leighton v. Young* (C. C. App. 8th C.) 266

2. Fixing the uniform date for the valuation of improvements by an occupying claimant in good faith, as the date of the occupant's entry upon the land, is not a violation of any constitutional right of the owner of the fee. *Id.*

3. An occupying claimant in good faith and the owner of the fee should be regarded in effect as tenants in common in proportion to the value of their respective interests, with the sole right of possession in the occupant so long as the joint tenancy continues, where the owner does not pay for the improvements and the occupant does not pay for the land as is re- 18 L. R. A.

quired by statute, and the statute does not provide for such a contingency. *Id.*

4. A sale of the property and a distribution of the proceeds according to the rights of the parties may be decreed in an equity case between an occupying claimant and the owner of the fee, where by the failure of each to pay to the other the value of his interest in the property they have become cotenants. *Id.*

INCOMPETENT PERSONS. See also CRIMINAL LAW, 1-3.

Reasonable ground to doubt the sanity of a person about to be tried for felony must appear before the court will impanel a jury to inquire as to his sanity; and the court may inspect and examine him, consider his action and demeanor, read affidavits, and inquire of physicians and others touching his condition. *State v. Harrison* (W. Va.) 234

INCUMBRANCE. See DEFINITIONS.

INDICTMENT.

An indictment for conspiracy to do an unlawful act in the night-time, and also for conspiracy to do an unlawful act while wearing white caps, masks, or other disguises, each of which acts is made unlawful by the same section of the statute, is not bad for duplicity. *Hobbs v. State* (Ind.) 774

NOTES AND BRIEFS.

Indictment; duplicity in. 774

INFANTS.

The supreme right of the state to the guardianship of children controls the natural right of parents when the welfare of society or of the children themselves conflicts with such parental rights. *Van Walters v. Marion County Bd. of Children's Guardians* (Ind.) 481

INJUNCTION. See also DAMAGES, NOTES AND BRIEFS; EQUITY, 5.

1. An injunction will be refused in the exercise of the discretion of the court when it would work an injury greater than the wrong to be redressed. *Chartiers Block Coal Co. v. Mellon* (Pa.) 703

2. An abutting owner will be enjoined from tearing up the tracks of a railroad lawfully in a highway. *Southern P. R. Co. v. Ferris* (Cal.) 510

3. An injunction against a change of grade of a street without making compensation for the damage, required by a constitution which prohibits private property to be taken or damaged for public or private use without just compensation having been first made or paid into court, may be granted in favor of an abutting owner, where the change will seriously reduce both the rental and the selling value of his property. *Brown v. Seattle* (Wash.) 161

4. An injunction suit in a Federal court, when it has jurisdiction, against the execution of a writ of possession, is a proper remedy to enforce an occupying claimant's right to compensation for improvements; and it may be

instituted at any time before he is dispossessed of the premises after they have been adjudged to the true owner, where the state statute provides for the protection of his rights by the appointment of appraisers after such judgment to ascertain the value of improvements and state the account. *Leighton v. Young* (C. App. 8th C.) 268

5. An injunction against the unlawful use of buildings as a nuisance is not beyond the jurisdiction of equity on the ground that it is in the nature of a punishment of a criminal offense. *State v. Saunders* (N. H.) 646

6. An injunction cannot be granted to prevent a board of county commissioners from making an illegal contract or illegal appropriation,—at least where there is nothing to show that the remedy to prevent enforcing any illegal act of the board would not be equally effective. *Stevens v. St. Mary's Training School* (Ill.) 883

7. Damages resulting from obedience to an injunction which is utterly void and under which no action has been taken by the plaintiff cannot be recovered by the defendant, but result from his voluntary and needless act. *Mark v. Hyatt* (N. Y.) 275

8. Damages caused by an injunction erroneously granted in the exercise of jurisdiction, where the proceedings have been regular, cannot be recovered from the party who obtained and served it, in the absence of an undertaking, unless the prosecution was malicious and without probable cause. *Id.*

9. An injunction which merely exceeds the relief demanded by perpetually restraining licensees from manufacturing a patented article, without in express terms merely forbidding it under the license, is not wholly void, although it would be in excess of the jurisdiction if regarded as restraining future infringement, but should be construed as a restraint upon manufacture under the contract, and as erroneous simply because open to possible misconstruction, and therefore valid until reversed. *Id.*

10. On sustaining a motion to dissolve an injunction where the bill is in effect for an injunction only, the bill may be dismissed. *American Livestock Commission Co. v. Chicago Livestock Exch.* (Ill.) 180

INSANE PERSONS. See CRIMINAL LAW, 1-3, NOTES AND BRIEFS; INCOMPETENT PERSONS.

INSOLVENCY. See also EXECUTORS AND ADMINISTRATORS.

1. A partial assignment for particular creditors is included within the provisions of Ill. Act May 22, 1877, which provides that an assignment shall include "any other property . . . comprehended within the general terms of" the same, and that all debts and liabilities are to be paid *pro rata* "from the assets thereof;" and the trust is enlarged by the statute, which makes it enure to the benefit of all the creditors. *Farwell v. Cohen* (Ill.) 281

2. A voluntary assignment which on its face includes only part of the debtor's property, and contains no general terms descriptive

of property, is not converted into a general assignment of all the debtor's unexempt property by Ill. Act May 22, 1877, which provides that an assignment for creditors shall not be void for want of any list or inventory, and that a list or inventory shall not be conclusive, but that the assignee shall take title to "any other property not exempt by law . . . comprehended within the general terms" of the assignment. *Id.*

3. A claim by an assignor and assignee that an assignment for creditors is a trust for certain creditors only, as they intended it, estops them from claiming that it is invalid for lack of acknowledgment and recording, when it is held to enure under the statute to the benefit of all creditors. *Id.*

4. A voluntary transfer by an insolvent of certain specified property in trust to sell enough of it to pay certain specified debts and return the remainder is, regardless of the form of the instrument, an assignment within the meaning of Ill. Act May 22, 1877, conferring jurisdiction on county courts to supervise the execution of trusts growing out of voluntary assignments for creditors. *Id.*

5. A petition by a creditor or some other party in interest is a proper way to call upon the court to declare a deed of trust for certain creditors to be in effect an assignment for all creditors. *Id.*

6. Failure to acknowledge and record an assignment for creditors as required by a statute which contains no negative words declaring it void for such failure will not prevent the assignment from becoming operative. *Id.*

7. A creditor of the assignor may be assignee in an assignment for benefit of creditors. *Id.*

8. A bill of sale which constitutes a voluntary transfer or assignment of a stock of goods for creditors, securing to one of them a preference over all others, is in violation of Wis. Rev. Stat. § 1698a. *Fuller & F. Co. v. McHenry* (Wis.) 512

NOTES AND BRIEFS.

See also LABORERS.

Insolvency; what constitutes an assignment for creditors. 281

INSURANCE. See also COMMERCE, 5; CONSPIRACY; CORPORATIONS, 9.

1. A joint tenancy in the beneficiaries of a mutual benefit certificate is created where the whole sum, without any direction for division, is made payable to two persons named; and on the death of one of them during the life of the insured the other takes the whole amount of the benefits. *Farr v. Grand Lodge A. O. U. W.* (Wis.) 249

2. The assignment of an insurance policy with the consent of the insurer creates a new contract between the latter and the assignee, which is unaffected by any causes of forfeiture previously existing and unknown to either party. *Hall v. Niagara F. Ins. Co.* (Mich.) 185

3. Each of two persons owning in severalty respective shares of personal property insured is the "absolute owner" of the property, within the meaning of a question and answer in an

application for insurance thereon. *Beebe v. Ohio Farmers Ins. Co.* (Mich.) 481

4. The provision of an insurance policy, that it shall become void, unless consent is indorsed thereon, if the insured is not the sole and unconditional owner of the property, relates only to subsequent changes, and does not apply to the state or condition of the property when the policy was issued. *Hall v. Niagara F. Ins. Co.* (Mich.) 185

5. Avoidance of an insurance policy for breach of a condition against other insurance, by the existence of a prior policy, is not prevented by the fact that the latter contains a like condition, although a void policy is not a breach of such a condition. *Reed v. Equitable F. & M. Ins. Co.* (R. I.) 496

6. A policy of insurance conditioned against other insurance is avoided by the existence of other insurance at the time of its issuance, although such other insurance is not in effect at the time of the loss. *Id.*

7. A condition against other insurance, contained in a policy of insurance, is not waived by the issuance of the policy after notice to a mere soliciting agent of the existence of additional insurance. *Id.*

8. Notice to an insurance company at the time of the issuance of a policy, that there is prior insurance, will estop it from asserting that the policy is void under a condition against other insurance. *Id.*

9. A false statement in an application for insurance, that there is no other insurance on the property, will not make the policy void where the other insurance was placed upon it by the same insurance agents, and the statement of the insured to the agents who wrote the application was that there was no other insurance except what they had placed on the property. *Steele v. German Ins. Co.* (Mich.) 85

10. The acts of clerks of insurance agents who solicit insurance, make out applications and policies, and generally attend to the business of such agents, are as binding as though done by the agents themselves. *Id.*

11. The knowledge of an incumbrance, on the part of an insurance agent who filled out an application and had the applicant sign it without reading, assuring her that it was all right and that she was fully protected under it, will prevent a forfeiture because of such incumbrance, which is not stated in the application. *Beebe v. Ohio Farmers Ins. Co.* (Mich.) 481

12. The failure of an insurance agent to write upon a policy the permission which he has, in the exercise of his authority, granted to place incumbrances on the property, will not defeat the permission,—especially where he took an active part in procuring the money for the insured, and gave assurances that the rights of the latter were fully protected. *Id.*

13. Proceedings to oust a tenant according to the provisions of a contract under which he has become merely a tenant holding over without permission is not a litigation which will defeat an insurance policy which provides that it shall be void "if the title or possession be now or hereafter involved in litigation." *Hall v. Niagara F. Ins. Co.* (Mich.) 185

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14. Failure to make proofs of loss within sixty days after the fire, as required by the Michigan standard policy, which provides that the loss shall not become payable until sixty days after such proofs, and that no suit or action shall be maintainable "until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire," will not make the policy void, where the specified requirements in fourteen cases expressly provide for a forfeiture in case of failure to comply therewith, but no such provision is made in respect to the proof of loss. *Steele v. German Ins. Co.* (Mich.) 85

NOTES AND BRIEFS.

Insurance; forfeiture by failure to furnish proofs of loss within a stipulated time. 85

Effect on assignee of policy, of assignor's acts of forfeiture; prior acts; subsequent acts; assignment after loss. 135

Joint tenancy in proceeds of life policy. 249

How far an undivided interest in property is a complete or full ownership for the purposes of insurance; partnership interest. 481

Waiver of forfeiture by knowledge of facts. 496

INTEREST.

Interest on the sum by which property is diminished in value on account of an accident in a street caused by the negligence of the city may be included in the damages awarded therefor. *Wilson v. Troy* (N. Y.) 449

NOTES AND BRIEFS.

Interest; on sum allowed as damages: (I.) for personal injuries; when death results; (II.) for injuries to property: (1) by railway fires; (2) by other fires; (3) injuries to stock by passing trains; (4) property injured, delayed, or lost in transportation; (5) vessel captured as a prize; (6) collision; (7) property destroyed by mob; (8) from negligent construction of railroads, canals, etc.; (9) from explosion, etc.; (10) against agents and officers; (11) on exemplary damages; (III.) rate of interest. 449

INTERVENTION. See ACTION OR SUIT, 6.

JOKE. See TRIAL, 11.

JUDGMENT. See also CREDITORS' BILL.

1. An entry of judgment *nunc pro tunc* by a justice's court nearly two years after the time when the case was tried, a verdict rendered, and an execution issued reciting that a judgment had been rendered, although no judgment was in fact rendered at that time, is a nullity under W. Va. Code, § 114, which requires the entry of judgment within twenty-four hours (Sunday excepted) after the trial. *McClain v. Davis* (W. Va.) 684

2. The decision that a testator was an inhabitant of the county, made by a surrogate to whom the will is presented for probate, is conclusive against collateral attack, independent of any statutory provision,—at least where the surrogate had jurisdiction of the subject

matter by reason of the fact that testator was an inhabitant of the state at the time of his death. *Bolton v. Schriever* (N. Y.) 242

8. A judgment requiring the execution of a deed to the real owner of land by persons having the record title to the whole estate, subject only to the contingency that other persons may be born who will have an interest in such record title, is effectual to cut off the rights of such persons subsequently born. *Kent v. St. Michael's Church* (N. Y.) 831

4. A justice's judgment is not open to collateral attack because his docket does not affirmatively show that he waited one hour on an adjourned day for defendant to appear. *People, Chaddock, v. Barry* (Mich.) 837

5. An adjudication as to a boundary line, in a suit under Or. Act 1887, cannot operate as an estoppel or bar to a subsequent suit, based on adverse possession, to quiet title to the strip of land between the lines respectively claimed as the boundary. *King v. Brigham* (Or.) 861

6. The recovery of compensation by a physician for his services, in a suit in which there is no appearance by the defendant, does not estop the latter from bringing a cross-action for malpractice, but if the latter appear, he is estopped by the recovery unless the records show that it was not to defend the suit, but solely to disclaim the waiver to his own right. *Lawson v. Conway* (W. Va.) 627

7. A satisfied judgment for one week's wages, in a suit brought after wrongful dismissal from service, is not a bar to a subsequent suit for wages thereafter accruing under the same contract, where the employé continues ready to work and his employment was "at a salary of \$50 per week payable weekly," although there was an express provision that the contract should continue for one year. *Olmstead v. Back* (Md.) 58

8. The expiration of the time during which a judgment continues to be a lien upon land pending an action to enforce the lien as against a title inferior thereto, but which would be a cloud on the title of an execution purchaser, will defeat the right of the plaintiff to such relief, since the court cannot extend the life of the lien beyond the statutory period. *McAfee v. Reynolds* (Ind.) 211

9. A judgment cannot be set aside on a petition which merely alleges facts in contradiction of the judgment. *Van Wallers v. Marion County Bd. of Children's Guardians* (Ind.) 431

10. A judgment void for want of jurisdiction may be set aside without showing a meritorious defense. *St. Paul Sav. Bank v. Authier* (Minn.) 498

11. An affidavit is not sufficient as a basis for setting aside a judgment entered after trial *ex parte*, which states simply that defendant "has fully stated his case to his attorney, who has advised him that he has a good defense on the merits to plaintiff's action." *Trefts v. Stahl* (Ill. App.) 500

NOTES AND BRIEFS.

Judgment; expiration of lien of. 212, 758

JUDICIAL SALE.

1. The doctrine of *caveat emptor* applies to 18 L. R. A.

a foreclosure sale, notwithstanding the fact that the purchaser is told by the sheriff and clerk that if he buys the land he will get a clear and perfect title thereto free from liens, and such statements are untrue, as it is his duty to examine the title, and not rely upon their statements. Such facts are not ground, therefore, for a motion to vacate and set aside the sale. *Norton v. Taylor* (Neb.) 88

2. A purchaser at a mortgage foreclosure sale will not be relieved from completing his purchase on the ground of defective title or because of prior incumbrances, when the true condition of the title is fully set out in the pleadings and the record of the proceedings under which the sale was made, as he is chargeable with notice of such material facts as the record discloses. *Id.*

NOTES AND BRIEFS.

Judicial sale; effect of misrepresentation to purchasers by sheriff. 88

JURISDICTION. See ADMIRALTY; CREDITORS' BILL; EXECUTORS AND ADMINISTRATORS, NOTES AND BRIEFS.

JUSTICE OF THE PEACE. See also JUDGMENT, 4.

NOTES AND BRIEFS.

Justice of the peace; regularity of judgments by. 684

LABORERS.

NOTES AND BRIEFS.

Laborers; who are laborers, employés, or servants within the meaning of statutes giving preferences: (1) definitions; (2) who are secured by mechanics' lien laws; (3) preferences of claims against insolvent corporations; (4) under the statutes making stockholders individually liable; (5) whose earnings are exempted from attachment or garnishment; (6) seamen. 805

LAKES. See BOUNDARIES; WATERS, 8-11, NOTES AND BRIEFS.

LANDLORD AND TENANT.

1. A lease, and not a mere license, is made by a writing acknowledging the receipt of a specified amount of money in payment of a certain described sand bar for one year, with "the exclusive right to all gravel and sand for the year above named, and excluding all other parties from said premises." *Heywood v. Fulmer* (Ind.) 491

2. A landlord is not liable for damages to an employé of his lessee from illness caused by defective plumbing, where he is not charged with fraud or deceit or with any more knowledge of the defects than the lessee had. *Angvine v. Knox-Goodrich* (Cal.) 264

3. No implied warranty of the habitable condition of a house leased for a dwelling is created by Cal. Civ. Code, § 1941, which provides that the lessor must put it in such condition. *Id.*

NOTES AND BRIEFS.

Landlord and tenant; obligation of landlord as to fitness of building for occupancy. 264
 Distinction between a lease and license; as to minerals. 491

LEASE. See LANDLORD AND TENANT, 1, NOTES AND BRIEFS.

LEVY.

The statutory exemption of the wages or earnings of a debtor continues while they are under his control, though temporarily in the hands of another. *Elliot v. Hall* (Id.) 586

NOTES AND BRIEFS.

Levy; exemption of debtor's wages after payment by employer. 586

LICENSE. See also ATTORNEYS, 5; LANDLORD AND TENANT, 1, NOTES AND BRIEFS.

A planter or farmer keeping a store on his plantation, and selling goods and liquors to his employes exclusively, is "doing a business of selling at retail," within the terms of a statute requiring a license. *Thibaut v. Kearney* (La.) 596

LIENS. See also LABORERS, NOTES AND BRIEFS.

1. A purchase-money mortgage which would otherwise have been prior to mechanics' liens, being by agreement postponed to another mortgage to a third person which would otherwise have been inferior to such liens, the priority of the purchase-money mortgage is transferred *pro tanto* to the other mortgage, and the balance of such other mortgage and the purchase-money mortgage are inferior to the mechanics' liens. *Malmgren v. Phinney* (Minn.) 753

2. A statute giving a lien for lumber, materials, or teams furnished in the construction of railroads or other works of public or quasi public character, is a legislative declaration that prior lien statutes did not cover such cases. *Tod v. Kentucky U. R. Co.* (C. C. App. 6th C.) 805

3. Contractors cannot be regarded as "employés" or "laborers" within the meaning of a statute giving liens to laborers and employes for their services, where the contract is to furnish laborers, tools, and teams by the day, for which certain sums per day are to be paid, with 10 per cent additional for the use of tools and superintendence. *Id.*

4. The mere fact of furnishing articles or supplies suitable or capable of being used in carrying on a designated business, without any understanding or agreement that they shall be so applied, will not of itself, without actual application in the business, give the furnisher a lien, under Ky. Act 1876, upon the property and effects embarked in such business. *Id.*

5. One who has failed or neglected to comply with the requirements of Ky. Act 1868, providing for a lien in favor of persons furnishing labor or materials in railroad construction, cannot claim a lien under the Act of 1876 giving a more extended lien in favor of 18 L. R. A.

laboring men and supply men in numerous kinds of business. *Id.*

LIFE TENANT. See ESTOPPEL, 1.

LIMITATION OF ACTIONS. See also CORAM NOBIS, 8.

The running of the Statute of Limitations in favor of a foreign corporation depends on the fact of its residence in the state in such sense that service may be made on it, through its keeping a managing agent therein, and not upon the knowledge or lack of knowledge of one having a cause of action against it as to the presence of such agent; but a foreign manufacturing corporation whose business is such that it can carry it on without a resident general agent cannot set the statute running by appointing at any time or times an agent in the state upon whom process may be served. *Winney v. Sandwich Mfg. Co.* (Iowa) 524

NOTES AND BRIEFS.

Limitation of actions; loss of cause of action by lapse of time pending suit. 211

Right of foreign corporation to plead statute. 524

LOAN ASSOCIATIONS. See USURY, NOTES AND BRIEFS.

MANDAMUS. See also INJUNCTION, 6.

1. Mandamus is the proper remedy to compel an officer who has been regularly and lawfully suspended, to deliver the official property of the office to his successor. *State, Attorney-General, v. Johnson* (Fla.) 410

2. The presumption that a statute has been constitutionally enacted when it has been enrolled, signed by the presiding officer of each House, and approved by the governor, is not conclusive in a proceeding by mandamus to enforce it, where facts showing that the bill was not constitutionally passed are alleged by the answer and admitted by demurrer. *Norman v. Kentucky Bd. of Managers of World's Col. Expo.* (Ky.) 556

3. The new appointee is not a necessary party to proceedings to compel a suspended officer to deliver over the official property of the office, but the attorney-general is a proper and sufficient relator. *State, Attorney-General, v. Johnson* (Fla.) 410

MARKETS.

The mere fact that the business of a particular market has become the largest in the world does not give to the courts any power to declare the market public and impressed with a public use, or to apply to it any rules of public policy peculiar to that class of markets, although the Legislature might be warranted in making such a declaration. *American Livestock Com. Co. v. Chicago Livestock Exch.* (Ill.) 190

MASTER AND SERVANT. See also CONTRACTS, 1; PROXIMATE CAUSE, 1.

1. It is part of the personal duty of the master to give direction to the work he undertakes,

and to prescribe a system for conducting it, which may be done by rules, when necessary, or by the personal guidance of managers and foreman. *Schroeder v. Chicago & A. R. Co.* (Mo.) 827

2. A railroad company is not guilty of negligence making it liable to a fireman on a train coming in collision with another train in advance of it on the road while the latter is stopping at a station, in ordering his train to run ahead of schedule time without giving the conductor of the forward train notice thereof, where it is not unusual to do so and specials are to be expected at all times,—especially where the train's running in advance of its time is not a direct cause of the action. *Relyea v. Kansas City, Ft. S. & G. R. Co.* (Mo.) 817

3. A foreman occupying the place of the master is guilty of negligence in placing a keg at the front end of a hand car on which he is riding with the hands under him, and leaving it where it is liable to roll off in front by the motion of the car, while he assists the men in moving the car. *Russ v. Wabash Western R. Co.* (Mo.) 823

4. That on a particular occasion use could have been made of another brakeman does not make a railroad company guilty of negligence in failing to provide more than the number of brakemen usually necessary upon a freight train, which will render it liable to a fireman of another train injured in a collision with such train. *Relyea v. Kansas City, Ft. S. & G. R. Co.* (Mo.) 817

5. A conductor of a freight train is not guilty of negligence in going to the station at which his train stops, without waiting to see that a brakeman ordered to detach cars from the train sets the brakes upon the remaining cars standing upon a grade. *Id.*

6. A master is not liable to his servant for injuries received by the latter in attempting to remove a towel from a shaft with which his service was in no way connected, where he had hung it for his own convenience to get it out of his way while engaged in the performance of his duties, where the shaft was not designed for, and the master could not have contemplated, such use, although the construction of the shaft was defective. *Kauffman v. Maier* (Cal.) 124

7. The motives which prompted a servant to inform the foreman about the condition of machinery, as well as his opinion concerning it, are immaterial upon the question of the master's liability to another servant for injuries caused by it. *Id.*

8. The want of any bumpers on freight cars, whether received from another company or not, renders a railroad company liable for injury received in consequence thereof by a brakeman who is suddenly called upon in the night to couple the cars, and who has no knowledge of their defects. *Mason v. Richmond & D. R. Co.* (N. C.) 845

9. It is not negligence in a railway company to haul cars of another company with double dead woods or double buffers, while couplings of a different pattern are in use on 18 L. R. A.

its own road. *Louisville & N. R. Co. v. Boland* (Ala.) 260

Warning.

10. A master must notify a servant of increased danger to which he is exposed by reason of any omission to supply usual and ordinary means to prevent accident, whereby the hazard to the servant is increased, if the change is not known to the servant or so open and visible that by the exercise of ordinary care it will be seen and known. *Pullman's Palace-Car Co. v. Laack* (Ill.) 215

11. A brakeman twenty-six years of age and of average intelligence is sufficiently warned of the increased danger, which is open to ordinary observation, in coupling cars with double dead-woods or double buffers which sometimes pass over the road, by a caution that railroading is dangerous and that coupling cars is specially so, requiring very great care, where he is further notified that cars with different coupling apparatus are hauled over the line. *Louisville & N. R. Co. v. Boland* (Ala.) 230

12. A master cannot delegate to another, even though it be a fellow servant, the duty of notifying his servant of increased danger, so as to absolve himself from liability for failure to communicate it. *Pullman's Palace-Car Co. v. Laack* (Ill.) 215

Assumption of risks.

13. A servant assumes all ordinary risks of his employment, but not unknown perils arising from negligent direction of the work. The latter are not usual risks of the service. *Schroeder v. Chicago & A. R. Co.* (Mo.) 827

14. The extra hazard to a brakeman by the use of cars with couplings of different patterns, some of which have double dead-woods or double buffers, is one of the risks or dangers assumed by entering the employment. *Louisville & N. R. Co. v. Boland* (Ala.) 260

Contributory negligence.

15. An employé is bound to use ordinary care to avoid dangers that arise, whether usually incident to the service or not. *Schroeder v. Chicago & A. R. Co.* (Mo.) 827

16. A servant is not to be held guilty of negligence in returning to protect his master's property after he has reached a place of safety, because some unforeseen cause intervenes which, concurring with the master's negligence, produces an injury which reasonable and prudent foresight could not have anticipated. *Pullman's Palace-Car Co. v. Laack* (Ill.) 215

17. It is not the duty of a brakeman to examine the bumpers of cars on a dark night before essaying to couple the cars in obedience to orders. *Mason v. Richmond & D. R. Co.* (N. C.) 845

Obeying orders.

18. Obedience to an order involving personal danger cannot be declared negligent in law, unless the danger was so glaring that no prudent person in like situation would have obeyed. *Schroeder v. Chicago & A. R. Co.* (Mo.) 827

19. The command of the conductor of a

freight train to a brakeman to go between the cars when he cannot couple them otherwise is a waiver of a rule of the company prohibiting brakemen to go between cars under any circumstances. *Mason v. Richmond & D. R. Co.* (N. C.) 845

Fellow servants.

20. A foreman is not a fellow servant of a man under his orders, in respect to his performance of the master's duty of directing the work in his charge. *Schroeder v. Chicago & A. R. Co.* (Mo.) 827

21. A foreman of a gang of section hands, having power to employ and discharge the men under him, and full control of their work and movements, is a vice-principal, and not a fellow servant with them. *Russ v. Wabash Western R. Co.* (Mo.) 828

22. A brakeman on a freight train is a fellow servant of a fireman on another train on the same section of the road, where both are under orders of the same train despatcher. *Relyea v. Kansas City, Ft. S. & G. R. Co.* (Mo.) 817

23. Employés of independent contractors, engaged in separate branches of labor upon a common enterprise, are not fellow servants. *Dixon v. Chicago & A. R. Co.* (Mo.) 793

24. Where persons are engaged in distinct departments of service, and have no such association in their work as that they can observe and influence each other's conduct and report delinquencies to a common correcting power, they are not in a common employment within the meaning of the law. *Parker v. Hannibal & St. J. R. Co.* (Mo.) 802

25. A track repairer under direction of a foreman, and the operatives of a passing construction train under different management from the section gang, are not fellow servants. *Id.*

26. A laborer working in defendant's quarry, under direction of a foreman having no connection with the train service, is not a fellow servant of employés operating a passenger train on defendant's line. *Dixon v. Chicago & A. R. Co.* (Mo.) 792

27. Persons who, under a license from the master, put new burners in a brick kiln for the purpose of testing their advantages, are in the position of vice-principals so far as relates to making such apparatus suitable and safe for the employés or giving notice of increased danger. *Pullman's Palace-Car Co. v. Laack* (Ill.) 215

NOTES AND BRIEFS.

See also **LABORERS.**

Master and servant; liability of master for injuries caused by defects in machinery while used for a purpose not contemplated. 124

Duty to warn inexperienced servant. 260

Right to discharge servant. 644

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MAXIMS. See also **ACTION OR SUIT**, 1.

1. A man shall not be twice vexed for one 18 L. R. A

and the same cause. *Van Walters v. Marion County Bd. of Children's Guardians* (Ind.) 431

2. Caveat emptor. *McDonough v. Martin* (Ga.) 343

3. In pari delicto potior est conditio possidentis. *Bernard v. Taylor* (Or.) 859

NOTES AND BRIEFS.

Maxim; de minimis non curat lex. 44

MINES.

The right to drill oil or gas wells through a stratum of coal belonging to another person, to reach oil or gas in a lower stratum belonging to the owner of the surface, is a right which exists at all times, although it must be exercised so as to do no violence to the rights of the owners of the coal. *Charlton's Block Coal Co. v. Mellon* (Pa.) 703

MISTAKE. See **ASSUMPSIT**, 2.

MONOPOLY. See **CARRIERS**, 21; **COMMERCE**, 5.

MORTGAGE. See also **ACTION OR SUIT**, 6; **EMINENT DOMAIN**, 8; **EVIDENCE**, 5; **JUDICIAL SALE**; **LIENS**, 1; **SALE**, 2; **TAXES**, 9, 10.

1. Statutory permission to the mortgagor to pay the taxes levied on the mortgage interest, and deduct the amount from the mortgage debt, does not make that remedy exclusive; but in case he pays the mortgage debt in full, and is afterwards compelled to pay such taxes to relieve his property from their lien, he may recover their amount from the mortgagee. *San Gabriel Valley Land & W. Co. v. Witmer Bros. Co.* (Cal.) 465

2. A mortgage on chattels afterwards manufactured does not give the mortgagee a sufficient title to sustain an action for conversion. *Deeley v. Dwight* (N. Y.) 298

3. An indemnity chattel mortgage upon a stock of goods is not void, as matter of law, in favor of creditors of the mortgagor, because of an extraneous agreement that he may continue to sell the goods in the usual course of trade, and use the proceeds to replenish the stock and defray the expenses of the business, applying the balance in discharge of the mortgage indebtedness, under a statute giving him the right to possession until foreclosure and sale; its invalidity depends upon the finding of fraud as a matter of fact. *Ephraim v. Keltner* (Wash.) 604

NOTES AND BRIEFS.

See also **EMINENT DOMAIN**.

Mortgage; efficacy of mortgage on chattels to be manufactured or acquired as independent articles, and not as increase or fruits of existing property; the general rule; effect as between the parties; effect of further act to perfect title in the mortgagee; property contemplated as additions to other property; the exception established by equity; application of equitable exceptions; where equitable exception is not recognized; the attitude of courts

of law towards the equitable doctrine; sufficiency of record notice; the effect of *Holroyd v. Marshall*, in England. 298

Effect upon the validity of a mortgage of merchandise, of a provision or agreement giving the mortgagor the possession with power of sale: (1) the general rules; (2) mortgage showing possession with power of sale; (3) effect of extraneous agreement; (4) sales by mortgagor as agent for mortgagee; (5) how far the instrument is void *in toto*; (6) effect of Recording Acts; (7) effect of statute making fraud a question for the jury; (8) effect of mortgagee's taking possession; (9) analysis of the law in different jurisdictions. 604

MOTIONS.

1. That service of notice of a motion to place a case on the short-cause calendar is defective because the copy was left only with one who merely has desk room in the office which defendant's attorney occupies is waived if such attorney acquires knowledge of the attempted service, and, with reason to believe that plaintiff's attorney is relying on such service, suffers the case to be placed upon such calendar and tried without objection. *Trefts v. Stahl* (Ill. App.) 500

2. Knowledge on the part of defendant's attorney, of an attempted service upon him of a notice of motion to place a case upon the short-cause calendar, by leaving a copy with a co-occupant of the same office, will be assumed where it is not positively denied, but the affidavits of denial merely deny facts the nonexistence of which is perfectly consistent with such knowledge. *Id.*

MUNICIPAL CORPORATIONS. See also ASSUMPSIT, 8-5; BUILDINGS, 3; CONTRACTS, 6; ESTOPPEL, 6; EVIDENCE, 11; PARKS.

1. A municipal corporation cannot become a trustee to collect in its own name—especially at its own expense—separate sums of money due to some of its citizens for damages from the closing of streets by a railroad. *New Haven v. New Haven & D. R. Co.* (Conn.) 258

2. Valid ordinances have the force of laws, and are as binding upon inhabitants of a municipality as are the statutes of the state upon its citizens generally. *Tacoma v. Little* (Wash.) 872

3. A valid ordinance limiting the salary of councilmen is not repealed or modified by merely allowing and paying a larger salary, but the payment thereof is as to the excess unlawful. *Id.*

4. A councilman can perform no "extra services" in his official capacity, for which he can receive compensation in addition to his salary, even if the services rendered greatly exceed in value the amount of his salary. *Id.*

5. A ratification of a resolution of a common council donating city land to a railroad company, passed when the vice-president of the road was a councilman and voted for it, is effected by a subsequent resolution of the council passed at a time when he was not a member, directing the execution of a deed which will 18 L. R. A.

render valid a deed executed in pursuance of it. *Fort Wayne v. Lake Shore & M. S. R. Co.* (Ind.) 387

6. An order or direction by the mayor to enforce an ordinance, which need not be made by a written order, is sufficiently made by a letter or order which is understood by both parties as a direction to enforce the ordinance, although it is not in words or form an order or even a request. *Eichenlaub v. St. Joseph* (Mo.) 590

7. The fact that the mode of building a cremating furnace is patented will not make the contract of a municipal corporation for its construction void, when the contract for performing the work and furnishing the materials is let to the lowest bidder, with the understanding that the patentee will allow the use of his patent and superintend its construction in consideration of a certain specified sum paid him by whoever secures the contract. *Kilvington v. Superior* (Wis.) 45

8. A village board may contract for a cremating furnace to consume garbage or dead animals, etc., as a means of conserving the health of the city, under the general power conferred to prevent and abate nuisances. *Id.*

9. The negligence of city employes in leaving uncovered an excavation in a street, made by them under direction of the superintendent of the city waterworks, for the purpose of connecting a private house with the street main, makes the city liable, although the work was done at the request of a private contractor who had agreed with the owner of the house to do the work. *Wilson v. Troy* (N. Y.) 449

10. The duty of providing and maintaining a city hall for the use of the city officers is a public and governmental use, for the negligence of its agents in the discharge of which the city of St. Paul, Minnesota, is not liable in a private action. *Snider v. St. Paul* (Minn.) 151

NOTES AND BRIEFS.

Municipal corporations; municipal contracts for work or articles which embody a patented invention. 45

Validity of vote of common council or similar body as affected by personal interest of members. 367

NEGLECT. See also BATHING RESORT; CARRIERS, 8.

1. The question whether or not the result could have been anticipated is not the test of liability for an act which is negligence *per se*, but the person guilty of it is equally liable for its consequences whether he could have foreseen them or not. *Sellick v. Lake Shore & M. S. R. Co.* (Mich.) 154

2. A higher degree of care and vigilance is required in dealing with a dangerous agency than in the ordinary affairs of life or business which involve little or no risk of injury to persons or property. *Koelsch v. Philadelphia Co.* (Pa.) 759

3. Failure to provide a stopcock in the pipe connecting an oil tank with burners used for firing a brick kiln may be found by the jury to be negligence, notwithstanding there was

a shut-off at each of the burners and one on the tank, where the tube adjacent to each burner was by reason of its construction liable to crack and allow the oil to escape, which in such case would ignite and render approach to the burner impossible because of the heat, and the valve on the tank could not be turned without a mechanical appliance, while in case the flow of the oil was not stopped a conflagration and explosion of the tank would be probable. *Pullman's Palace-Car Co. v. Laack* (Ill.) 215

4. Contributory negligence fairly imputable to the plaintiff according to his own evidence will defeat his right of action for an injury resulting from negligence of the defendant. *Butcher v. West Virginia & P. R. Co.* (W. Va.) 519

5. Persons are justified in assuming greater risks to protect human life than would be sanctioned in other circumstances. *Schroeder v. Chicago & A. R. Co.* (Mo.) 827

NOTES AND BRIEFS.

Negligence; what constitutes. 509

NEGLIGENT SUPERIORS.

NOTES AND BRIEFS. 828

NEGROES. See CARRIERS, 22; CIVIL RIGHTS; CONSTITUTIONAL LAW, 2.

NEWSPAPER. See SUNDAY.

NEW TRIAL. See also APPEAL AND ERROR, 7.

1. A right to a new trial as matter of law is not lost by failure to take the statutory course to remove from the panel a juror who is related to the parties within such a degree as to be by statute disqualified to sit, if knowledge of the relationship is not obtained until after the trial. *Jewell v. Jewell* (Me.) 478

2. A principal cause of challenge to a juror, which was not known, and was not and could not have been known by the exercise of ordinary diligence, until after the verdict, will not require a new trial of a criminal case, unless injustice resulted to the prisoner from the fact that such juror served; and in determining this the court should look only to the evidence touching such cause of challenge, and not to that as to the prisoner's guilt. *State v. Harrison* (W. Va.) 224

3. To set aside a verdict because of an opinion entertained by a juror before he was sworn, it must appear to have been, not merely unsubstantial and hypothetical, but such as would have excluded him if it had been known before he was sworn. *Id.*

4. Mere business conversation by a juror with another person, entirely foreign to the case on trial, in the presence and hearing of the sheriff and other jurors, will not avoid the verdict. *Id.*

5. A mere separation of the jury will not entitle a person to a new trial, although in a criminal case where there has been an improper separation the State has the burden of showing beyond reasonable doubt that no injury resulted therefrom to the prisoner. *Id.* 18 L. R. A.

6. The testimony of jurors may be received to disprove or explain any separation, misconduct, or irregularity, but not to show their motives or that they were influenced by any admitted fact. *Id.*

7. Other grounds for a new trial cannot be filed after a motion for a new trial has been overruled and after the expiration of the three days allowed for filing such grounds by Ky. Code, § 342. *Kentucky C. R. Co. v. Smith* (Ky.) 63

NOTES AND BRIEFS.

New trial; disqualification of jurors as ground for; general statement of the law; waiver of objection by silence; ignorance of disqualification; neglect to make inquiries as affecting party's right; objections on the ground of juror's age; alienage; want of property qualification; irregularities of selection; bias of jurors; relationship; preconceived opinions; juror having served on grand jury; concealment of interest by juror; preponderance of evidence to show bias; criminality of juror. 473

NOTARY.

The office of notary public is a civil office of profit which cannot be held by a person holding the office of receiver of the United States land office, under Nev. Const. art. 4, § 9, providing that no person holding any lucrative office under the United States shall be eligible to any civil office of profit in the state. *State v. Summerfield, v. Clarke* (Nev.) 813

NOTICE. See HIGHWAYS, 4; MOTIONS, 1, TAXES, 6.

NUISANCES. See also BUILDINGS, 1; DAMAGES, 5; EQUITY, 2; ESTOPPEL, 5; FISHERIES; INJUNCTION, 5.

1. A nuisance cannot be abated with or without legal process, if it has been discontinued and has not been renewed when proceedings are begun against it. *State, Rhodes, v. Saunders* (N. H.) 646

2. The use, in burning brick, of a process that generates noxious gases which are wafted upon adjacent land, injuring and destroying growing crops of wheat, is a nuisance that will render a brick company using the process liable for the damages to the owner of the wheat. *Fogarty v. Junction City Pressed Brick Co.* (Kan.) 756

NOTES AND BRIEFS.

Nuisance; private remedy for. 553

By use of neighboring property. 756

NUNC PRO TUNC. See JUDGMENT, 1.

OCCUPYING CLAIMANTS. See COURTS, 10; IMPROVEMENTS, 1, 2; INJUNCTION, 4.

OFFICERS. See also COUNTIES, 1.

1. Members of a state board of taxation are not judicial officers within a constitutional provision requiring judicial officers to be elected by the people. *Cleveland, C. O. & St. L. R. Co. v. Backus* (Ind.) 729

2. An appointment to fill an office, of which the incumbent has been suspended under Fla. Const. art. 4, § 15, can be only for the remainder of the pending term and until the qualification of a successor. *Advisory Opinion (Fla.)* 594

3. A suspension from office and the appointment of another to fill the office under Fla. Const. art. 4, § 15, do not affect the suspended officer's right to qualify for or exercise the duties of a succeeding term of the same office, nor prevent the governor succeeding the one who made the suspension from commissioning the suspended officer for the new term. *Id.*

4. One elected or appointed to an office under an unconstitutional statute before it is adjudged to be so is an officer *de facto*. *Parker v. State, Powell (Ind.)* 587

5. Whether or not a tax collector was guilty of such neglect of duty in not receiving poll taxes on a certain day on which electors had the right to pay them to qualify for an election as will justify his suspension from office is a question for the governor under the Florida Constitution. *State, Attorney-General, v. Johnson (Fla.)* 410

6. The suspension of an officer by the governor for neglect of duty may be made, under the Florida Constitution, without previous notice of the charge against him; but the officer has a constitutional right to notice of the cause and of a hearing on such charges, and to reinstatement if they are not sustained by the evidence. *Id.*

7. The suspension of an officer for neglect of duty, whether it is to be considered as an exercise of judicial or administrative authority, is vested in the governor by the Florida Constitution. *Id.*

8. The term "eligible," in Nev. Const. art. 4, § 9, providing that United States officers shall not be eligible to civil office in the state, applies to appointive, as well as to elective, offices. *State, Summerfield, v. Clarke (Nev.)* 818

NOTES AND BRIEFS.

Officers; who are.	818
Power of removal and suspension.	410
Validity of agreements extending beyond term.	447

OIL. See NEGLIGENCE, 8.

OPTION. See ACTION OR SUIT, 3.

PARKS.

Before land purchased by a city for a park has been actually dedicated to the public use the city may convey it to a railroad company for a yard and depot grounds, if no limitation or restriction as to alienation was inserted in the deed to it. *Fort Wayne v. Lake Shore & M. S. R. Co. (Ind.)* 387

PARLIAMENTARY LAW. See also MUNICIPAL CORPORATIONS, 5.

NOTES AND BRIEFS.

Parliamentary law; effect of personal interest on validity of vote.	367
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PARENT AND CHILD. See INFANTS.

PARTIES. See ACTION OR SUIT, 4-6; MANDAMUS, 3.

PARTNERSHIP. See HUSBAND AND WIFE, 1, 2.

PATENTS. See MUNICIPAL CORPORATIONS, NOTES AND BRIEFS.

PAYMENT.

A direction by the maker of notes to an agent to apply money in his hands to the payment of the notes, which the agent holds as agent for the payee, does not of itself constitute or have the effect of such an application of the money. *Moore v. Norman (Minn.)* 359

PENALTY. See also CONSTITUTIONAL LAW, 4; FINE; RAILROADS, 8.

More than one penalty can be incurred by violating the Indiana Act of 1889 which requires a report at each railroad station at which there is a telegraph office as to whether trains are on time, and provides that "for each violation" in failing to report or making a false report a penalty may be recovered; but there can be only one forfeiture as to one train at any particular station on the same trip. *State v. Indiana & I. S. R. Co. (Ind.)* 502

PERPETUITIES.

An unlawful perpetuity is not created by a provision that executors shall sell all the real estate as soon as may be conveniently done after testator's death. *Hope v. Brewer (N. Y.)* 458

PHYSICIANS. See also JUDGMENT, 6.

1. The employment of a physician continues while sickness lasts, unless put an end to by the assent of the parties or revoked by the express dismissal of the physician. *Lawson v. Conway (W. Va.)* 627

2. The mere failure to effect a cure does not even raise a presumption of a want of proper care, skill, and diligence in a physician. *Id.*

3. A physician does not ensure that his treatment will be successful, but he is bound to bestow such reasonable ordinary care, skill, and diligence as physicians in the same neighborhood, in the same general line of practice, ordinarily have and exercise in like cases. *Id.*

NOTES AND BRIEFS.

Physicians; liability for malpractice.	627
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PLEADING.

1. Plaintiff in an action upon a warranty cannot recover interest for a longer period than asked in his petition. *Winney v. Sandwich Mfg. Co. (Iowa)* 524

2. A plea defectively verified may be verified in open court at the trial, under Ga. Code, § 3479, relating to amendments, and U. S. Rev. Stat. § 954, permitting the amendment, at any time, of any defect in process or pleadings. *Bank of Edgefield v. Farmers Co-Op. Mfg. Co. (C. C. App. 5th C.)* 201

3. A petitioner who has no cause of action has no right to compel answers to interrogatories. *Van Walters v. Marion County Bd. of Children's Guardians* (Ind.) 481

4. An allegation in a suit to recover an overcharge of freight, that an excess was paid, authorizes an inference that it was paid by the shipper,—at least as against a demurrer. *Louisville, H. & St. L. Consol. R. Co. v. Wilson* (Ind.) 105

5. The invalidity, on the grounds of public policy, of a contract by a city with a railroad company, will be considered by the court in an action to enforce it, although such invalidity is not pleaded. *New Haven v. New Haven & D. R. Co.* (Conn.) 256

6. A demurrer to a complaint by a city upon a contract between it and a railroad company, by which it consents to the closing of certain streets on condition that the company pays to thirty-five different property-holders injured thereby the damages sustained, must be sustained, even if such property-holders have any right of action thereunder, since such right would be several, and not joint, and the court is not required to select and substitute one of the thirty-five claimants in place of the city. *Id.*

7. The difference between a complaint and a receipt attached as an exhibit, in respect to the date of a payment, does not make the complaint demurrable. *Erickson v. Brookings County* (S. D.) 347

8. A petition against a foreign corporation, showing that defendant had no agent within the state upon whom personal service could be had between the inception of the right and the commencement of the action, is not demurrable on the ground that the cause of action is barred. *Winney v. Sandwich Mfg. Co.* (Iowa) 524

POND. See BOUNDARIES, 2, 3; WATERS, 6, 7, NOTES AND BRIEFS

POOR. See COUNTIES, 1.

PRACTICAL JOKE. See TRIAL, 11.

PRESCRIPTION. See WATERS, 1.

PRESUMPTION. See APPEAL AND ERROR, 4.

PRINCIPAL AND AGENT. See also CHECKS, 1.

NOTES AND BRIEFS.

Principal and agent; extent of authority conferred upon traveling salesman; authority to collect payment; effect of agent's possession of goods; authority to accept payment in anything else than money; authority to pledge principal's credit for traveling expenses; authority to sell samples; other cases relating to the powers of drummers. 663

PRIVATE RIGHTS. See CONSTITUTIONAL LAW, NOTES AND BRIEFS.

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PROXIMATE CAUSE. See also RAILROADS, 13, 14.

1. The continued flow of burning oil, which would have been at once checked except for the master's negligent failure to provide the usual facilities for cutting off the supply, is the proximate cause which will render him liable in case of injury resulting therefrom to a servant, although this would not have happened if a fellow servant had not also been negligent in failing to cut off the supply by the use of the less adequate facilities that did exist. *Pullman's Palace-Car Co. v. Laack* (Ill.) 215

2. The negligence of a city in leaving a street in an unsafe condition is legally the proximate cause of an injury which resulted therefrom to a traveler, although it would not have occurred except for the running away of a horse which became frightened and unmanageable because the bit of the bridle became loosened, if there was no negligence on the part of the traveler. *Joliet v. Shufelt* (Ill.) 750

PUBLICATION. See HOLIDAY.

PUBLIC BUSINESS. See MARKETS; STOCK AND PRODUCE EXCHANGE, 1.

PUBLIC IMPROVEMENTS. See also EMINENT DOMAIN, 2.

Assessment by special taxation is not justified by § 53 of the Illinois City and Village Act, providing that in condemnation proceedings on supplemental petition an assessment may be made to raise the amount necessary to pay the compensation and damages awarded. *Bloomington v. Latham* (Ill.) 487

NOTES AND BRIEFS.

Public improvements; validity of assessments for. 487

PUBLIC LANDS. See WATERS, 11.

PUBLIC MONEYS. See APPROPRIATIONS.

PUNISHMENT. See CRIMINAL LAW, 4.

RAILROAD COMMISSIONERS. See also CONSTITUTIONAL LAW, 3.

1. The details of practice and pleading may be supplied by a railroad commission which is constituted a court of record, under the inherent power of every court of record to make such rules, not inconsistent with the law, as are necessary to the exercise of the powers conferred upon it. *Atlantic Exp. Co. v. Wilmington & W. R. Co.* (N. C.) 393

2. Authority is given to the railroad commission to hear and determine complaints of unjust discriminations and preferences, under the North Carolina Railroad Commission Act, which expressly provides that if a railroad company is guilty of a violation of the rules of the commission, and after due notice of such violation does not make full recompense for the wrong or injury done, it shall incur a penalty, and also constitutes such commission a court of record. *Id.*

RAILROADS. See also **COMMERCE**, 2, 5, **CONSTITUTIONAL LAW**, 8, 9; **CONTRACTS**, 6; **EMINENT DOMAIN**, 6, 7; **HIGHWAYS**, 2, 3; **INJUNCTION**, 2; **PENALTY**.

1. A statute providing that a "corporation, company, or person," operating a railroad, shall place in the passenger depot of such "company" a blackboard upon which such "company or person" shall cause to be written the fact as to whether trains are on time, is clearly intended to apply to corporations, as well as natural persons, although the word "corporation" is not repeated in each clause. *State v. Indiana & I. S. R. Co.* (Ind.) 502

2. The words "each passenger depot . . . located at any station . . . at which there is a telegraph office," at which a railroad company is required by Ind. Act 1889 to provide a blackboard on which shall be stated whether a train is on time or not, do not mean merely the station-house for passengers, but include every station where a train stops, if there is a telegraph office at such point at which information is received as to the arrival of trains at such stopping place. *Id.*

3. The penalty for failure to report on a blackboard the time of the arrival of trains, provided by Ind. Act 1889, § 2, cannot be avoided by the failure to provide a blackboard, which is expressly required to be done by § 1 of the Act. *Id.*

4. Injury to a colt by running into a barbed-wire fence along a railroad when frightened off the track by a train whistle does not make the railroad company liable, although the colt got upon the track through defects in the fence, where the railroad company is not required by statute to fence out stock. *St. Louis, I. M. & S. R. Co. v. Ferguson* (Ark.) 110

5. The omission of a required warning signal is evidence of negligence in running a train. *Dixon v. Chicago & A. R. Co.* (Mo.) 792

6. No statute is necessary to make a railroad company liable for failure to run trains with care and caution at a highway crossing; and the duty of the company may require due warning of the approach of the train by whistle or bell or in some other way. *Vandewater v. New York & N. E. R. Co.* (N. Y.) 771

7. The failure of an engineer to give signals required by statute at a highway crossing does not, as matter of law, make the railroad company liable for neglect of duty, where the provisions of the statute impose the duty upon the engineer and make him liable for a misdemeanor if he fails to comply therewith. *Id.*

8. Extraordinary care must be shown by a railroad company in the use of its tracks on one of the principal streets of a city, which is constantly used for street travel and in which there are three tracks, in order to exempt it from liability for injuring travelers on the street. *Kentucky C. R. Co. v. Smith* (Ky.) 63

9. The jury may properly find a railroad company guilty of negligence in making a flying switch across a highway from which the view of its tracks is somewhat obstructed,—especially where the trainmen saw a top carriage approaching the crossing, at which there was no means of warning the traveler, and the 18 L. R. A.

tracks formed an acute angle with the highway so that the train came up behind the carriage. *York v. Maine C. R. Co.* (Me.) 60

10. Negligence of a railroad company in making a flying switch across one of the principal streets without any watchman at the crossing or any lookout on the front of the cars, which are being pushed by an engine 60 feet away, although the bell is ringing, is so gross as to make the railroad company liable for injury to a boy thirteen years old who is struck at the crossing just after he has got out of the way of a train going in the other direction on a parallel track, even if he was guilty of ordinary negligence and was engaged at the time in picking up pebbles from the street and examining them. *Kentucky C. R. Co. v. Smith* (Ky.) 63

11. A traveler on a public road cannot recover against a railroad company for injuries received at a crossing, if his own negligence in any degree contributed to the injury, unless the defendant, having opportunity to avert the danger after becoming aware of it, fails to use ordinary caution to do so. *Butcher v. West Virginia & P. R. Co.* (W. Va.) 519

12. The jury may properly find due care on the part of a traveler on a highway who, upon nearing a railroad crossing, becomes aware of the approach of a train thereto, although after seeing the engine and several cars cross the highway he attempts to cross the tracks without looking out for other cars which may have been cut off from the train for the purpose of making a flying switch. *York v. Maine C. R. Co.* (Me.) 60

13. The failure of a railroad company to give the signals required by law at a crossing must be the proximate cause of an injury in order to make the company liable therefor. *Butcher v. West Virginia & P. R. Co.* (W. Va.) 519

14. The obstruction of a railroad crossing by a freight train for a time longer than the statute allows may be a concurrent cause with smoke, steam, and noise of another train in frightening a team which is waiting to cross, and render the railroad company liable for the damages thus occasioned, where the team would not have been frightened by the other train if it had not been concealed from view by the freight train which obstructed the crossing. *Sellick v. Lake Shore & M. S. R. Co.* (Mich.) 154

NOTES AND BRIEFS.

See also **CONSTITUTIONAL LAW**.

Railroad; negligence of railroad company in respect to flying switches or detached cars moving by their own momentum; contributory negligence. 63

Liability for obstructing highway crossings. 154

Necessity of signals at crossings. 519

Liability for failure to give signals. 771

REAL PROPERTY.

NOTES AND BRIEFS.

Real property; power to cut off contingent interests. 881

When remainder under trust is vested. 881

RECITAL. See COVENANT.

RECORD. See APPEAL AND ERROR, 8.

REHEARING. See APPEAL AND ERROR, 12-15; COURTS, 1.

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SALE. See also ACTION OR SUIT, 8.

1. On the passing of title under a conditional sale by the vendor's election, no lien or incumbrance enures to his benefit for any unpaid portion of the purchase money. *Crompton v. Beach* (Conn.) 187

2. There can be no contract which shall give to one party all the benefits, and to the other, as well as the public, all the burdens of both a conditional sale and a chattel mortgage. *Id.*

2. A contract for the sale of a certain number of "merchantable brick" which are not yet segregated, but which are to be taken from a kiln containing a larger number, some of which are unmerchantable, does not pass the title although the purchase price is paid. *Anderson v. Crisp* (Wash.) 419

NOTES AND BRIEFS.

Sale; when title passes. 419

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TRUSTS, 4.

STATUTE OF FRAUDS. See BILLS AND NOTES, 6; CONTRACTS, NOTES AND BRIEFS.

STATUTES. See also COURTS, 6; MANDAMUS, 2.

1. Constitutional requirements as to a vote on the "final passage" of a bill apply to amendments concurred in, after the bill had passed both Houses, by the House in which the bill was originally passed. *Norman v. Kentucky Bd. of Managers of World's Col. Expo.* (Ky.) 556

2. The title "An Act in Relation to the Formation of Co-operative Associations" sufficient.

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ciently expresses the purpose of a statute to authorize corporations of "trade, or of carrying on any lawful mechanical, manufacturing, or agricultural business." *Finnegan v. Knights of Labor Bldg. Assn.* (Minn.) 778

8. Courts will look to all parts of a statute to determine the legislative purpose and intent. *Cleveland, O. C. & St. L. R. Co. v. Backus* (Ind.) 729

4. A statute which will admit of two interpretations, one valid and the other invalid, will receive the interpretation sustaining its validity. *Id.*

5. An entire statute must be construed together and effect given to every part of it, if this can be done without manifestly violating the intent of the Legislature. *Id.*

6. The rule that penal statutes are to receive a strict construction is not violated by taking the common-sense view of the statute as a whole, and giving effect to the object of the Legislature if a reasonable construction of the words permits it. *State v. Indiana & L. S. R. Co.* (Ind.) 503

7. The amendment of a statute "so as to read as follows" does not operate as a repeal of provisions which are not retained in the same precise words, if they are substantially re-enacted in equivalent words. *Es Prime's Estate* (N. Y.) 718

STOCK AND PRODUCE EXCHANGE.

See also ASSOCIATIONS.

1. The fact that a livestock market owned by a private corporation is the largest in the world does not make the business therein of an incorporated stock exchange which has no corporate relation with the market company a public business, such that the exchange can be compelled to deal with all persons at that market without discrimination. *American Livestock Commission Co. v. Chicago Livestock Exch.* (Ill.) 190

2. The transfer to a corporation by its former manager, of a certificate of membership in an incorporated exchange which he held merely as its representative, and the request of the corporation that a certificate be issued to its present manager, do not give the corporation or its new manager any rights as a member of such exchange, where the rules of the latter require a formal application for membership, with payment of an initiation fee and an approval of the new member by the board of directors. *Id.*

NOTES AND BRIEFS.

Stock exchange; rights as to rejection of members. 194

STREET RAILWAYS. See CARRIERS, 6-9; EVIDENCE, 87.

SUNDAY.

Selling Sunday newspapers is not a work of necessity or charity within a proviso excepting such works from the operation of a statute imposing a penalty for doing and performing worldly employment on Sunday. *Com. v. Matthews* (Pa.) 761

NOTES AND BRIEFS.

Sunday; what are works of necessity. 76.

SUPERIOR EMPLOYEES.

NOTES AND BRIEFS. 827

TAXES. See also ASSIGNMENT; CONSTITUTIONAL LAW, 11; COURTS, 4; MORTGAGE, 1

1. "The principal office or place of business" for the purpose of taxation under the Wisconsin statutes, of a corporation owning and employing a large number of vessels, is at the office of a firm of agents one of whom is the president and the other the secretary of the company, where all the business of the company, except the annual and special meetings of stockholders for the election of directors and the annual meeting of the directors to elect officers, is conducted by such agents, although such elections are held in another place which is designated as its principal office in its articles of association by an unauthorized provision, as the statute only required them to state "the name and location" of such corporation. *Milwaukee Steamship Co. v. Milwaukee* (Wis.) 858

2. Interstate commerce is not taxed by a state tax on the track of a railroad company within the state and a proportionate part of its rolling-stock. *Cleveland, C. C. & St. L. R. Co. v. Backus* (Ind.) 729

3. A constitutional provision for uniform and equal taxation is complied with in respect to railroad property, when the same basis of assessment is fixed for all such property, and the same rate fixed for all property in any district subject to taxation. *Id.*

4. Providing for the assessment of railroad property by a state board, while other property is assessed by local boards, does not violate a constitutional provision giving the Legislature power to "prescribe such regulations as shall secure a just valuation for taxation." *Id.*

5. The Indiana state board of tax commissioners for the assessment of railroad property has the same power in relation to the property and assessment over which it has jurisdiction that is possessed by county boards as to hearing grievances and making corrections. *Id.*

6. Sufficient notice of the assessment of railroad property is given by the law regulating the assessment, where the statute itself fixes the time of the meeting for grievances and corrections, and also requires each company to furnish a schedule of its property for use in the assessment. *Id.*

7. The costs of the construction of a railroad and the equipment thereof, the market value of its stocks and bonds, and its gross and net earnings, with all other matters appertaining thereto that will assist in arriving at a true cash value of the property, are proper for consideration in determining the value of the railroad property for taxation. *Id.*

8. A statute providing that the rolling-stock of a railroad company shall be listed and taxed in the several counties, etc., in the proportion that the main track in such county bears to the total length of the main track, does not

impose double taxation on the ground that values of rolling-stock taxable in other states are imported into the state for the purpose of taxation. *Id.*

9. The validity of a tax upon a mortgage interest in land cannot be questioned by the mortgagee on the ground that the description in the assessment varies from that in the mortgage, where the land has been divided into lots and blocks and the assessment description complies substantially with the statutory requirements as to the assessment of a mortgage interest in such property, and is sufficiently particular and certain to afford the mortgagee the means of identification without being misled, although the mortgage describes the property with reference to the government survey. *San Gabriel Valley Land & W. Co. v. Witmer Bros. Co.* (Cal.) 465

10. Mere assignment of a mortgage before the levy of the tax upon the mortgage interest will not discharge the obligation of the assignor to pay the tax, if the assignment was made after the date which the statute fixes for its assessment. *Id.*

11. The exemption from taxation of educational institutions "and the grounds attached . . . necessary for their proper occupancy, use, and enjoyment, and not leased or otherwise used with a view to profit," extends to houses on college grounds used as residences for professors without charge for rent, and which have never been leased or used for profit, but does not extend to unimproved and unused land partly swampy and partly covered with timber, constituting a part of the college tract of 40 acres, although at some indefinite future time it may become necessary and be used as a place of recreation, and such use is contemplated. *Ramsey County v. Macalaster College* (Minn.) 278

Collateral inheritance tax.

12. A statute conferring upon a corporation a limited privilege of taking and holding property in the state does not relieve it from a legacy duty. *Re Prime's Estate* (N. Y.) 718

13. The exemption of "any religious, educational . . . or charitable corporation, or corporation organized for . . . other than business purposes," from the collateral inheritance tax by N. Y. Laws 1890, chap. 553, extends only to domestic corporations. *Id.*

14. A tax on the right of succession under a will or devolution in case of intestacy is imposed by the New York Collateral Inheritance Tax Law of 1887, chap. 718, amending the Act of 1885, chap. 493, although the language of the statute is "all property which shall pass, etc., shall be and is subject to a tax." *Re Swift's Estate* (N. Y.) 709

15. Personal property of a resident decedent, wheresoever situated, whether within or without the state, is subject to the New York Collateral Inheritance Laws. *Id.*

16. Real estate situated out of the state, owned by a decedent residing in the state at the time of his death, is not subject to the Collateral Inheritance Tax Laws of New York even after it has been converted into money which is in the hands of the executors. *Id.*

17. The residuary estate is not subject to any

deduction for the purpose of determining the collateral inheritance tax payable thereon, because of a provision of the will directing payment of the tax on the specific legacies as an expense of administration. *Re Swift's Estate* (N. Y.) 709

NOTES AND BRIEFS.

Taxes; place of taxation of corporation. 858
Validity of, on mortgages. 465
On collateral inheritances. 709, 718

TENDER.

1. A tender by a debtor to a creditor who in good faith asserts that the amount tendered is insufficient is not good if coupled with conditions the acceptance of which will involve an admission that no more is due. *Moore v. Norman* (Minn.) 359

2. A demand for the surrender of notes will prevent a tender from being effectual so as to discharge a chattel mortgage securing the notes, where the creditor in good faith claims that a larger sum is due. *Id.*

TIME.

The day of service may be excluded and the return day included in computing the six days before the time of appearance required by How. (Mich.) Stat. § 6827, for the service of a summons. *People, Chaddock, v. Barry* (Mich.) 837

TRIAL. See also EQUITY, 2.

1. There is no right of trial by jury in equity proceedings. *State, Rhodes, v. Saunders* (N. H.) 646

2. It is for the jury to determine whether, from the notoriety attending the construction of a sewer, a gas company having a proper system of inspection would or ought to have had knowledge of a leak in its pipe caused by construction of the sewer, sooner than the leak was in fact discovered. *Koelsch v. Philadelphia Co.* (Pa.) 759

3. The jury must determine whether the plumber or the city was responsible for the acts of laborers in leaving unguarded an excavation made in the street to connect private property with the city water main, where a city ordinance prohibited any person without the consent of the water board from tapping or making any connection with a distributing pipe, which had been interpreted to include the making of the excavation by the board, whose custom had been to furnish men for that purpose, and the plumber employed by the landowner had in accordance with such custom applied for and received the men, who were to be paid by the city, which was to be reimbursed by the plumber. *Wilson v. Troy* (N. Y.) 449

4. What constitutes a passenger depot or a station at a particular place is a question of fact. *State v. Indiana & I. S. R. Co.* (Ind.) 502

5. Whether a freight train obstructing a highway crossing did or did not give to the noise, steam, and smoke of another passing train a character which they would not pos-

sess in the absence of the obstruction, so as to make a concurrent cause of the frightening of a team, is a question for the jury where there is evidence that the team was accustomed to trains. *Sellick v. Lake Shore & M. S. R. Co.* (Mich.) 154

6. Whether the agreement of a shipper to furnish a railroad company certain goods at a given price relieves a discrimination of rates in his favor of its objectionable features is a question of fact for the jury. *Louisville, E. & St. L. Consol. R. Co. v. Wilson* (Ind.) 105

7. Whether lumbermen's tools, second-hand furniture, and camp equipment, are included within a policy of insurance on a stock of dry goods, groceries, hardware, queen's ware, hats, caps, boots, shoes, and such other articles not more hazardous as are usually kept for sale in country stores,—is a question for the jury where the evidence is conflicting as to the character of the property. *Steels v. German Ins. Co.* (Mich.) 85

8. It is a question of fact for the jury whether a carrier exercised reasonable care for a passenger who was in a feeble mental and physical condition. *Croom v. Chicago, M. & St. P. R. Co.* (Minn.) 603

9. Questions of negligent direction by the foreman to a member of a section gang, as to removing a hand car from the track in front of an approaching train, and of the latter's contributory negligence, are for the jury. *Schroeder v. Chicago & A. R. Co.* (Mo.) 827

10. The court is authorized to pronounce certain conduct negligent, only when no other construction may reasonably be placed upon it in the circumstances. *Dixon v. Chicago & A. R. Co.* (Mo.) 793

11. The defense in an action of tort, that the act was done by way of a joke, makes a question for the jury whether or not the parties had been perpetrating practical jokes upon each other in such a way that the defendant had a right to believe that the plaintiff would accept his act as a joke. *Wartman v. Swindell* (N. J. Err. & App.) 44

12. The court should define "temporary insanity," where it has charged under the Texas statute that the guilt of a person who has committed a homicide is to be tried without reference to his drunkenness, unless that produced temporary insanity. *Evers v. State* (Tex. Crim. App.) 421

13. The court cannot properly charge the jury that the statements of a witness as to verbal admissions of another should be received with caution, under a constitutional provision that judges "shall not charge juries with respect to matters of fact." *Kaufman v. Maier* (Cal.) 124

14. The judge presiding at the trial may properly suggest to the jury possible methods of harmonizing seemingly contradictory evidence, although counsel do not allude to such explanation and it might not, without such suggestion, have occurred to them. *York v. Maine C. R. Co.* (Me.) 60

NOTES AND BRIEFS.

Trial; right to jury in equity case.

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TROVER. See ACTION OR SUIT, 1; MORTGAGE, 2; DAMAGES, 4.

TRUSTS. See also ACTION OR SUIT, 5; COMMERCE, 5; CONFLICT OF LAWS, 2; COURTS, 2; MUNICIPAL CORPORATIONS, 1.

1. Express trusts of realty which are valid in their creation are made indestructible by the New York Statute of Uses and Trusts, §§ 68, 65 (4 R. S. 8th ed. p. 2489), which declare that the beneficiary cannot assign or in any manner dispose of his interest, and that every sale, conveyance, or other act of the trustee in contravention of his trust shall be absolutely void. *Cuthbert v. Chauvet* (N. Y.) 745

2. A trustee's offer of judgment or failure to answer in a suit attacking the trust is within the prohibition of a statute declaring that any act in contravention of the trust shall be void. *Id.*

3. A woman who purchases land with money fraudulently obtained from a man by a promise to marry him and to hold such land in lieu of her right to dower under the marriage may be held to be a trustee on her refusal to marry him, and the land charged with a lien for such money. *Edwards v. Culbertson* (N. C.) 204

4. Creditors cannot reach the interest of a debtor under a will creating a trust for his support during life, providing that the trustee shall make quarterly payments to him until his death,—at least where it does not appear that there is any accumulation of the income over and above the sum needed for his support. *Leigh v. Harrison* (Miss.) 49

NOTES AND BRIEFS.

Trusts; power of court to dissolve. 745

UNBORN CHILDREN. See ACTION OR SUIT, 2.

USURY.

1. It is not usury to include in a promissory note a stipulation for 10 per cent as an attorneys' fee if the note is not paid when due and suit is brought thereon. *Dorsey v. Wolf* (Ill.) 428

2. The contract of a member borrowing money from a building and loan association is not within the usury laws, where the rate of interest to be paid cannot be known until the maturity of the shares, and whether it will be greater or less than the legal rate is wholly contingent on the prosperity of the association. *Reeve v. Ladies Bldg. Assn.* (Ark.) 129

NOTES AND BRIEFS.

Usury; in loans by building associations; contract held usurious; effect of voluntary payment; contract not usurious; constitutionality of statutes; necessity of strict conformity with statute. 129

VENDOR AND PURCHASER. See also BILLS AND NOTES, 6.

1. A vendee who, after discovering a defect in the title, makes an oral agreement by 18 L. R. A.

which he remains in possession until the record title can be perfected in his vendor, and never offers to surrender the premises, thereby waives a provision requiring the execution of a deed within a specified time. *Kent v. St. Michael's Church* (N. Y.) 881

2. A purchaser of land who does not offer to perform the contract on his part until several days after the time set for performance cannot enforce a forfeiture for nonperformance on the part of the vendor. *Kraak v. Fries* (D. C.) 143

VERIFICATION. See PLEADING, 2.

VIEW. See APPEAL AND ERROR, 11.

VILLAGES. See MUNICIPAL CORPORATIONS, 8.

VOTERS AND ELECTIONS.

Ballots are not so marked as to be illegal under a statute prohibiting any "ornaments, designation, mutilation, symbol, or mark of any kind whatsoever," except the names of the candidates and of the offices to be filled, by the fact that on the face of the tickets between the words "For Electors of President and Vice-President," at the head of the ticket, and the names of the electors, are printed the words "National Republican Ticket," or on the face of other tickets, at about the middle, between the names of certain candidates, are the words "Free Suffrage Ticket." *State, Law, v. Sazon* (Fla.) 721

WAGERS. See BETTING, NOTES AND BRIEFS.

WAGES. See LEVY, NOTES AND BRIEFS.

WATERS. See also BOUNDARIES; CONFLICT OF LAWS, 8; ICE; WHARVES, 2, 8.

1. No prescriptive rights can be acquired by an individual in public waters. *Concord Mfg. Co. v. Robertson* (N. H.) 679

2. There may be a severance of an abutter's private right of use and occupation in a public body of water, from his adjoining upland. *Id.*

3. An abutter has a common-law right to improve and occupy tide land above and below low-water mark, where it ought to be improved and occupied. *Id.*
See also WHARVES.

4. An abutter's use of the bed of a public water is governed by the rule of reasonableness applied to the facts of his case. *Id.*

5. The manner in which, and the extent to which, the bed of a public body of water can be reasonably appropriated to the exclusive use of a littoral proprietor, is in New Hampshire determinable on a bill in equity. *Id.*

6. Explicit legislative authority is necessary to the alienation to an individual of the public rights in the beds of large ponds. *Id.*

7. The waters of a great pond in New Hampshire cannot be lawfully diverted to the damage of one owning land on a stream flowing from the pond. *Id.*

8. The title to land under the waters of small inland lakes and ponds is presumed to belong to the proprietors of adjoining uplands. *Gouverneur v. National Ice Co.* (N. Y.) 695

9. So long as inland lakes continue capable of being put to any beneficial public use they are public waters; and the definition or test of navigability must be sufficiently broad and liberal to include all public uses, including boating for pleasure. *Lamprey v. State* (Minn.) 670

10. If a lake is navigable in fact its waters and bed belong to the state in its sovereign capacity, and a riparian patentee takes the fee only to the water line, but with all the rights incident to riparian ownership on navigable waters, including accretions or relictions. *Id.*

11. A patent by the United States for land forming the bed, or former bed, of a meandered lake, after all the lands bordering thereon have been disposed of by patent without reservation or restriction, is void and inoperative, as there is nothing to convey. *Id.*

NOTES AND BRIEFS.

Waters; riparian rights. 670, 679.

Ownership of bed of. 670, 695

Ownership of bed of lakes and ponds; small lakes and ponds; derelict and accretions; artificial ponds. 695

WHARVES.

1. One erecting a structure below the edge of a public body of water without having the question of its reasonableness judicially determined assumes the risk of its being found to be unreasonable and abated as a nuisance. *Concord Mfg. Co. v. Robertson* (N. H.) 679

2. Wharves or channels extending below low-water mark may be made by the proprietor of land adjoining navigable water, to connect himself with such water, so long as he does nothing to interfere with the free navigation of the waters. *Prior v. Swartz* (Conn.) 668

3. The designation of land under navigable water for the planting of and cultivation of oysters, under Conn. Gen. Stat. §§ 2346, 2349, does not destroy the right of an adjoining owner to build wharves or dig channels below low-water mark in front of his land, for the purpose of connecting himself with navigable water. *Id.*

WILLS. See also TAXES, 17.

1. The recognition of holographic wills by Wyo. Act 1891, providing that they may be
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proved in the same manner as other private writings are proved, does not dispense with the necessity of two witnesses in order to make them valid, as in the case of other wills under Wyo. Rev. Stat. § 2237. *Neer v. Conshick* (Wyo.) 598

2. Real estate is converted into personality by a provision of a will that the executors shall, as soon as may be conveniently done after his death, sell and convert into money all the real estate. *Hope v. Brewer* (N. Y.) 458

NOTES AND BRIEFS.

Will; holographic, when valid. 598

WITNESSES. See also APPEAL AND ERROR, 8.

1. One to whom a check is given merely for the purpose of making a gift *causa mortis* to a third person to whom he gives a due-bill of the amount is not incompetent, by reason of interest, to testify, in a controversy between the donee and the donor's administrator, as to the validity of the gift. *Re Taylor's Estate* (Pa.) 855

2. A witness who has been impeached by statements out of court is not incompetent to prove his own corroborating statements. *Hobbs v. State* (Ind.) 774

3. Statements by a witness out of court are admissible to corroborate him, where he has been impeached by proof of other statements out of court. *Id.*

WORLD'S FAIR. See APPROPRIATIONS, 8.

WRIT. See CORAM NOBIS, 1, NOTES AND BRIEFS; HOLIDAY; WRIT AND PROCESS.

WRIT AND PROCESS.

1. In an action on a contract against a foreign corporation, service, to be good, must be made on an agent conducting the business out of which the contract arose. *Winney v. Sandwich Mfg. Co.* (Iowa) 524

2. A summons mailed to the defendant by another person on whom it is served by mistake is not sufficient to give jurisdiction under a statute requiring personal service, but declaring in terms that service by mail of notices and other papers in actions shall not apply to the service of a summons. *St. Paul Sav. Bank v. Authier* (Minn.) 496

L. R. A. CASES AS AUTHORITIES.

CASES IN 18 L. R. A.

18 L. R. A. 33, FULLERTON v. HILL, 48 Kan. 558, 29 Pac. 583.

Rights and liabilities of indorsers.

Cited in footnotes to Sheahan v. Davis, 28 L. R. A. 476, which upholds right of indorser for third person's benefit to recover from maker; Ewan v. Brooks-Waterfield Co. 35 L. R. A. 786, which holds maker of note payable to own order, indorsing same, liable as maker only.

Parol evidence as to liability on negotiable instruments.

Approved in Kline v. Bank of Tescott, 50 Kan. 97, 18 L. R. A. 535, 34 Am. St. Rep. 107, 31 Pac. 688; Benham v. Smith, 53 Kan. 498, 36 Pac. 997; Atkinson v. Bennet, 103 Ga. 511, 30 S. E. 599; Janes v. Citizens Bank, 9 Okla. 562, 60 Pac. 290,—holding parol evidence admissible to show liability of indorser on promissory note.

Cited in footnotes to Gregg v. Groesbeck, 32 L. R. A. 266, which holds parol evidence inadmissible that indorser had given instruction to destroy indorsement before note transferred; Peterson v. Russell, 29 L. R. A. 612, which holds oral evidence admissible to explain writing of names on back of note to which one is not a party; United States Nat. Bank v. Geer, 41 L. R. A. 439, which holds inadmissible, parol evidence to vary indorsement on certificate of deposit for payment of certain person's order for indorser's account.

18 L. R. A. 37, ULRICH v. ULRICH, 136 N. Y. 120, 32 N. E. 606.

Recovery for services rendered parent or near relative.

Approved in *Re Stevenson*, 86 Hun, 327, 33 N. Y. Supp. 493, holding no legal presumption to exist against agreement to pay for services rendered by child to parent; Gorrell v. Taylor, 107 Tenn. 570, 64 S. W. 888, holding child cannot maintain action to recover compensation for services to parent in absence of contract; Marion v. Farnan, 68 Hun, 384, 22 N. Y. Supp. 946, holding daughter may recover for services rendered mother, if compensation was expected and promised.

Cited in footnote to Plate v. Durst, 32 L. R. A. 404, which sustains right of minor living with near relative to recover actual value of services rendered on promise of compensation.

18 L. R. A. 39, *MANSFIELD v. PLACE*, 93 Mich. 450, 53 N. W. 617.

Construction of deed.

Cited in footnote to *Davenport v. Gwilliams*, 22 L. R. A. 244, holding general language of deed not limited by recital of intent to pass wife's interest.

Acquirement of right to harvest ice.

Approved in *Williams v. Barber*, 104 Mich. 33, 62 N. W. 155, holding right to harvest ice acquired by prescription, as effective as if acquired by deed.

Cited in footnotes to *Becker v. Hall*, 56 L. R. A. 573, which holds marking, staking, or cleaning ice not thick enough for harvesting, insufficient appropriation; *Marsh v. McNider*, 20 L. R. A. 334, which authorizes sale by tenant of right to cut ice on running stream.

18 L. R. A. 44, *WARTMAN v. SWINDELL*, 54 N. J. L. 589, 25 Atl. 356.

Liability for injury from act committed as a joke.

Cited in footnote to *State v. Monroe*, 43 L. R. A. 861, which holds druggist dropping croton oil on candy for customer for joke on third person liable for assault.

18 L. R. A. 45, *KILVINGTON v. SUPERIOR*, 83 Wis. 222, 53 N. W. 487.

Power of municipality.

Approved in *Smiley v. MacDonald*, 42 Neb. 14, 27 L. R. A. 545, 47 Am. St. Rep. 684, 60 N. W. 355, holding contract for collection and disposition of foul refuse of municipality valid exercise of police power; *State ex rel. Wisconsin Teleph. Co. v. Sheboygan*, 111 Wis. 38, 86 N. W. 657, holding municipality may exercise such implied powers as are essentially necessary to render corporate existence effective; *California Reduction Co. v. Sanitary Reduction Works*, 61 C. C. A. 98, 126 Fed. 36, upholding right of city to grant exclusive franchise for removal of garbage for fifty years.

Competitive bidding for public work.

Approved in *Holmes v. Detroit*, 120 Mich. 232, 45 L. R. A. 124, footnote p. 121, 77 Am. St. Rep. 587, 79 N. W. 200, holding competitive bidding not precluded by municipality specifying patented material for street pavement; *State ex rel. Atty. Gen. v. Shawnee County*, 57 Kan. 274, 45 Pac. 616, holding contract for erection of patented bridge will not be restrained by injunction, where there is opportunity for competitive bidding; *Hurley Water Co. v. Vaughn*, 115 Wis. 477, 91 N. W. 971, holding statute relating to letting of contracts to lowest bidder inapplicable to contract for public water supply.

Cited in footnotes to *Diamond v. Mankato*, 61 L. R. A. 448, which holds street improvement contract avoided by limiting asphaltum to two particular kinds and inserting other conditions tending to restrict bidding; *Fishburn v. Chicago*, 39 L. R. A. 482, which holds void, as creating monopoly, ordinance for paving with asphaltum from lake owned by private corporation.

Cited in note (26 L. R. A. 711) on right of lowest bidder on public contract.

Plans and specifications for public work.

Distinguished in *Ricketson v. Milwaukee*, 105 Wis. 602, 47 L. R. A. 690, footnote p. 685, 81 N. W. 864, which holds void, contract for garbage crematory, let without filing plan and on indefinite specifications, and referring particularly to the annotation in 18 L. R. A. 45.

Contracts for public work or service.

Distinguished in *Erskine v. Steele County*, 4 N. D. 344, 28 L. R. A. 647, 60 N. W. 1050, holding warrant issued by county in payment of services rendered under *ultra vires* contract void.

18 L. R. A. 49, *LEIGH v. HARRISON*, 69 Miss. 923, 11 So. 604.

Subjecting trust estate to claims of creditors.

Cited in footnotes to *Re Qua v. Graham*, 52 L. R. A. 641, which holds annuity in wife's will in lieu of other interest, accepted by husband, not trust beyond reach of creditors; *Hutchinson v. Maxwell*, 57 L. R. A. 384, which denies power to create equitable life estate free from debts of beneficiary; *Murphy v. Delano*, 55 L. R. A. 727, which holds income of spendthrift trust not within reach of creditors by void agreement of trustees to pay certain portion of income absolutely to beneficiary.

Distinguished in *Stern v. Hampton*, 73 Miss. 565, 19 So. 300, holding, where whole equitable interest is vested in widow and children, without restriction, latter may convey to former, and mortgage executed by her upon the property is valid as against her creditors.

18 L. R. A. 53, *OLMSTEAD v. BACH* (Md.) 25 Atl. 343.

Judgment as bar.

Reversed on rehearing in 78 Md. 132, 22 L. R. A. 74, 44 Am. St. Rep. 273, 27 Atl. 501, holding satisfied judgment for one week's wages of discharged employee bar to subsequent action.

18 L. R. A. 55, *NICHOLS v. SOUTHERN P. CO.* 23 Or. 123, 37 Am. St. Rep. 664, 31 Pac. 296.

Assignability of railroad coupon ticket.

Approved in *The Willamette Valley*, 71 Fed. 713, holding purchaser from ticket broker of return part of round-trip ticket containing no provision against transferability entitled to use same.

Ticket as prima facie evidence of right to ride.

Approved in *International & G. N. R. Co. v. Ing*, 29 Tex. Civ. App. 399, 68 S. W. 722, holding excursion ticket prima facie evidence of possessor's right to ride.

Ticket limited to specified "branch."

Cited in footnote to *Pennsylvania R. Co. v. Parry*, 22 L. R. A. 251, which holds round-trip ticket by specified "branch" good on main line only on trains connecting with branch trains.

Ticket brokerage.

Cited in note (24 L. R. A. 152) on statutes against ticket brokerage or "scalping."

Right of stop-over on coupon ticket.

Cited in note (28 L. R. A. 774) on right of passenger to stop over.

18 L. R. A. 60, *YORK v. MAINE C. R. CO.* 84 Me. 117, 24 Atl. 790.

Negligence in making flying switch.

Cited in *Smith v. Maine C. R. Co.* 87 Me. 349, 32 Atl. 967, and *Baker v. Kansa*;

City, Ft. S. & M. R. Co. 147 Mo. 159, 48 S. W. 838, holding railroad company guilty of implied negligence in making "flying switch" at crossing without using proper precautions to protect travelers from injury.

Cited in note (18 L. R. A. 64) on negligence of railroad company as to flying switches or detached cars moving by their own momentum.

Contributory negligence at crossing.

Approved in Day v. Boston & M. R. Co. 96 Me. 217, 90 Am. St. Rep. 335, 52 Atl. 771, setting aside verdict against railroad company where evidence did not show that one killed at crossing looked or listened.

Distinguished in Giberson v. Bangor & A. R. Co. 89 Me. 344, 36 Atl. 400, holding person failing to look out for approach of cars at village railroad crossing guilty of contributory negligence.

Duty of trial judge.

Cited in Hamlin v. Treat, 87 Me. 316, 32 Atl. 909, and Jameson v. Weld, 93 Me. 358, 45 Atl. 299, holding presiding justice may suggest to jury the real issues, and harmonize contradictory arguments of counsel.

Setting aside verdict.

Approved in Pollard v. Maine C. R. Co. 87 Me. 62, 32 Atl. 735, and Griswold v. Lambert, 89 Me. 536, 36 Atl. 1046, holding court will not set aside verdict unless so clearly wrong that impartial men would not have rendered it, except by mistake.

Province of jury.

Followed in Goodwin v. Boston & M. R. Co. 84 Me. 210, 24 Atl. 816, holding determination of facts and circumstances attending injury, and whether acts or omissions of parties were prudent or negligent, questions for jury.

Waiver of objections to charge to jury.

Approved in State v. Richards, 85 Me. 257, 27 Atl. 122, holding failure of counsel to make proper and timely objections to erroneous charge to jury by court deemed a waiver.

18 L. R. A. 63, KENTUCKY C. R. CO. v. SMITH, 93 Ky. 449, 20 S. W. 392.

Care in use of tracks.

Cited in Florida C. & P. R. Co. v. Foxworth, 41 Fla. 61, 79 Am. St. Rep. 149, 25 So. 338, holding it not erroneous to charge jury that failure of railway company to provide flagman at highway crossing in village while switching cars was gross negligence.

Cited in footnote to West Virginia C. & P. R. Co. v. State, 61 L. R. A. 574, which holds company liable for injury to bystander by car broken loose from train and thrown from track by collision with other car at foot of decline.

Flying switches.

Cited in Bradley v. Ohio River & C. R. Co. 126 N. C. 742, 36 S. E. 181, holding railway company guilty of negligence *per se* in shunting or "kicking" cars across highway in populous community, without proper precaution for safety of travelers.

Cited in footnotes to Roth v. Union Depot Co. 31 L. R. A. 855, which holds railroad liable for kicking car around curve down grade at place where track used as footpath; Tobey v. Burlington, C. R. & N. R. Co. 33 L. R. A. 496, which

holds it negligent to kick cars at speed of more than 6 miles an hour, in violation of ordinance; *Schaible v. Lake Shore & M. S. R. Co.* 21 L. R. A. 600, which holds kicking cars without attendant in railroad yard not negligence *per se*; *York v. Maine C. R. Co.* 18 L. R. A. 60, which authorizes finding of negligence in making flying switch across highway; *Pomponio v. New York, N. H. & H. R. Co.* 32 L. R. A. 530, which requires reasonable care in making flying switch at crossing kept planked by company for employees.

Cited in note (25 L. R. A. 292) on duty to maintain lookout on railroad train.

Contributory negligence.

Cited in *Schleiger v. Northern Terminal Co.* 43 Or. 15, 72 Pac. 324, holding it question for jury whether child exercises care required of one of his age and development; *Monroe v. Lake Shore & M. S. R. Co.* 129 Mich. 312, 88 N. W. 888, holding conflicting testimony as to care taken by one injured by train making flying switch at crossing properly submitted to jury.

View by jury.

Cited in note (42 L. R. A. 375) on view by jury.

Supplemental ground for motion for new trial.

Cited in *Wooldridge v. White*, 105 Ky. 252, 48 S. W. 1081, holding additional grounds for new trial may be offered after expiration of three days, if of such nature that they ought to be considered before original motion is disposed of.

Setting aside excessive verdict.

Cited in *Louisville & N. R. Co. v. Long*, 94 Ky. 420, 22 S. W. 747, holding verdict for \$26,000 in personal injury case excessive.

18 L. R. A. 68, *VENABLE v. WABASH WESTERN R. CO.* 112 Mo. 103, 20 S. W. 493.

Inchoate right of dower.

Approved in *Chouteau v. Missouri P. R. Co.* 122 Mo. 384, 22 S. W. 458, holding voluntary conveyance of land by husband to railroad corporation destroyed wife's inchoate right of dower; *Baker v. Atchison, T. & S. F. R. Co.* 122 Mo. 398, 30 S. W. 301 (distinguished in dissenting opinion), majority holding wife's inchoate right of dower completely cut off as to land conveyed by husband to railroad company; *Bartlett v. Ball*, 142 Mo. 36, 34 S. W. 583, holding inchoate right of dower subject to legislative changes until vested on death of husband; *Bartlett v. Tinsley*, 175 Mo. 332, 75 S. W. 143, holding legislature may modify or abolish inchoate right of dower.

Cited in footnote to *Flynn v. Flynn*, 42 L. R. A. 98, which denies wife's right to any part of proceeds of land taken in eminent domain, because of inchoate right of dower.

Cited in note (18 L. R. A. 79) on power of husband or his creditors to defeat wife's right of dower.

Public use.

Cited in *Southern P. Co. v. Hyatt*, 132 Cal. 243, 54 L. R. A. 524, 64 Pac. 272, holding land conveyed to railroad company for right of way constitutes dedication to public use; *State ex rel. National Subway Co. v. St. Louis*, 145 Mo. 588, 42 L. R. A. 126, 46 S. W. 981 (concurring opinion), holding statutory authorization of telegraph and telephone companies to obtain right of way and condemn

lands recognizes such use as a public one; *State ex rel. Allison v. Hannibal & R. County Gravel Road Co.* 138 Mo. 346, 36 L. R. A. 460, 39 S. W. 910, holding expiration of turnpike company's charter in no wise affects public use of highway in which said company had only easement.

Consensus of opinion and practice of legal profession.

Approved in *Watson v. Alderson*, 146 Mo. 351, 69 Am. St. Rep. 615, 48 S. W. 478, holding general consensus of opinion of the bar that creditors of an heir have no right to contest validity of will is persuasive evidence of right; *Matz v. Chicago & A. R. Co.* 85 Fed. 189, holding uniform contemporaneous practice and opinion of the bar with reference to particular statute should have weight in determining its construction; *Verdin v. St. Louis*, 131 Mo. 125, 33 S. W. 480, holding municipal ordinance sanctioned by contemporaneous and long-continued practice will not be declared invalid except for most incontrovertible reasons; *Fears v. Riley*, 148 Mo. 64, 49 S. W. 836, holding common consent of legal profession of much persuasive force in determining meaning of statute providing for change of venue in case of joint defendants; *Steinhauser v. Spraul*, 127 Mo. 561, 27 L. R. A. 446, 28 S. W. 620, holding failure after diligent search to find rule of law fixing liability of wife for injuries suffered by domestic servant is cogent evidence of nonexistence of rule; *Barber Asphalt Paving Co. v. Meservey*, 103 Mo. App. 194, 77 S. W. 137, holding opinion of legal profession as to construction of charter provision persuasive evidence of its true meaning.

18 L. R. A. 75, *FLOWERS v. FLOWERS*, 89 Ga. 632, 15 S. E. 834.

Competency of witness.

Cited on subsequent appeal in 92 Ga. 690, 18 S. E. 1006, holding one who defends application for dower individually, and not as executor, may testify as to transactions with deceased.

Right to, and defeat of, dower.

Approved in *Redmond v. Redmond*, 112 Ky. 766, 66 S. W. 745, holding widow entitled to dower in land conveyed to son at husband's request to defeat dower; *Newton v. Newton*, 162 Mo. 185, 61 S. W. 881, holding equity will enforce right to dower as against conveyance made by husband with intent to defraud wife of her marital rights.

Cited in footnotes to *Phelps v. Phelps*, 25 L. R. A. 625, which denies dower rights in land conveyed to third person on payment by husband; *Venable v. Wabash Western R. Co.* 18 L. R. A. 68, which holds inchoate right of dower destroyed by husband's voluntary conveyance for railroad right of way; *Stroup v. Stroup*, 27 L. R. A. 523, which holds dower right attaches to land paid for by husband, but conveyed by invalid trust to another for his benefit; *Butler v. Fitzgerald*, 27 L. R. A. 252, which holds dower interest in land alienated by husband reached by taking value at time of assigning dower, less value of improvements by alienees; *Haggerty v. Wagner*, 39 L. R. A. 384, which holds wife's inchoate interest in husband's interest as cotenant of land subject to defeat by partition; *Dayton v. Corser*, 18 L. R. A. 80, which holds inchoate dower right not defeated by execution sale.

Cited in note (19 L. R. A. 257) on power of legislatures to change or destroy estates by dower, curtesy, or similar estates.

18 L. R. A. 80, DAYTON v. CORSER, 51 Minn. 406, 53 N. W. 717.

Dower right.

Approved in *Lynde v. Wakefield*, 19 Mont. 29, 47 Pac. 5, and *Butler v. Fitzgerald*, 43 Neb. 200, 27 L. R. A. 254, 47 Am. St. Rep. 741, 61 N. W. 640, holding dower right of surviving husband or wife not defeated by execution sale; *Aretz v. Kloos*, 89 Minn. 438, 95 N. W. 216, holding that wife's interest in husband's land would not pass under execution sale; *Holmes v. Holmes*, 54 Minn. 355, 56 N. W. 46, holding that wife's statutory interest in husband's lands cannot be set off in divorce suit; *Roberts v. Meighen*, 74 Minn. 277, 77 N. W. 139, holding assignee of purchaser at mortgage sale has right to satisfy judgment lien subsisting against estate to preserve dower interest of purchaser's wife; *Williamson v. Selden*, 53 Minn. 77, 54 N. W. 1055, holding that action of insolvency against husband in no wise affects dower interest of wife.

Cited in *Luse v. Reed*, 63 Minn. 7, 65 N. W. 91, refusing to determine whether surviving husband's statutory interest subject to payment of wife's debts.

Cited in note (18 L. R. A. 78) on power of husband or his creditors to defeat wife's right of dower.

Limited in *Johnson v. Minnesota Loan & T. Co.* 75 Minn. 6, 74 Am. St. Rep. 438, 77 N. W. 421, holding surviving husband's statutory interest subject to payment of its just proportion of wife's debts.

Distinguished in *Merrill v. Security Trust Co.* 71 Minn. 65, 70 Am. St. Rep. 312, 73 N. W. 640, holding adjudication and sale of husband's estate in bankruptcy completely defeats inchoate interest of wife in such estate.

18 L. R. A. 82, DAVIS v. LANING, 85 Tex. 39, 34 Am. St. Rep. 784, 19 S. W. 846.

Civil rights of convict.

Approved in *Schmidt v. Northern Life Asso.* 112 Iowa, 44, 51 L. R. A. 143, 84 Am. St. Rep. 323, 83 N. W. 800, holding children of beneficiary, who forfeited her rights to insurance by murdering insured, cannot claim the insurance as her heirs.

Cited in footnotes to *Smith v. Becker*, 53 L. R. A. 141, which holds descent of property not cast on heirs of person by life sentence of latter; *Kenyon v. Saunders*, 26 L. R. A. 232, which upholds convict's right to maintain action to enforce property rights; *Wilson v. King*, 23 L. R. A. 802, which holds maintenance of civil action by person in one state not prevented by his sentence to death in another.

Cited in note (31 L. R. A. 515) on effect on marriage relation of conviction and sentence of either husband or wife.

18 L. R. A. 85, STEELE v. GERMAN INS. CO. 93 Mich. 81, 53 N. W. 514.

Failure to give notice or make proof of loss or injury.

Cited in *Law v. New England Mut. Acci. Asso.* 94 Mich. 268, 53 N. W. 1104; *Allen v. Milwaukee Mechanics' Ins. Co.* 106 Mich. 209, 64 N. W. 15; *Peck v. German F. Ins. Co.* 102 Mich. 53, 60 N. W. 453,—holding failure of insured to furnish proof of loss within time stipulated bars right of action; *Southern F. Ins. Co. v. Knight*, 111 Ga. 625, 52 L. R. A. 71, footnote p. 70, 78 Am. St. Rep. 216, 36 S. E. 821, holding policy not avoided by failure to furnish proofs of loss within time specified; *Mason v. St. Paul F. & M. Ins. Co.* 82 Minn. 339, 83 Am.

St. Rep. 433, 85 N. W. 13, holding that, in absence of provision for forfeiture, failure of insured to render proof of loss within time fixed by policy does not relieve insurer from liability; *Rheims v. Standard F. Ins. Co.* 39 W. Va. 684, 20 S. E. 670; *Continental F. Ins. Co. v. Whitaker* (Tenn.) 64 L. R. A. 456, 79 S. W. 119; *Gerringer v. North Carolina Home Ins. Co.* 133 N. C. 413, 45 S. E. 773,—holding policy not forfeited by failure to make timely proofs of loss.

Cited in footnotes to *Ermentrout v. Girard F. & M. Ins. Co.* 30 L. R. A. 346, which holds policy requiring "immediate notice" of loss forfeited by sixty days' delay in giving notice; *Peabody v. Satterlee*, 52 L. R. A. 956, which requires reception, not mere mailing, of statement as to time and origin of fire within time specified; *Woodmen Acci. Asso. v. Byers*, 55 L. R. A. 291, which holds failure to give notice of injury excused by derangement of insured; *Foster v. Fidelity & C. Co.* 40 L. R. A. 833, which holds twenty-nine days' delay in giving notice of accident fatal under policy requiring immediate notice.

Distinguished in *White v. Home Mut. Ins. Co.* 128 Cal. 134, 60 Pac. 666, holding failure of insured to comply with provision in policy to furnish proof of loss within time stipulated, bar to right of action; *California Sav. Bank v. American Surety Co.* 87 Fed. 121, holding stipulation for giving notice of default on surety bond, material, performance of which is condition precedent to right of recovery.

Failure to serve notice of death.

Cited in *Dezell v. Fidelity & C. Co.* 176 Mo. 281, 75 S. W. 1102, holding policy not forfeited in absence of provision therefor, by failure to give timely notice of death.

Cited in footnote to *Trippe v. Provident Fund Soc.* 22 L. R. A. 432, which holds failure to serve notice of death within time stipulated waived by its retention and request for further information.

Proof of loss as conferring right of action.

Cited in *Northern Assur. Co. v. Hanna*, 60 Neb. 31, 82 N. W. 97, and *Rynalski v. Insurance Co.* 96 Mich. 396, 55 N. W. 981, holding compliance by insured with conditions of policy by offering proof of loss confers right to maintain action on policy.

Effect of agent's knowledge of falsity of application.

Cited in footnotes to *Home Ins. Co. v. Hancock*, 52 L. R. A. 665, which holds statement that life tenant has fee-simple title to insured property not avoid policy where agent knew facts; *Sternaman v. Metropolitan L. Ins. Co.* 57 L. R. A. 319, which denies insurer's right to rely on warranty by applicant that answers properly recorded, where medical examiner knew otherwise.

Binding effect of acts of agent.

Cited in *Continental Ins. Co. v. Chew*, 11 Ind. App. 332, 54 Am. St. Rep. 506, 38 N. E. 417, holding failure on part of insurance agent in filling out application, to record correctly answers of applicant, imputed negligence of company and not misrepresentations of applicant; *Coles v. Jefferson Ins. Co.* 41 W. Va. 267, 23 S. E. 732, and *Improved Match Co. v. Michigan Mut. F. Ins. Co.* 122 Mich. 263, 80 N. W. 1088, holding action of insurance agent in naming condition of policy relative to use of factory at nighttime binding upon company.

— Acts of agents, clerks, or subagents.

Cited in *Pollock v. German F. Ins. Co.* 127 Mich. 472, 86 N. W. 1017, holding

acts of agents or clerks, when done within scope of their general authority, binding upon insurer.

Cited in footnotes to *Goode v. Georgia Home Ins. Co.* 30 L. R. A. 842, which holds insurance company represented by agent's clerk; *Franklin F. Ins. Co. v. Bradford*, 55 L. R. A. 408, which holds company liable on policy delivered without knowledge of duly authorized agent, by his subagent; *Insurance Co. of N. A. v. Thornton*, 55 L. R. A. 547, which holds appointment of subagents within implied authority of insurance agent for territory with radius of 35 miles; *Bradford v. Hanover F. Ins. Co.* 49 L. R. A. 530, which denies insurance agent's liability for loss on forbidden policy on which clerk forged his name.

18 L. R. A. 88, *NORTON v. TAYLOR*, 35 Neb. 466, 37 Am. St. Rep. 441, 53 N. W. 481.

Approved on rehearing in 40 Neb. 394, 58 N. W. 953.

Caveat emptor as applicable to judicial sales.

Approved in *Peterborough Sav. Bank v. Pierce*, 54 Neb. 719, 75 N. W. 20, and *Butler v. Fitzgerald*, 43 Neb. 202, 27 L. R. A. 255, 47 Am. St. Rep. 741, 61 N. W. 640, holding purchaser at judicial sale takes property subject to rule of *caveat emptor*.

Cited in *Hammond v. Chamberlain Bkg. House*, 58 Neb. 447, 76 Am. St. Rep. 106, 78 N. W. 718, holding rule of *caveat emptor* applicable to judicial sales.

Setting aside judicial sales.

Cited in *Kampman v. Nicewaner*, 60 Neb. 211, 82 N. W. 623, holding court of equity warranted in setting aside judicial sales, even after confirmation, where purchase made through fraud or mistake.

— Notice of condition of title.

Approved in *Hooper v. Castetter*, 45 Neb. 76, 63 N. W. 135, holding court will not set aside mortgage sale if it is apparent that purchaser had full knowledge of existence of encumbrances upon estate purchased; *Motley v. Motley*, 53 Neb. 382, 68 Am. St. Rep. 608, 73 N. W. 738, holding purchaser of lands at administrator's sale chargeable with notice of dower interest apparent from record of proceedings under which sale is made; *Nye & S. Co. v. Fahrenholz*, 49 Neb. 278, 59 Am. St. Rep. 540, 68 N. W. 498, holding purchaser at judicial sale charged with notice of condition of title of property purchased and of appraisement.

— Proper party in interest.

Cited in *Penn Mut. L. Ins. Co. v. Creighton Theatre Bldg. Co.* 51 Neb. 664, 71 N. W. 279, holding, upon appeal from an order confirming judicial sale, successful bidder proper party in interest and subject to jurisdiction of court.

18 L. R. A. 95, *JONES v. JONES*, 95 Ala. 443, 11 So. 11.

Legislative divorce.

Cited in footnote to *Re Christensen*, 41 L. R. A. 504, which denies power of legislature to grant divorce at instance of party at fault, without other party's consent.

Divorce for desertion.

Cited in footnotes to *Hardie v. Hardie*, 25 L. R. A. 697, which holds divorce for desertion not authorized where wife, on receiving blow from husband, leaves

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house without intent to remain away permanently; *Tirrell v. Tirrell*, 47 L. R. A. 750, which holds mere payment of allowance to abandoned wife under order of court will not prevent divorce for desertion.

Allowance of alimony.

Cited in *Downey v. Downey*, 98 Ala. 377, 21 L. R. A. 679, 13 So. 412, holding court of equity will not, after dissolution of marriage, entertain suit for alimony against former husband.

Cited in footnote to *Hooper v. Hooper*, 44 L. R. A. 725, which sustains allowance of gross sum from husband's estate in addition to monthly alimony.

Cited in note (21 L. R. A. 679) on suit for alimony after decree of divorce.

18 L. R. A. 100, *SCHAEFFER v. JACKSON TWP.* 150 Pa. 145, 30 Am. St. Rep. 792, 24 Atl. 629.

Defective highways and bridges.

Cited in *Cage v. Franklin Twp.* 11 Pa. Super. Ct. 538, holding township liable for natural and probable consequences of failure to keep public ways in safe condition; *Habecker v. Lancaster Twp.* 9 Pa. Super. Ct. 556, 16 Lanc. L. Rev. 180, 44 W. N. C. 53, holding township not liable for injury to traveler on account of defective highway, where traveler's horse becomes unmanageable by breaking of harness; *Kieffer v. Hummelstown*, 151 Pa. 312, 17 L. R. A. 220, 24 Atl. 1060, holding township not liable for injuries suffered by traveler whose horses took fright on account of shooting, and ran into stone pile at road side, which in no wise obstructed wagon track; *Kitchen v. Union Twp.* 171 Pa. 156, 33 Atl. 76, holding township liable for failure to provide proper guard rail along dangerous part of highway, where plaintiff was precipitated over embankment by horse becoming frightened.

Distinguished in *Yoders v. Amwell Twp.* 172 Pa. 459, 37 W. N. C. 515, 51 Am. St. Rep. 750, 33 Atl. 1017, holding township liable for failure to maintain guard rails on highway bridge over stream, which failure resulted in plaintiff's being backed off bridge and into stream by frightened horse; *Closser v. Washington Twp.* 11 Pa. Super. Ct. 126, holding township liable to injured individual who, while riding along narrow highway, was thrown down unguarded embankment by horse becoming frightened.

— Liability for death of traveler.

Cited in *Dixon v. Butler Twp.* 4 Pa. Super. Ct. 340, 40 W. N. C. 212, holding township not liable for death of plaintiff's wife, which resulted from collision with passing train at dangerous railroad grade crossing; *Card v. Columbia Twp.* 191 Pa. 270, 43 Atl. 217, holding township not liable for death of plaintiff's wife, who was riding in conveyance of private carrier, through whose negligence tugs of harness became detached from whiffletrees, causing conveyance to go over embankment which was without guard rail.

Proximate cause of injury.

Cited in *Missouri P. R. Co. v. Columbia*, 65 Kan. 398, 58 L. R. A. 403, 89 Pac. 338, holding one liable only for natural and probable results of his conduct; *McCauley v. Logan*, 152 Pa. 205, 31 W. N. C. 438, 25 Atl. 499, holding lumberman whose boat or raft is swept from its moorings during extraordinary rise of water, and damages bridge builder's false work, not liable; *Bockin v. Bethlehem*, 4 Pa. Super. Ct. 389, holding it duty of plaintiff to show by preponderance of evidence, proximate cause of injury complained of.

Modified in *Cage v. Franklin Twp.* 8 Pa. Super. Ct. 94, holding question of proximate cause of injury suffered by one having balky horse back off unprotected wing wall of bridge, properly for jury.

18 L. R. A. 105, LOUISVILLE, E. & ST. L. CONSOL. R. CO. v. WILSON, 132 Ind. 517, 32 N. E. 311.

Recovery of overcharge.

Cited in *Chicago, St. L. & P. R. Co. v. Wolcott*, 141 Ind. 279, 50 Am. St. Rep. 320, 39 N. E. 451, holding payment of advances made in freight rates after tender of freight for shipment not voluntary, and recoverable by express terms of Ind. Rev. Stat. 1894, § 5333; *Lake Erie & W. R. Co. v. Condon*, 10 Ind. App. 539, 38 N. E. 71, holding right of action to recover excessive freight charges is in consignor where consignee deducted amount from price of goods.

Discrimination in rates.

Cited in footnotes to *State v. Southern R. Co.* 41 L. R. A. 246, which denies carrier's right to discriminate in favor of high official, larger shipper, or powerful politician; *Hoover v. Pennsylvania R. Co.* 22 L. R. A. 263, which authorizes giving lower rates for transportation of coal to manufacturing company than coal dealer; *Barrington v. Commercial Dock Co.* 33 L. R. A. 116, which denies power to discriminate between similar vessels using wharf for landing place; *Atlantic Exp. Co. v. Wilmington & W. R. Co.* 18 L. R. A. 394, which holds carrier not required to give equal facilities to express companies.

— By telegraph company.

Cited in *Western U. Teleg. Co. v. Call Pub. Co.* 44 Neb. 346, 27 L. R. A. 628, footnote p. 622, 48 Am. St. Rep. 729, 62 N. W. 506 (dissenting opinion), majority holding difference in telegraph rates to morning and evening paper not illegal discrimination.

— By water company.

Cited in footnote to *Griffin v. Goldsboro Water Co.* 41 L. R. A. 240, which holds discrimination in rates charged consumers for water, unlawful.

— At common law.

Cited in *Murray v. Chicago & N. W. R. Co.* 35 C. C. A. 66, 92 Fed. 872, holding that, independent of statute, the common law affords shipper cause of action against common carrier for discriminating in rates of transportation.

Cited in footnote to *Cowden v. Pacific Coast S. S. Co.* 18 L. R. A. 221, which holds discrimination between shippers in freight rates not remedial at common law.

Stipulation of shipper not to ship by rival carrier.

Cited in footnote to *Lough v. Outerbridge*, 25 L. R. A. 674, which denies right of one refusing to stipulate against shipping by rival vessel to special rates offered to persons stipulating.

18 L. R. A. 110, ST. LOUIS, I. M. & S. R. CO. v. FERGUSON, 57 Ark. 16, 38 Am. St. Rep. 217, 20 S. W. 545.

Injury to animals.

Cited in *St. Louis, I. M. & S. R. Co. v. Scott*, 68 Ark. 416, 59 S. W. 762, hold-

ing railroad company not liable to owner of horse which, upon taking fright, left highway and ran over railroad bridge and was injured.

Cited in footnote to *Johnson v. Oregon Short Line R. Co.* 53 L. R. A. 744, which holds railroad company liable for horses killed on unfenced track.

18 L. R. A. 113, *GOODRICH v. ATCHISON COUNTY*, 47 Kan. 355, 27 Pac. 1006.

Condemnation proceedings.

Approved in *Armstrong v. Moore*, 1 Kan. App. 458, 40 Pac. 834, holding in proceedings to condemn mortgaged land, notice to mortgagor is legally sufficient.

Cited in *Rand v. Ft. Scott, W. & W. R. Co.* 50 Kan. 118, 31 Pac. 683, holding mortgagor in possession "owner" within meaning of statutes relating to condemnation; *Mathewson v. Skinner*, 66 Kan. 312, 71 Pac. 580, holding wife occupying homestead with husband not entitled to notice of highway proceedings; *Clement v. Wichita & S. W. R. Co.* 53 Kan. 687, 37 Pac. 133, holding recitals in report of condemnation commissioners prima facie proof of proper notice.

Condemnation proceedings as affecting liens or secret equities.

Cited in *Phipps v. Kansas & C. P. R. Co.* 58 Kan. 145, 48 Pac. 573, holding money paid on award in condemnation proceedings had in due form passes title to land condemned, free from secret equities of those failing to appeal at proper time; *Williams v. Hutchinson & S. R. Co.* 62 Kan. 413, 84 Am. St. Rep. 408, 63 Pac. 430, holding action of ejectment not maintainable by judgment creditor to recover land condemned, after payment of award to owner who was judgment debtor; *Chicago, K. & W. R. Co. v. Need*, 2 Kan. App. 496, 43 Pac. 997, holding rights of mere lien holder not affected by condemnation proceedings instituted by railroad company where such company is itself owner of fee; *Wichita & W. R. Co. v. Thayer*, 54 Kan. 260, 38 Pac. 266, holding mortgage creditors not being owners of land have no legal or equitable right in condemnation award for railroad right of way; *Chicago, K. & W. R. Co. v. Nashua Sav. Bank*, 52 Kan. 469, 35 Pac. 18, and *Chicago, K. & W. R. Co. v. Sheldon*, 53 Kan. 172, 35 Pac. 1105, holding right of way of railroad company, acquired by eminent domain, free from mortgage.

18 L. R. A. 120, *GRIGGS v. DAY*, 136 N. Y. 152, 48 N. Y. S. R. 853, 32 Am. St. Rep. 704, 32 N. E. 612.

Rehearing denied in 137 N. Y. 542, 32 N. E. 1001.

Account books as evidence.

Cited in footnote to *Re Fulton*, 35 L. R. A. 133, which holds book containing charges against one person only inadmissible.

Cited in note (53 L. R. A. 539) on use of person's books of account as evidence on issues between other parties.

Value of collateral securities.

Cited in *Whitehead v. Heidenheimer*, 57 App. Div. 598, 68 N. Y. Supp. 704, holding face value of collateral securities is prima facie their real value; *Barber v. Hathaway*, 47 App. Div. 167, 62 N. Y. Supp. 329, holding, in absence of proof of insolvency of obligor in bond held as collateral, amount unpaid is prima facie the value of the security.

Value of book accounts or note.

Approved in *Kennett v. Hopkins*, 58 App. Div. 416, 69 N. Y. Supp. 18, holding

liquidating partner, in absence of proof to contrary, chargeable with face value of book accounts.

Cited in *Boyer v. Fenn*, 19 Misc. 130, 43 N. Y. Supp. 533, holding note given in payment of stock presumably worth its face value.

Duty of pledgee.

Approved in *Foot v. Utah Commercial Sav. Bank*, 17 Utah, 295, 54 Pac. 104, holding that exercise of power of sale by pledgee must be in good faith and with due regard to rights of pledgeor; *Hawley Bros. Hardware Co. v. Brownstone*, 123 Cal. 649, 56 Pac. 468, holding pledgee of negotiable paper liable for failing to preserve legal validity of pledge; *Farm Invest. Co. v. Wyoming College & Normal School*, 10 Wyo. 268, 68 Pac. 561, holding creditor receiving pledge of collateral notes from debtor bound to exercise ordinary diligence in their collection.

Distinguished in *First Nat. Bank v. Hall*, 22 App. Div. 358, 47 N. Y. Supp. 1054, holding unauthorized sale of collateral by holder to himself void unless pledgeor consents.

Extent of pledgee's lien or recovery.

Approved in *George R. Barse Live Stock Co. v. Range Valley Cattle Co.* 16 Utah, 69, 50 Pac. 630, holding pledge of corporate stock valid, without making transfer thereof on books of corporation, and that subsequent sale and transfer in no wise affects pledgee's lien; *Fullerton v. Chatham Nat. Bank*, 17 Misc. 534, 40 N. Y. Supp. 874, holding bonds pledged with bank as security for individual loan cannot be retained to secure indebtedness of firm of which pledgeor is member.

Damages for conversion.

Subsequent appeal in 158 N. Y. 1, 52 N. E. 692, Reversing 21 App. Div. 442, 47 N. Y. Supp. 609, holding owner required to replace within reasonable time corporate stock converted by pledgee in good faith and entitled to recover as damages highest market price during such time.

Approved in *Barber v. Hathaway*, 47 App. Div. 168, 62 N. Y. Supp. 329, holding pledgee of collateral security who converts security liable for difference between its actual value and debt secured; *Brown v. Union Sav. & L. Asso.* 28 Wash. 663, 69 Pac. 383, holding pledgee of stock having right of action against corporation for conversion cannot recover full value of stock if his debt is less; *Pawson v. Miller*, 66 App. Div. 12, 72 N. Y. Supp. 1011, holding measure of damages for conversion of negotiable check to be amount unpaid thereon at time of conversion; *Fisher v. George S. Jones Co.* 108 Ga. 493, 34 S. E. 172, holding measure of damages in case of conversion of collateral security is actual loss at time of conversion; *Nelson v. First Nat. Bank*, 16 C. C. A. 430, 32 U. S. App. 554, 69 Fed. 798, holding damages recoverable by surety because of unauthorized exchange of stock held as collateral, to be difference in value of stock at time of exchange.

Cited in footnotes to *Langford v. Rivinus*, 33 L. R. A. 250, which holds value of judgment at date of conversion is measure of damages; *Woods v. Nichols*, 48 L. R. A. 773, which holds measure of recovery in trover by one retaining title as security for purchase price limited to balance due, less depreciation by use.

Collateral attack on compromise judgment.

Distinguished in *Hartford F. Ins. Co. v. King*, 31 Tex. Civ. App. 640, 73 S. W. 71, holding compromise judgment, although open to direct attack as compromise by pledgee without consent of pledgeor, not open to collateral attack.

Termination of contract.

Cited in *Ceballos v. Munson S. S. Line*, 42 Misc. 26, 85 N. Y. Supp. 530, holding no novation shown, and that contract uncertain as to duration is terminable at will.

18 L. R. A. 124, *KAUFFMAN v. MAIER*, 94 Cal. 269, 29 Pac. 481.

Review of order granting new trial.

Cited in *Rand v. Kipp*, 27 Mont. 141, 69 Pac. 714, holding on appeal from order refusing new trial on ground of insufficiency of evidence, appellate court will accept such conclusion without further consideration; *Siemens v. Oakland, S. L. & H. Electric R. Co.* 134 Cal. 496, 66 Pac. 672, holding on appeal from order granting new trial for misconduct of juror, appellate court will not, as a rule, reconsider sufficiency of evidence; *Menard v. Montana C. R. Co.* 22 Mont. 345, 56 Pac. 592, holding on appeal from order granting new trial, appellate court may properly exclude from consideration, grounds excluded by lower court on making order appealed from; *Churchill v. Flournoy*, 127 Cal. 362, 59 Pac. 791, and *People v. Castro*, 133 Cal. 12, 65 Pac. 13, holding order granting new trial to defendant convicted of rape will be sustained on appeal if such order rests on any proper ground raised by defendant; *Newman v. Overland P. R. Co.* 132 Cal. 74, 64 Pac. 110, holding order granting new trial on ground of insufficiency, matter within discretion of trial court, and ordinarily not reviewable on appeal; *Reno Mill & Lumber Co. v. Westerfield*, 26 Nev. 345, 67 Pac. 961, sustaining order granting new trial on other reasons than that given by trial court; *Simon Newman Co. v. Lassing*, 141 Cal. 175, 74 Pac. 761, holding that general order granting new trial will be sustained on appeal upon any tenable ground; *Boyd v. Western U. Teleg. Co.* 117 Iowa, 339, 90 N. W. 711, holding that motion for new trial appealed from will be treated as a whole, unless expressly ruled upon in part; *Sweet v. Gray*, 141 Cal. 69, 74 Pac. 439, upholding power of trial court to order new trial unless plaintiff remit portion of judgment.

Review of judgment sustaining demurrer.

Approved in *Vincent v. Ellis*, 116 Iowa, 618, 88 N. W. 836, holding appellate court in sustaining judgment on demurrer not limited to reasons given by trial court.

Defective premises.

Cited in footnote to *Kinney v. Onsted*, 38 L. R. A. 665, which holds owner of premises not liable for fall of person while leaning against defective railing on platform of grain elevator.

Admissibility of expert testimony.

Cited in *Limberg v. Glenwood Lumber Co.* 127 Cal. 605, 49 L. R. A. 42, 60 Pac. 176, holding, in action for damages for personal injuries suffered by teamster by reason of defective wagon and harness, testimony of expert on such matters inadmissible.

Distinguished in *Snyder v. Holt Mfg. Co.* 134 Cal. 327, 66 Pac. 311, holding testimony of expert in construction of harvester machinery clearly admissible in action for damages suffered by individual, caused by breaking of machine, claimed to be due to faulty construction.

Instructions to jury.

Cited in *People v. Vereneseneckcockchoff*, 129 Cal. 503, 62 Pac. 111, holding invasion of province of jury by trial judge in his charge to them, by reference to

matters of fact, constitutes reversible error; *People v. Rodley*, 131 Cal. 258, 63 Pac. 351, holding defendant found guilty of perjury will not be heard to complain of instruction to jury, cautioning it to weigh carefully verbal admissions, when given at his own request, notwithstanding instructions were contrary to Code provision; *People v. Cuff*, 122 Cal. 591, 55 Pac. 407, holding, in trial of criminal cause, instructions by trial judge as to weight of evidence, invasion of province of jury; *People v. Buckley*, 143 Cal. 391, 77 Pac. 169, holding instruction as to weight to be given oral admission properly refused; *People v. Wardrip*, 141 Cal. 231, 74 Pac. 744, holding refusal to instruct as to weight to be given oral admissions not reversible error.

18 L. R. A. 129, *REEVE v. LADIES' BLDG. ASSO. PERPETUAL*, 56 Ark. 335, 19 S. W. 917.

Usurious contracts of loan association.

Approved in *Black v. Tompkins*, 63 Ark. 504, 39 S. W. 553, holding contract between shareholders and a building and loan association, whereby payment of usurious interest is exacted, valid and enforceable in foreclosure of mortgage given to secure loan; *Taylor v. Van Buren Bldg. Asso.* 56 Ark. 344, 19 S. W. 918, holding mortgage contract not usurious which provides for payment of 10 per cent interest on loan of stockholders of building and loan association; *Farmers' Sav. & Bldg. & L. Asso. v. Ferguson*, 69 Ark. 356, 63 S. W. 797, holding contract with building and loan association not usurious because, in addition to legal interest, payment of monthly dues is required.

Cited in *McCauley v. Workingman's Bldg. & Sav. Asso.* 97 Tenn. 436, 35 L. R. A. 248, 56 Am. St. Rep. 813, 37 S. W. 212, holding loan by building association, usurious on its face, will be set aside on repayment of loan with legal interest; *American Homestead Co. v. Linigan*, 46 La. Ann. 1128, 15 So. 369, holding loan to shareholder by building association providing for payment of 8 per cent interest not usurious, where time of payment of shares given in security is contingent.

Cited in footnotes to *Falls v. United States Sav. Loan & Bldg. Co.* 24 L. R. A. 174, which holds annual instalments void for usurious agreement for loan payable in instalments, with interest on amount of original loan; *Gray v. Baltimore Bldg. & L. Asso.* 54 L. R. A. 217, which holds percentage, payable to loan association indefinitely, usurious though called "premium;" *People ex rel. Fairchild v. Preston*, 24 L. R. A. 57, which holds valid, income stock of loan association on which 60 per cent is paid in advance, with cash dividends limited to 8 per cent; *Pacific States Sav. Loan & Bldg. Co. v. Hill*, 56 L. R. A. 163, which holds requirement that borrower bid for stock and pay dues on same, device to cover usury; *Borrowers' & Investors' Bldg. Asso. v. Eklund*, 52 L. R. A. 637, which requires strict adherence to mode fixed by statute exempting loan associations from usury laws; *Washington Nat. Bldg. Loan & Invest. Asso. v. Stanley*, 58 L. R. A. 816, which holds exaction of monthly premium which, with interest, exceeds legal rate, unauthorized; *Smoot v. People's Perpetual Loan & Bldg. Asso.* 41 L. R. A. 589, which sustains retroactive statute relieving from usury all contracts with loan associations.

Annotation in 18 L. R. A. 129, referred to particularly in *Post v. Mechanics' Bldg. & L. Asso.* 97 Tenn. 411, 34 L. R. A. 203, 37 S. W. 216, holding loans made by building and loan association to its stockholders, without competitive bidding and in excess of legal rate of interest, unlawful and usurious.

— Construction of usurious contract.

Cited in *Tilley v. American Bldg. & L. Asso.* 52 Fed. 622, holding that whether

contract between building and loan association and one of its shareholders is usurious is determinable by amount agreed to be paid as interest, or as "dues" on stock.

— **Laws governing usurious contract.**

Cited in footnotes to *National Mut. Bldg. & L. Asso. v. Brahan*, 57 L. R. A. 793, which holds usury in loan by foreign loan association to resident, secured by mortgage on land in state, determined by local law; *Bennett v. Eastern Bldg. & L. Asso.* 34 L. R. A. 595, which holds contract to pay money to loan association governed by laws of state where association located; *Floyd v. National Loan & Invest. Co.* 54 L. R. A. 536, which holds contract with foreign loan association not within exemption of domestic associations as to usury, unless in conformity to local law.

Application of payments upon stock on mortgage.

Cited in note (29 L. R. A. 124) on right to apply payments made on stock in building and loan association on mortgage given for loan by same member.

18 L. R. A. 135, *HALL v. NIAGARA F. INS. CO.* 93 Mich. 184, 32 Am. St. Rep. 497, 53 N. W. 727.

Sole and unconditional ownership.

Cited in *Hanover F. Ins. Co. v. Bohn*, 48 Neb. 752, 58 Am. St. Rep. 726, 67 N. W. 774, holding policy containing clause of sole ownership of property covered by policy not rendered void, on discovery that insured had only equitable interest, in absence of fraud; *Wooliver v. Boylston Ins. Co.* 104 Mich. 135, 62 N. W. 149, holding insurance policy not vitiated where insured, upon oral application to agent, stated fact of conditional ownership of property; *Manchester Fire Assur. Co. v. Abrams*, 32 C. C. A. 429, 61 U. S. App. 276, 89 Fed. 932, holding insurer estopped to deny liability on policy covering personal property about which no inquiry was made concerning interest of insured at time of application; *Haire v. Ohio Farmers' Ins. Co.* 93 Mich. 486, 32 Am. St. Rep. 516, 53 N. W. 623, holding policy covering interest of minor heirs as owners in fee simple not invalidated because property subject to widow's dower right, which she separately insured.

Distinguished in *Peet v. Dakota F. & M. Ins. Co.* 7 S. D. 420, 64 N. W. 206, holding existence of mortgage encumbrance upon property insured will avoid policy containing stipulation against known and existing encumbrances; *Rosenstock v. Mississippi Home Ins. Co.* 82 Miss. 686, 35 So. 309, holding vendor granting possession to vendee on payment of large part of purchase price not "sole and unconditional owner;" *Hamilton v. Dwelling House Ins. Co.* 98 Mich. 541, 22 L. R. A. 529, 57 N. W. 735, holding vendor in contract of sale not "sole and unconditional owner."

— **Waiver of clause.**

Cited in *German Mut. Ins. Co. v. Niewedde*, 11 Ind. App. 629, 39 N. E. 534, holding failure of insurer to inquire of owner concerning encumbrances, upon oral application for insurance, deemed waiver of clause against encumbrances.

Rights of mortgagee.

Cited in footnote to *Oakland Home Ins. Co. v. Bank of Commerce*, 36 L. R. A. 673, which holds mortgagee to whom loss payable may recover on policy, notwithstanding conditions as to assignment which might defeat recovery by owner.

Cited in note (19 L. R. A. 321) on effect of settlement between insurer and mortgagor upon rights of mortgagee.

Construction of provision for forfeiture.

Cited in *Farmers & M. Ins. Co. v. Newman*, 58 Neb. 510, 78 N. W. 933, holding provision for forfeiture of policy will be strictly construed.

18 L. R. A. 142, *KRAAK v. FRIES*, 21 D. C. 100.

18 L. R. A. 144, *ALTON v. FIRST NAT. BANK*, 157 Mass. 341, 34 Am. St. Rep. 285, 32 N. E. 228.

Money paid on mistake of fact.

Cited in footnote to *Behring v. Somerville*, 49 L. R. A. 578, which holds money paid on mistake of fact, of which both were ignorant, not recoverable in absence of fraud.

Misrepresentation of fact.

Approved in *Motherway v. Wall*, 168 Mass. 338, 47 N. E. 135, holding grantor entitled to cancelation of deed of his interest in his wife's estate, executed because of misrepresentations as to his rights and state of title.

Conclusion of law.

Approved in *Haskell v. Merrill*, 179 Mass. 123, 60 N. E. 485, upholding master's report against objection that such words as "loan," "security," or "delivery" express conclusion of law from the facts.

18 L. R. A. 146, *MEYER v. GRAHAM*, 33 Neb. 566, 29 Am. St. Rep. 500, 50 N. W. 763.

Adverse possession.

Approved in *Lantry v. Wolff*, 49 Neb. 376, 69 N. W. 494, holding title to land becomes complete in occupant who has held it adversely under claim of title for ten years.

— Of public highway.

Followed in *Lewis v. Baker*, 39 Neb. 639, 58 N. W. 126, holding ten years' adverse possession of portion of city street, under claim of right, vests title in occupant.

Approved in *Webster v. Lincoln*, 56 Neb. 503, 76 N. W. 1076, holding occupant of portion of city street under claim of ownership acquires title thereto in ten years; *Carneal v. Lynch*, 91 Va. 121, 50 Am. St. Rep. 819, 20 S. E. 959, holding, under express provision of statute, owner of building which for over twenty years has encroached upon street acquires title by adverse possession.

Cited in *Norrell v. Augusta R. & Electric Co.* 116 Ga. 316, 59 L. R. A. 103, footnote p. 101, 42 S. E. 466, holding title by prescription not acquired by adverse possession of land dedicated and accepted as city street.

Cited in footnotes to *Teass v. St. Albans*, 19 L. R. A. 803, which holds title to street by adverse possession obtainable; *Reuter v. Lawe*, 34 L. R. A. 733, which sustains estoppel against claim of public to park by dedication on plat by one continuing in possession; *St. Paul & D. R. Co. v. Duluth*, 43 L. R. A. 433, which holds mere construction and occasional use of railroad track across unimproved platted street not adverse possession; *McClellan v. Weston*, 55 L. R. A. 898,

which holds land within boundary of street as shown by plat not subject to adverse possession as against town.

Distinguished in *Krueger v. Jenkins*, 59 Neb. 642, 81 N. W. 844, holding individual cannot secure title to unused parts of public highway of county by adverse possession and use for statutory time.

Prescriptive right.

Cited in footnote to *Webb v. Demopolis*, 21 L. R. A. 62, which holds rights of public in street not lost by prescription or laches.

Cited in note (53 L. R. A. 898) on prescriptive right to maintain public nuisance.

Nonuser.

Cited in notes (18 L. R. A. 542) on effect of nonuser of easement; (26 L. R. A. 452) on abandonment of highway by nonuser, or otherwise than by act of public authorities.

18 L. R. A. 151, *SNIDER v. ST. PAUL*, 51 Minn. 466, 53 N. W. 763.

Negligence of public corporation.

Cited in *Weltsch v. Stark*, 65 Minn. 7, 67 N. W. 648, holding that in absence of statute, township, being agency of government, is not liable to private individual for injuries sustained by reason of defective highway; *Gullikson v. McDonald*, 62 Minn. 279, 64 N. W. 812, holding villages not liable for failure to maintain suitable and comfortable prison, by reason of which plaintiff, who suffered arrest and detention therein, contracted permanent disability from rheumatism; *Garre v. Clay County*, 90 Minn. 532, 97 N. W. 422, holding county not liable for neglect of commissioners to repair ditch.

— Of private corporation.

Distinguished in *Lane v. Minnesota State Agri. Soc.* 62 Minn. 177, 29 L. R. A. 709, 64 N. W. 382, holding defendant, a private corporation, liable for negligence which resulted in injury to plaintiff while engaged in horse race under management of former.

18 L. R. A. 154, *SELLICK v. LAKE SHORE & M. S. R. CO.* 93 Mich. 375, 53 N. W. 556.

Obstruction of highways.

Cited in *Beopple v. Illinois C. R. Co.* 104 Tenn. 429, 58 S. W. 231, holding railroad liable for injuries to traveler, whose horses took fright on approach of train, while he was awaiting removal of cars negligently permitted to remain on crossing for undue length of time; *Mueller v. Milwaukee Street R. Co.* 86 Wis. 344, 21 L. R. A. 723, 56 N. W. 914, holding street railroad company liable for damages caused to funeral carriage suddenly stopped by car at crossing, such being proximate cause of injury; *Wall v. New York C. & H. R. R. Co.* 56 App. Div. 603, 67 N. Y. Supp. 519, holding railroad company unreasonably obstructing highway liable, notwithstanding his contributory negligence, to one injured while climbing over bumper of cars on one track to avoid engine on adjoining track.

Cited in footnotes to *Brunswick & W. R. Co. v. Hardey*, 52 L. R. A. 396, which authorizes recovery by merchant specially damaged by wilful obstruction of street; *Shields v. Louisville & N. R. Co.* 27 L. R. A. 680, which holds obstruction

of highway by excursion train not proximate cause of injury to travelers on highway by passenger's misconduct.

Cited in note (39 L. R. A. 619) on municipal control over public nuisance on public streets and highways created by street railroads and other electrical companies.

Lookout to prevent frightening of teams.

Cited in footnote to *Kentucky & I. Bridge Co. v. Montgomery*, 57 L. R. A. 781, which requires railroad company operating railroad bridge as toll bridge to keep lookout to prevent frightening teams by trains.

Proximate cause of injury.

Cited in *Laible v. New York C. & H. R. R. Co.* 13 App. Div. 574, 43 N. Y. Supp. 1003, holding that whether obstruction of public highway by cars was proximate cause of injury received by one thrown out of her carriage when her horse became frightened on approach of another train, proper question for jury; *Lincoln Twp. v. Koenig*, 10 Kan. App. 509, 63 Pac. 90, holding proximate cause question for jury where one was injured by runaway team on defective highway; *Simons v. Casco Twp.* 105 Mich. 592, 63 N. W. 500, holding proximate cause of injury question for jury where horse became frightened on account of large hole in roadway, causing him to jump and thus throw plaintiff down high embankment; *Needham v. King*, 95 Mich. 312, 54 N. W. 891, holding adjacent land owner liable for failure to guard against spread of fire to his neighbor's land, although the wind contributed to injury; *White v. Riley Twp.* 113 Mich. 299, 71 N. W. 502 (dissenting opinion), majority holding fact that injury was due to horse's backing away from bridge because of its fright does not render want of barriers too remote a cause to permit recovery.

Cited in footnote to *Western R. Co. v. Mutch*, 21 L. R. A. 316, which holds excessive speed not proximate cause of death of boy attempting to catch on train.

Master and servant.

Cited in *Noble v. Bessemer S. S. Co.* 127 Mich. 114, 54 L. R. A. 400, 89 Am. St. Rep. 461, 86 N. W. 520, holding master liable for injuries suffered by servant, through use of defective tool, even though fellow servant of one injured knew of defect; *McDonald v. Michigan C. R. Co.* 108 Mich. 14, 65 N. W. 597, holding master liable for injury to servant which is proximate result of concurrent negligence of master and fellow servant.

Crossing track as negligence per se.

Cited in footnote to *Chicago & N. W. R. Co. v. Prescott*, 23 L. R. A. 654, which holds attempt to cross track on flagman's invitation at crossing partly blocked by train not negligence *per se*.

Liability for unforeseen consequences of wrongful act.

Cited in footnotes to *Texas & P. R. Co. v. Carlin*, 60 L. R. A. 462, which sustains liability for negligence likely to produce injury, though particular injury not anticipated; *Osborne v. Van Dyke*, 54 L. R. A. 367, which holds one unlawfully beating horse liable for injury by unintentional blow on bystander.

18 L. R. A. 158, *GOSNELL v. FLACK*, 76 Md. 423, 25 Atl. 411.

Right of set-off.

Cited in *Hoffman v. Armstrong*, 90 Md. 131, 44 Atl. 1012, holding that in

administering estate it is duty of administrators to deduct amount of insolvent distributee's debts to estate before settlement of his share; *Hoffman v. Hoffman*, 88 Md. 62, 40 Atl. 712, and *Armiger v. Reitz*, 91 Md. 342, 46 Atl. 990, holding that in administering estate it is duty of administrator to deduct from share of distributee or legatee amount equal to claim against him on behalf of decedent estate.

Cited in footnotes to *Oxsheer v. Nave*, 37 L. R. A. 98, which sustains right to set off indebtedness of distributee against distributive share, although purchased by creditor; *Webb v. Fuller*, 22 L. R. A. 177, which authorizes set-off of amount due by legatee against distributive share; *Ainsworth v. Bank of California*, 39 L. R. A. 686, which authorizes setting off against claim due estate, debt due from deceased, though unmatured at time of death.

Cited in note (23 L. R. A. 313) on right to set off insolvent's obligation on claim in hands of his receiver or assignee or trustee for creditors.

18 L. R. A. 161, *BROWN v. SEATTLE*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214.

Taking of private property for public use.

Cited in *Wendel v. Spokane County*, 27 Wash. 125, 91 Am. St. Rep. 825, 67 Pac. 576, holding county liable for damages caused to lands of individual, by cutting canal through natural ridge, causing water to overflow land which was before protected; *Pueblo v. Strait*, 20 Colo. 18, 24 L. R. A. 394, 46 Am. St. Rep. 273, 36 Pac. 789, holding erection of viaduct in public street such extraordinary use as entitles abutting property owners to damages for depreciation of property; *San Antonio v. Mullaly*, 11 Tex. Civ. App. 599, 33 S. W. 256, holding damages recoverable from municipality for grading street to detriment of abutting property; *Bigelow v. Ballerino*, 111 Cal. 566, 44 Pac. 307, holding easement in public highway, being property right, may not be destroyed or impaired by municipality, without rendering compensation; *Seattle Transfer Co. v. Seattle*, 27 Wash. 526, 68 Pac. 90, holding municipality liable for damages caused to private property abutting on street, by erection of overhead roadway; *State ex rel. Smith v. Superior Court*, 26 Wash. 289, 66 Pac. 385, holding private property not subject to use by private corporation erecting elevated railroad through street, without first making due compensation to owner; *Ft. Worth v. Howard*, 3 Tex. Civ. App. 539, 22 S. W. 1059, holding owner of private property entitled to damages for depreciation of property abutting on street, grade of which was materially changed; *Denver v. Bonesteel*, 30 Colo. 111, 69 Pac. 595, holding city liable to abutting owner for damages caused by change of grade of street; *Less v. Butte*, 28 Mont. 32, 61 L. R. A. 603, 98 Am. St. Rep. 545, 72 Pac. 140, holding abutting owner entitled to damages resulting from fixing grade of street for first time.

Cited in footnote to *Rauenstein v. New York, L. & W. R. Co.* 18 L. R. A. 768, which denies liability to abutter for embankment to change grade, necessitated by railroad embankment in intersecting street.

Distinguished in *Levee Dist. No. 9 v. Farmer*, 101 Cal. 184, 23 L. R. A. 391, 35 Pac. 569, holding vacation of public highway by municipality not such injury to abutting property as to require payment of damages.

Payment a condition precedent.

Cited in *Lewis v. Seattle*, 5 Wash. 745, 32 Pac. 794, holding municipality must, upon exercising right of eminent domain, make payment before using property

condemned; *Geurkink v. Petaluma*, 112 Cal. 310, 44 Pac. 570, holding payment of damages condition precedent to right of city to change water course along highway, causing injury to abutting property.

Enjoining taking private land for public use.

Approved in *Olson v. Seattle*, 30 Wash. 690, 71 Pac. 201, holding injunction proper remedy where public authorities seek to take private property for public use, without first making compensation.

18 L. R. A. 166, *MEMPHIS & C. R. CO. v. BIRMINGHAM, S. & T. RIVER R. CO.* 96 Ala. 571, 11 So. 642.

Taking private property.

Cited in *Hamilton County v. Rape*, 101 Tenn. 227, 47 S. W. 416, holding change in grade of public highway, causing material injury to abutting property, such taking within constitutional provision as to necessitate compensation to owner; *Southern R. Co. v. Birmingham, S. & N. O. R. Co.* 130 Ala. 670, 31 So. 509, holding that before land owner may be deprived of property under eminent domain proceeding, assessment and payment of damages a condition precedent; *Louisville & N. R. Co. v. Peoples Street R. & Improv. Co.* 101 Ala. 332, 13 So. 308, holding, in absence of statutory authority, lands of one railroad corporation not subject to condemnation by another.

Cited in footnotes to *St. Louis v. Hill*, 21 L. R. A. 226, which holds prohibition against building on certain portion of land a "taking" of property; *White v. Northwestern North Carolina R. Co.* 22 L. R. A. 627, which holds use of street for steam railroad a taking of same.

Protection of private rights from public interference.

Cited in footnotes to *Morton v. New York*, 22 L. R. A. 241, which holds city has no right to build pumping station on own land, rendering adjoining buildings uninhabitable.

Cited in note (18 L. R. A. 544) on protection of private rights from interference by public.

Right of appeal in eminent domain proceedings.

Cited in *Memphis & C. R. Co. v. Hopkins*, 108 Ala. 159, 18 So. 845, holding provision of Code giving effect to constitutional provision for intersection and crossing of railroad unconstitutional, because of elimination of right of appeal from award of commissioners in assessing damages.

18 L. R. A. 170, *PAGE v. LEWIS*, 89 Va. 1, 37 Am. St. Rep. 848, 15 S. E. 389.

Gifts causa mortis.

Cited in *First Nat. Bank v. Holland*, 99 Va. 502, 55 L. R. A. 160, 86 Am. St. Rep. 698, 39 S. E. 126, holding valid gift *causa mortis* of bank stock by delivery of keys to depository containing gift; *Leyson v. Davis*, 17 Mont. 286, 31 L. R. A. 451, footnote p. 429, 42 Pac. 775, holding valid gift *causa mortis* of bank stock certificates by actual delivery to donee without indorsement; *Johnson v. Colley*, 101 Va. 418, 99 Am. St. Rep. 884, 44 S. E. 721; holding gift *causa mortis*, otherwise valid, not defeated by condition, "If I die, or anything happens to me."

Cited in footnotes to *Royston v. McCulley*, 52 L. R. A. 899, which upholds gift *causa mortis* of bank certificates made by donor asking to have trunks unlocked

and certificates indorsed; *Lord v. New York L. Ins. Co.* 56 L. R. A. 597, which sustains gift of policy found among papers of insured at his death, on proof of his declarations that it was donee's; *Hatcher v. Buford*, 27 L. R. A. 507, which holds bank stock, given a few nights before donor's death from consumption, a gift *causa mortis*.

— **Sufficiency of delivery.**

Cited in *Jones v. Weakley*, 99 Ala. 445, 19 L. R. A. 701, 42 Am. St. Rep. 84, 12 So. 420, holding delivery of bank book insufficient delivery to sustain gift *causa mortis*, of funds in bank; *Waite v. Grubbe*, 43 Or. 411, 73 Pac. 206, holding act of donor in last illness in pointing out to donee places where money was concealed, with appropriate declarations of gift, valid delivery.

Cited in note (19 L. R. A. 700) on delivery of bank book to sustain gift of money in bank.

Distinguished in *Newman v. Bost*, 122 N. C. 529, 29 S. E. 848, holding delivery of keys to bureau not sufficient delivery of insurance policy contained therein to constitute valid gift *causa mortis*; *Keepers v. Fidelity Title & D. Co.* 56 N. J. L. 306, 23 L. R. A. 186, footnote p. 184, 44 Am. St. Rep. 397, 28 Atl. 583, holding delivery of key to box containing securities given, insufficient delivery.

Admissibility of evidence.

Cited in *Fidelity Mut. Life Asso. v. Miller*, 34 C. C. A. 217, 63 U. S. App. 717, 92 Fed. 69, holding letter written by insured to his wife day before his death, admissible to rebut evidence that he had deliberately committed suicide after obtaining policy.

18 L. R. A. 187, *CROMPTON v. BEACH*, 62 Conn. 25, 36 Am. St. Rep. 323, 25 Atl. 446.

Vendor's election of remedies.

Cited in *Tufts v. Brace*, 103 Wis. 345, 79 N. W. 414, holding election to rescind conditional contract of sale, and retake possession of thing sold, bars vendor's right of recovery of balance due on purchase price; *Smith v. Barber*, 153 Ind. 328, 53 N. E. 1014, holding vendor of machinery to be erected in manufacturing plant, retaining title until paid for, may upon default of payment elect to treat contract as absolute and recover contract price, or rescind and recover property sold; *Howell v. Campbell*, 53 Kan. 749, 37 Pac. 120, holding, as between creditors of vendee, and vendor, election to treat contract of sale of goods as absolute will be conclusive upon vendor's right to recover unpaid portion of selling price; *Turk v. Carnahan*, 25 Ind. App. 128, 81 Am. St. Rep. 85, 57 N. E. 729, holding seller of property may not, upon default of payment by purchaser, repudiate contract, retake property, and also sue to recover balance of purchase price.

Cited in note (32 L. R. A. 463, 471) on rights and liabilities of vendor and purchaser by conditional sale, on default of payment.

Distinguished in *Robinson's Appeal*, 63 Conn. 296, 28 Atl. 40, holding vendor of goods retaining legal title until fully paid for does not, by receiving balance of goods upon insolvency of vendees, elect to take such balance in satisfaction of the debt.

Qualified in *Johnson-Brinkman Commission Co. v. Missouri P. R. Co.* 126 Mo. 350, 26 L. R. A. 842, 47 Am. St. Rep. 675, 28 S. W. 870, holding that notwithstanding election by vendor of one of two inconsistent remedies in case of de-

fault of payment for goods sold, if remedy elected be dismissed before judgment, or intervening rights of others become vested, another and different remedy may be resorted to.

Vendor's lien.

Cited in *Herrmann v. Central Car Trust Co.* 41 C. C. A. 180, 101 Fed. 45, holding pledgee of bonds deposited as collateral to secure purchase price of rolling stock loses lien on security on default of payment by reclaiming property sold.

18 L. R. A. 190, *AMERICAN LIVE STOCK COMMISSION CO. v. CHICAGO LIVE STOCK EXCHANGE*, 143 Ill. 210, 36 Am. St. Rep. 385, 32 N. E. 274.

Sale of stock exchange seat.

Cited in footnote to *Lowenberg v. Greenebaum*, 21 L. R. A. 399, which holds levy on, and sale of, stock exchange seat ineffectual to pass title.

Equitable control of corporate action.

Cited in *State ex rel. Star Pub. Co. v. Associated Press*, 159 Mo. 461, 51 L. R. A. 168, 81 Am. St. Rep. 368, 60 S. W. 91, holding equity will not by mandamus compel voluntary association engaged in purely private enterprise, to render service and furnish news to one not member thereof; *Greer v. Staller*, 77 Fed. 8, holding equity will not reinstate suspended member in voluntary association, when he bases his action on contract of membership, portion of which he alleges to be illegal and in restraint of trade.

Dismissal of bill on dissolution of injunction.

Cited in *Field v. Western Springs*, 181 Ill. 190, 54 N. E. 929, holding court of equity may properly dismiss bill of complaint on sustaining motion to dissolve injunction without hearing on pleadings and proofs.

18 L. R. A. 201, *BANK OF EDGEFIELD v. FARMERS' CO-OP. MFG. CO.* 2 C. C. A. 637, 2 U. S. App. 282, 52 Fed. 98.

Conflict of laws.

Cited in *The Carib Prince*, 63 Fed. 268, holding vessel not liable for injury to cargo by water, under contract of shipment limiting liability for latent defects in construction; such contract being governed by law of place of execution; *Manship v. New South Bldg. & L. Asso.* 110 Fed. 859, holding question whether contract between citizens of different states is to be construed by law of place of performance, or not, governed by general commercial law; *Limerick Nat. Bank v. Howard*, 71 N. H. 19, 93 Am. St. Rep. 489, 51 Atl. 641, holding question whether fraud of payee of Vermont note in obtaining it is defense against indorsee determinable by law of Vermont.

Cited in note (61 L. R. A. 194) on conflict of laws as to negotiable paper.

Bona fide holder of negotiable paper.

Cited in *Kaiser v. First Nat. Bank*, 24 C. C. A. 91, 41 U. S. App. 637, 78 Fed. 284, holding one purchasing negotiable paper before maturity, for valid consideration and without notice of existing equities, obtains good title.

Cited in note (46 L. R. A. 799) on rights of holder of negotiable paper transferred after maturity.

18 L. R. A. 204, *EDWARDS v. CULBERTSON*, 111 N. C. 342, 16 S. E. 233.

Following trust property.

Cited in *Ross v. Davis*, 122 N. C. 267, 29 S. E. 338, holding equity will follow funds invested in lands purchased from ancestors, heirs of whom subsequently repudiate sale and oust purchaser; *Summers v. Moore*, 113 N. C. 405, 18 S. E. 712, holding that where property is conveyed to one, and consideration furnished by another, equity will hold legal owner as trustee of the real owner; *Pender v. Mallett*, 123 N. C. 62, 31 S. E. 351, holding property assigned by insolvent husband to wife recoverable in equity by husband's creditors; *Williams v. Walker*, 111 N. C. 612, 16 S. E. 706, holding money loaned to married woman, and by her invested in real property, through fraudulent representation as to capacity, may be impressed with equitable lien; *Barnard v. Hawks*, 111 N. C. 339, 16 S. E. 329, holding equity will follow funds invested in stock, through as many hands as it may be traced, and impress it with original trust in favor of real owner; *Fidelity & D. Co. v. Jordan*, 134 N. C. 242, 46 S. E. 496, holding beneficiary under resulting trust entitled to follow property substituted for part of that affected with trust.

18 L. R. A. 206, *GUNN v. WHITE SEWING MACH. CO.* 57 Ark. 24, 4 Inters. Com. Rep. 309, 38 Am. St. Rep. 223, 20 S. W. 591.

State interference with interstate commerce.

Cited in *Hargraves Mills v. Harden*, 25 Misc. 666, 56 N. Y. Supp. 937, holding state cannot deny right of foreign corporation to sue for breach of contract of sale within state of goods to be manufactured without state, because such corporation neglects to comply with state statute relative to foreign corporations doing business within state; *Miller v. Goodman*, 91 Tex. 43, 40 S. W. 718, and *Allen v. Tyson-Jones Buggy Co.* 91 Tex. 25, 40 S. W. 393, holding foreign corporation not precluded from maintaining action because of failure to obtain permit to do business; *Murphy Varnish Co. v. Connell*, 10 Misc. 560, 32 N. Y. Supp. 492, holding foreign corporation will not be denied aid of local state courts to enforce contract rights, even though it fail to comply with state statute requiring it to file copy of articles of incorporation with proper state officer; *Davis & R. Bldg. & Mfg. Co. v. Dix*, 64 Fed. 412, holding state legislature cannot deny right of foreign corporation to sell its goods in state through local salesmen; *Havens & G. Co. v. Diamond*, 93 Ill. App. 567, holding foreign corporation taking orders or making sales by sample not "doing business" in state within meaning of statute regulating transaction of business by foreign corporations.

Cited in footnotes to *Re Sanders*, 18 L. R. A. 549, which holds void as to original packages, act requiring marking on package of year in which seed grown; *Smith v. Jackson*, 47 L. R. A. 416, which holds agent collecting garments and sending them to laundry outside of state, and redelivering to owners, not engaged in commerce; *Racine Iron Co. v. McCommons*, 51 L. R. A. 134, which holds traveling agent taking orders and distributing contents of original package among customers not engaged in interstate commerce; *Croy v. Epperson*, 51 L. R. A. 254, which holds one taking orders in own name for articles manufactured in other state, and delivering separate articles to customers, not engaged in interstate commerce; *French v. State*, 52 L. R. A. 160, which holds agent of nonresident company selling organ taken with him, or taking orders for others to be delivered by him, engaged in interstate commerce; *State v. Willingham*, 452 L.

R. A. 198, which holds delivery of portraits and frames by agent previously taking order for nonresident manufacturer, interstate commerce.

18 L. R. A. 211, *McAFEE v. REYNOLDS*, 130 Ind. 33, 30 Am. St. Rep. 194, 28 N. E. 423.

Extinguishment of judgment lien.

Cited in *Savings & Trust Co. v. Bear Valley Irrig. Co.* 89 Fed. 38, holding lien of judgment creditor, being creature of statute, must be executed within statutory period, notwithstanding fact of debtor's asset being in hands of receiver, against whom suit is forbidden without permission of court; *Bradfield v. Newby*, 130 Ind. 60, 28 N. E. 619, holding land purchased from judgment debtor after expiration of lien of judgment not subject to sale under judgment; *Miller v. Melone*, 11 Okla. 253, 56 L. R. A. 625, footnote p. 620, 67 Pac. 479, holding creditor's bill fails on judgment forming basis of suit becoming dormant during its pendency; *Ruth v. Wells*, 13 S. D. 488, 79 Am. St. Rep. 902, 83 N. W. 568, holding lien of judgment debtor extinguished, notwithstanding action thereon was instituted sixty days before the period at which the judgment lien expired; *Johnson v. Central Trust Co.* 159 Ind. 609, 65 N. E. 1028, holding judgment of allowance against funds in hands of receiver not lien on property after discharge of receiver without reservation as to existing claims; *Taylor v. McGrew*, 29 Ind. App. 327, 64 N. E. 651, holding that judgment lien on legatee's real estate or proceeds perished eleven years from date of rendition.

Power of appellate court.

Cited in *Matchett v. Cincinnati, W. & M. R. Co.* 132 Ind. 345, 31 N. E. 792, holding appellate court may remand cause with instructions to award *venire de novo* or grant new trial.

Injunction.

Cited in *Miller v. Bowers*, 30 Ind. App. 118, 65 N. E. 559, holding taxpayer entitled to injunction to restrain contractor from using improper material in road in violation of contract; *Hart v. Hildebrandt*, 30 Ind. App. 418, 66 N. E. 173, denying injunction to prevent adverse use of private alley, which in time would ripen into an easement.

18 L. R. A. 215, *PULLMAN'S PALACE CAR CO. v. LAACK*, 143 Ill. 242, 32 N. E. 285.

Direction of verdict.

Approved in *Finley v. West Chicago Street R. Co.* 90 Ill. App. 370; *Gartside Coal Co. v. Turk*, 147 Ill. 123, 35 N. E. 467; *Baltimore & O. R. Co. v. Stanley*, 158 Ill. 398, 41 N. E. 1012; *Cicero & P. Street R. Co. v. Meixner*, 160 Ill. 322, 31 L. R. A. 332, 43 N. E. 823; *Foster v. Wadsworth-Howland Co.* 168 Ill. 517, 48 N. E. 163; *North Chicago Street R. Co. v. Wiswell*, 168 Ill. 614, 48 N. E. 407; *Kean v. West Chicago Street R. Co.* 75 Ill. App. 41; *Missouri Malleable Iron Co. v. Hoover*, 77 Ill. App. 439; *Ackerstadt v. Chicago City R. Co.* 94 Ill. App. 130,—holding it duty of trial court to direct jury to return verdict for defendant in absence of evidence tending to establish plaintiff's right of recovery; *Bayer v. Chicago, M. & N. R. Co.* 68 Ill. App. 225, holding, in absence of evidence tending to establish plaintiff's cause of action, it is not reversible error for trial court to direct verdict for defendant; *Landgraf v. Kuh*, 188 Ill. 493,

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59 N. E. 501, holding instruction to find for defendant erroneous if there is evidence tending to show plaintiff's right to recover; *Cooney v. United States Wringler Co.* 101 Ill. App. 473, holding instruction to find for defendant erroneous, unless evidence wholly insufficient to sustain verdict for plaintiff; *Siddall v. Jansen*, 168 Ill. 45, 39 L. R. A. 114, 48 N. E. 191, holding supreme court may review facts to ascertain if there was evidence tending to support the declaration, where error is assigned on direction of verdict for defendant.

Refusal of trial court to direct verdict.

Cited in *Ashley Wire Co. v. Mercier*, 163 Ill. 491, 45 N. E. 222, holding refusal to direct verdict for defendant in action for personal injury not erroneous where there is evidence tending to show negligence on part of defendant; *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 72, 30 L. R. A. 42, 38 N. E. 773, holding motion to instruct jury to return verdict for defendant properly overruled, if there is sufficient evidence to support cause of action; *Ide v. Fratcher*, 194 Ill. 555, 62 N. E. 814, holding, in action against employer to recover for injury due to bursting emery wheel, case should be submitted to jury if there is any evidence showing right of recovery.

Proper questions for jury.

Cited in *St. Louis, A. & T. H. R. Co. v. Holman*, 53 Ill. App. 621, holding question whether two foremen are fellow servants one of fact for jury to determine; *Mobile & O. R. Co. v. Massey*, 152 Ill. 151, 38 N. E. 787, holding it question of fact for jury whether shoveler and conductor of work train were fellow servants; *West Chicago Street R. Co. v. Dwyer*, 162 Ill. 493, 44 N. E. 815, holding question whether "gripman" and "starter" on cable road, employed by common master, are fellow servants, one of fact; *Mobile & O. R. Co. v. Langsdorf*, 69 Ill. App. 180, holding question of weight and credibility given to testimony, one for jury to determine; *Field v. French*, 80 Ill. App. 90, holding question of owner's liability for defective elevator, resulting in injury to passenger therein, one of fact for jury; *Hartley v. Chicago & A. R. Co.* 197 Ill. 446, 64 N. E. 382, holding that whether relation of fellow servant exists is mixed question of law and fact, determinable fact being whether particular employee was fellow servant; *Western Stone Co. v. Muscial*, 196 Ill. 385, 89 Am. St. Rep. 325, 63 N. E. 664, holding question whether servant assumes risk of employment in particular case, for jury, upon submission of evidence tending to show right of action; *Mobile & R. Co. v. Godfrey*, 155 Ill. 82, 39 N. E. 590, holding it question for jury to determine, within rules laid down by court, who are fellow servants; *Chicago & N. W. R. Co. v. Delaney*, 68 Ill. App. 311, holding it question for jury whether servant was injured by negligence of fellow servant.

Submission of evidence to jury.

Cited in *Brezinski v. Swift*, 91 Ill. App. 539, and *Chicago, B. & Q. R. Co. v. Gunderson*, 174 Ill. 497, 51 N. E. 708, holding it not reversible error for trial court to submit whatever evidence there is tending to establish issues in plaintiff's behalf; *West Chicago Street R. Co. v. Marzalkiewicz*, 75 Ill. App. 242, holding evidence tending to substantiate plaintiff's allegations must be submitted to jury, whose verdict in reference thereto must control; *West Chicago Street R. Co. v. Lyons*, 167 Ill. 594, 42 N. E. 55, and *Cummings v. Chicago & N. W. R. Co.* 189 Ill. 614, 60 N. E. 51, holding sufficiency of evidence in favor of

cause of action a question of law, decision of which determines question whether cause should be submitted to jury.

Instructions to jury.

Cited in *Swift & Co. v. Fue*, 66 Ill. App. 658, holding it not reversible error for trial court to refuse to give instructions on oral request, directing verdict in favor of defendant; *Wenona Coal Co. v. Holmquist*, 152 Ill. 588, 38 N. E. 946, holding refusal to instruct jury to find for defendant not reviewable unless instruction submitted in writing and marked "refused."

Failure to warn servant.

Cited in *Evansville & T. H. R. Co. v. Holcomb*, 9 Ind. App. 207, 36 N. E. 39, holding master liable for injuries to car repairer who, being engaged in service, was injured through neglect of another to give proper notice of danger; *McFarland v. Edmunds Mfg. Co.* 97 Ill. App. 631, holding it duty of master to notify servant of increased danger arising by reason of destruction of building upon which latter is engaged at time of injury; *Cheaney v. Ocean S. S. Co.* 92 Ga. 732, 44 Am. St. Rep. 113, 19 S. E. 33, holding negligence of fireman in failing to provide "hatch tender" to notify servant in hold of ship of danger imputable to master; *Chicago & A. R. Co. v. Bell*, 111 Ill. App. 292, holding master liable for injury to servant by driving engine over ash pit without warning.

Distinguished in *Lang v. H. W. Williams Transp. Line*, 119 Mich. 83, 77 N. W. 633, holding defendant not liable for death of servant who had knowledge of all conditions of his employment.

Master's duty to servants.

Cited in *National Syrup Co. v. Carlson*, 155 Ill. 216, 40 N. E. 492, holding master liable for injuries to servant, resulting from failure to properly guard elevator opening in factory, down which injured one fell during nighttime; *Wellston Coal Co. v. Smith*, 65 Ohio St. 76, 55 L. R. A. 102, 87 Am. St. Rep. 547, 61 N. E. 143, holding mine owner cannot so delegate duty of furnishing safe place for miner to work as to absolve itself from liability for injury due to negligence of agent or servant charged with such duty; *Chicago & A. R. Co. v. Eaton*, 194 Ill. 445, 88 Am. St. Rep. 161, 62 N. E. 784, holding master may not delegate to another, duty of notifying servant of defective track, which caused deceased's injury resulting in his death; *Edward Hines Lumber Co. v. Ligas*, 172 Ill. 317, 64 Am. St. Rep. 38, 50 N. E. 225, Affirming 68 Ill. App. 528, holding master cannot absolve himself from liability for injury to servant by delegating duty of furnishing safe place for servant to work; *Western Stone Co. v. Whalen*, 151 Ill. 487, 42 Am. St. Rep. 244, 38 N. E. 241, holding servant may assume employer has discharged his legal duty in selecting his coemployees, in absence of notice to contrary; *McBeath v. Rawle*, 93 Ill. App. 215, holding legal obligation of master to furnish reasonably safe places for servant to work cannot be shifted to other so as to relieve master of liability; *Eingartner v. Illinois Steel Co.* 94 Wis. 80, 34 L. R. A. 507, 59 Am. St. Rep. 859, 68 N. W. 664, holding master cannot delegate duty to provide safe place, and is liable for injuries to servant, received while working in place furnished by other servants not fellow servants of one injured; *Spring Valley Coal Co. v. Robizas*, 111 Ill. App. 52, holding coal company cannot delegate duty to furnish and place cars, and is liable for injury due to cars negligently placed

by fellow servant; *Illinois Terminal R. Co. v. Thompson*, 112 Ill. App. 469, holding switchman does not assume risk of injury due to maintenance of telegraph pole too close to track.

Cited in note (44 L. R. A. 39, 50, 87) on master's duty to instruct and warn his servants as to perils of employment.

— **Safe appliances.**

Cited in *Chicago & A. R. Co. v. Maroney*, 170 Ill. 524, 62 Am. St. Rep. 396, 48 N. E. 953, holding master liable for failure to furnish safe scaffolding for servant to work upon; *Rice & B. Malting Co. v. Paulsen*, 51 Ill. App. 125, holding master cannot delegate duty of furnishing safe scaffolding and ladders for servants to work upon; *Chicago & E. I. R. Co. v. Heerey*, 105 Ill. App. 648, holding master liable for death of servant, due to negligent coupling of engine and tender, whereby they separated, causing deceased to fall and be run over by tender; *Goldie v. Werner*, 50 Ill. App. 300, holding duty of master to furnish suitable appliances and material for servant to work upon and with may not be shifted so as to absolve him from liability; *Slack v. Harris*, 200 Ill. 108, 65 N. E. 669, holding master liable for injuries suffered by elevator operator, who, acting under orders of master's engineer, attempted to run defective elevator; *Ralph v. American Bridge Co.* 30 Wash. 507, 70 Pac. 1098, holding master liable for injury to servant, due to defective ladder.

Vice principalship.

Cited in notes (51 L. R. A. 590) on vice principalship considered with reference to superior rank of servant; (54 L. R. A. 38, 52, 81, 97, 98, 171) on vice principalship as determined with reference to character of act which caused injury.

Concurrent negligence of master and fellow servant.

Cited in *Illinois C. R. Co. v. Johnson*, 95 Ill. App. 59, holding master liable for injuries to servant received through combined negligence of master and fellow servant; *St. Louis Nat. Stock Yards v. Godfrey*, 101 Ill. App. 50, holding company liable for injuries to employee, even though proximate cause thereof was combined negligence of company and coemployee of one injured; *Chicago & N. W. R. Co. v. Gillison*, 173 Ill. 270, 64 Am. St. Rep. 117, 50 N. E. 657, holding master liable for injury to servant through combined negligence of fellow servant and defective appliances furnished by master; *New York, C. & St. L. R. Co. v. Periguy*, 138 Ind. 432, 37 N. E. 976, holding master liable for injury to servant resulting from concurrent negligence of fellow servant and master in failing to keep proper headlight on railroad engine; *Swift v. Rutkowski*, 82 Ill. App. 115, holding master liable for injury to servant resulting from insufficiency of help, concurring with negligence of fellow servant; *Norris v. Illinois C. R. Co.* 88 Ill. App. 620, holding that if negligence of master co-operates with negligence of fellow servant, and so produces injury, servant may recover.

Cited in footnotes to *Noble v. Bessemer S. S. Co.* 54 L. R. A. 456, which holds master liable for injury by defective tool, though defect known to fellow servant procuring tool; *Loveless v. Standard Gold Min. Co.* 59 L. R. A. 596, which holds master liable for injury from combined negligence of himself and fellow servant.

Negligence of master combined with independent cause.

Cited in *Morris v. Stanfield*, 81 Ill. App. 272, holding employer liable for injury to child servant whose employment was contrary to statute, such violation being proximate cause of injury; *Malott v. Hood*, 99 Ill. App. 363, holding it not

necessary that master's negligence should be sole proximate cause of servant's injury to warrant recovery, where injury is result of master's negligence combined with ulterior cause; *Springside Coal Min. Co. v. Grogan*, 87 Ill. App. 492, holding master liable for injury to servant, resulting from combined accident and negligence of former in properly guarding mine shaft.

Distinguished in *American Exp. Co. v. Risley*, 179 Ill. 299, 53 N. E. 558, Affirming 77 Ill. App. 484, holding master liable to servant the proximate cause of whose injury is master's negligence, although other causes co-operated; *Chicago Economic Fuel Gas Co. v. Myers*, 168 Ill. 144, 48 N. E. 66, holding master liable for servant's injuries resulting from combined negligence of independent contractor and master, under whose direction work was being done; *Western & A. R. Co. v. Bailey*, 105 Ga. 103, 31 S. E. 547, holding master liable for injuries to servant, standing safe distance from track, by being struck by body of trespasser on track, who was thrown violently against plaintiff by train running at reckless rate of speed.

Injuries resulting from concurrent negligent causes.

Cited in *Chicago & E. I. R. Co. v. Hines*, 183 Ill. 485, 56 N. E. 177, holding persons receiving injuries while riding on street car, through combined negligence of servants of street car company and railroad company, may recover of latter; *Chicago Terminal Transfer R. Co. v. Schmelling*, 197 Ill. 631, 64 N. E. 714, holding one may recover for personal injuries suffered by reason of negligence of carrier in operating trains and failure to provide safe station facilities; *Kornazewska v. West Chicago Street R. Co.* 76 Ill. App. 372, and *Chicago & A. R. Co. v. Harrington*, 192 Ill. 29, 61 N. E. 622, holding recovery may be had from either or both of two parties, whose combined negligence resulted in injury to servant while switching cars for either one; *Landon v. Chicago & G. T. R. Co.* 92 Ill. App. 223, holding passenger who, while riding in bus, is struck by passenger train at crossing, owing to combined negligence of driver and railroad company, may recover of either or both; *North Chicago Street R. Co. v. Dudgeon*, 69 Ill. App. 59, holding street railway company not liable to conductor whose injury resulted from negligent acts of fellow servant and independent contractor.

Contributory negligence as defense.

Cited in *Chicago City R. Co. v. Canevin*, 72 Ill. App. 85, holding want of due care on part of party injured will preclude recovery for negligence of another, even though such neglect contributed to injury complained of; *Chicago & A. R. Co. v. Kelly*, 75 Ill. App. 496, holding that to recover for negligence of another it must be shown one injured in no wise contributed to cause of injury; *Metropolitan Acci. Asso. v. Taylor*, 71 Ill. App. 139, denying recovery on accident policy providing against negligent exposure to danger where insured voluntarily sat down on railroad track and was run over after losing volition; *Browne v. Siegel, C. & Co.* 191 Ill. 235, 60 N. E. 815, holding master not liable for accidental death of servant, caused by falling down elevator shaft as result of his own contributory negligence; *Peoria v. Walker*, 47 Ill. App. 194, holding city not liable for injury to one driving along street in negligent manner and in dangerous place, where there is safer roadway elsewhere; *Lake Shore & M. S. R. Co. v. Hessions*, 150 Ill. 556, 37 N. E. 905, holding that to recover for death of one killed at railroad crossing, it must appear deceased exercised ordinary care and railroad company was negligent.

Proximate cause.

Cited in *Chicago v. O'Malley*, 95 Ill. App. 362, holding city liable for negligence of servant whose acts, combined with those of another, were proximate cause of injury to third person, who, while upon swing bridge, was driven therefrom while it was in motion; *Joliet v. Shufeldt*, 144 Ill. 411, 18 L. R. A. 752, 36 Am. St. Rep. 453, 32 N. E. 969, holding city liable for injury to person, due to defective construction of highway, which defect, in conjunction with runaway horse, was proximate cause of injury; *Dixon v. Scott*, 181 Ill. 119, 54 N. E. 897, holding city liable for negligence resulting in injury to individual, notwithstanding particular result could not have been foreseen, so as to make act complained of, proximate cause; *Illinois C. R. Co. v. Almon*, 100 Ill. App. 534, holding proximate cause of fire injuring apple orchard of one whose land was separated from railway by intervening land, over which fire spread to orchard, to be negligence of company; *Peoria v. Adams*, 72 Ill. App. 673, holding failure of city to provide drainage facilities not proximate cause of injury to one whose arm was so scalded, when foundation of building gave way, that amputation was necessary; *True & T. Co. v. Woda*, 104 Ill. App. 17, holding negligence of company in violating city ordinance forbidding piling of material on sidewalk, proximate cause of child's death; *North Chicago Street R. Co. v. Dudgeon*, 184 Ill. 489, 56 N. E. 796, holding master liable for injuries to servant, proximately caused by negligence of independent contractor in employ of master; *Chicago & G. T. R. Co. v. Hoffman*, 82 Ill. App. 462, holding carrier not liable for death of boy, resulting from his voluntary act in jumping from fast moving train; *Lake Erie & W. R. Co. v. Charman*, 161 Ind. 103, 67 N. E. 923, holding failure of yardmaster to give warning, proximate cause of death of car coupler, due to backing of engine against cars, on signal from brakeman; *Chicago, P. & St. L. R. Co. v. Willard*, 111 Ill. App. 230, holding escape of fire from locomotive, proximate cause of resulting injury to cattle by spreading of flames; *Chattanooga Light & P. Co. v. Hodges*, 109 Tenn. 336, 60 L. R. A. 460, footnote p. 459, 97 Am. St. Rep. 844, 70 S. W. 616, holding employee's re-entering burning building to telephone fire alarm, proximate cause of his death; *Terminal R. Asso. v. Larkins*, 112 Ill. App. 370, holding defectively running car not proximate cause of injury to switchman, run over by stepping in front of moving train; *Illinois C. R. Co. v. Creighton*, 63 Ill. App. 169, holding master failing to furnish safe engineer liable to injured servant, where such failure was proximate cause of his injury.

Cited in footnotes to *Western R. Co. v. Mutch*, 21 L. R. A. 316, which holds excessive speed not proximate cause of death of boy attempting to catch on train; *Goodlander Mill Co. v. Standard Oil Co.* 27 L. R. A. 583, which holds burning of mill by oil escaping from tank car not proximate result of shipper's negligence in not having valve in tank outlet.

— Question for jury.

Cited in *Canfield v. North Chicago Street R. Co.* 98 Ill. App. 5, holding question of proximate cause of person's injury, received by being struck by car on other track while alighting from street car, proper for jury to determine; *O'Fallon Coal Co. v. Laquet*, 89 Ill. App. 19, holding question of proximate cause of intestate's death one for jury to determine under proper instruction from court; *Brownback v. Frailey*, 78 Ill. App. 265, holding question of proximate cause of pregnant woman's miscarriage by alleged violence of trespasser, proper for jury to determine; *West Chicago Street R. Co. v. Feldstein*, 160 Ill. 141, 48 N. E. 193, holding question of proximate cause of injury to individual, resulting from collision of

cars, one of fact for jury to determine; *Moore v. Grachowski*, 111 Ill. App. 220, holding question whether presence of coal dust was proximate cause of injury to miner by explosion, properly submitted to jury; *Swift & Co. v. Rutkowski*, 182 Ill. 24, 54 N. E. 1038, holding question of proximate cause to be one of fact; *Chicago & N. W. R. Co. v. Gillison*, 72 Ill. App. 221, holding question of proximate cause to be for jury; *North Chicago Street R. Co. v. Dudgeon*, 184 Ill. 489, 56 N. E. 796, holding question of proximate cause of injury one of fact; *Chicago & E. I. R. Co. v. Mochell*, 193 Ill. 210, 86 Am. St. Rep. 318, 61 N. E. 1028, Affirming 96 Ill. App. 182, holding question whether excessive speed of train was proximate cause of injury, properly submitted to jury.

Assumed risk.

Cited in *Swisher v. Illinois C. R. Co.* 182 Ill. 541, 55 N. E. 555 (dissenting opinion), majority holding that finding of appellate court that injury to servant was result of risk or employment is fatal to recovery; *Phinney v. Illinois C. R. Co.* 122 Iowa, 491, 98 N. W. 358, holding under statute, that servant does not assume risk of negligence of coservant.

18 L. R. A. 221, *COWDEN v. PACIFIC COAST U. S. CO.* 94 Cal. 470, 28 Am. St. Rep. 142, 29 Pac. 873.

Discrimination in rates.

Cited in *Railroad Commission v. Weld*, 96 Tex. 405, 93 S. W. 529, upholding right of railroad commission to establish reasonable discriminating rates.

Cited in footnotes to *Hoover v. Pennsylvania R. Co.* 22 L. R. A. 263, which authorizes giving of lower rates for transportation of coal to manufacturing company than coal dealer; *Western U. Teleg. Co. v. Call Pub. Co.* 27 L. R. A. 622, which authorizes difference in telegraph rates to morning and evening paper; *Griffin v. Goldsboro Water Co.* 41 L. R. A. 240, which holds discrimination in rates charged consumers for water unlawful; *State v. Southern R. Co.* 41 L. R. A. 246, which denies carrier's right to discriminate in favor of high official, larger shipper, or powerful politician.

Cited in note (18 L. R. A. 105) on right of carrier at common law to discriminate between passengers or shippers.

18 L. R. A. 224, *STATE v. HARRISON*, 36 W. Va. 729, 15 S. E. 982.

Separation and misconduct of jury.

Cited in *State v. Cobbs*, 40 W. Va. 724, 22 S. E. 310, holding separation of jury over night will not vitiate verdict; *State v. Church*, 7 S. D. 292, 64 N. W. 152, holding new trial will be granted where jury have separated and been subjected to improper influence to prejudice of parties litigant; *State v. Kent*, 5 N. D. 563, 35 L. R. A. 535, 67 N. W. 1052, holding separation of jury without proof of prejudicial misconduct will not entitle convicted person to new trial; *State v. Clark*, 51 W. Va. 472, 41 S. E. 204, holding verdict of jury will not be set aside because of separation and misconduct of jury, in absence of proof showing that prisoner was prejudiced thereby.

Presumption raised by misconduct of jury.

Cited in *State v. Cotts*, 49 W. Va. 623, 55 L. R. A. 180, 39 S. E. 605, holding misconduct of trial jury in criminal cause raises rebuttable presumption that accused was prejudiced thereby.

New trial.

Cited in *State v. Hobbs*, 37 W. Va. 826, 17 S. E. 380, holding new trial will not be granted in criminal case unless it appear prisoner suffered injustice from bias or juror; *State v. Morrison*, 67 Kan. 166, 72 Pac. 554, holding mere prior expression of opinion by jurors insufficient ground for annulling verdict.

Continuance.

Cited in *State v. Roberts*, 50 W. Va. 424, 40 S. E. 484, holding it not error for trial court to deny motion for continuance, where it is apparent subterfuge has been resorted to to obtain such continuance; *Maxwell v. Cunningham*, 50 W. Va. 319, 40 S. E. 499, holding motion for continuance in action of ejectment being addressed to discretion of trial court, judgment will not be reversed unless plainly erroneous; *State v. Emblem*, 46 W. Va. 327, 33 S. E. 223, and *State v. Lane*, 44 W. Va. 732, 29 S. E. 1020, holding refusal of continuance in criminal cause not ground for reversal, unless such action is plainly erroneous; *State v. Madison*, 49 W. Va. 97, 38 S. E. 492, holding it not reversible error of trial court to refuse to grant motion for continuance of trial of one charged with murder, where such motion is without foundation in fact.

Insanity as affecting responsibility for crime.

Cited in *State v. Maier*, 36 W. Va. 770, 15 S. E. 991, holding person guilty of murder, who, though alleged to be insane, had sufficient power to appreciate difference between right and wrong of particular act; *Copeland v. State*, 41 Fla. 325, 26 So. 319, holding one taking human life under "irresistible impulse" criminally responsible in absence of proof of legal insanity; *State v. Knight*, 95 Me. 478, 55 L. R. A. 376, footnote p. 373, 50 Atl. 276, holding criminal responsibility not affected by uncontrollable impulse to commit crime; *State v. Kelley*, 74 Vt. 286, 52 Atl. 434, raising, but not deciding, question whether one with due capacity and understanding, conclusively presumed to act with free will, and referring particularly to annotation in 18 L. R. A. 224.

Cited in footnotes to *Harnish v. People*, 18 L. R. A. 237, which holds insanity, to take away accountability, must be such as to obliterate sense of right and wrong; *Evers v. State*, 18 L. R. A. 421, which authorizes taking into consideration temporary insanity, when design to kill was formed and executed.

Cited in note (38 L. R. A. 577, 580) on insanity after commission of criminal act.

18 L. R. A. 237, *HORNISH v. PEOPLE*, 142 Ill. 620, 32 N. E. 677.

Insanity as affecting responsibility for crime.

Cited in footnote to *Evers v. State*, 18 L. R. A. 421, which authorizes taking into consideration temporary insanity, when design to kill was formed and executed.

Cited in note (39 L. R. A. 745) on measure of proof of insanity in criminal cases.

18 L. R. A. 240, *CAPITAL CITY BANK v. PARENT*, 134 N. Y. 527, 47 N. Y. S. R. 643, 31 N. E. 976.

Jurisdiction.

Cited in *Dittmar v. Gould*, 60 App. Div. 100, 69 N. Y. Supp. 708, holding court without jurisdiction of creditor's suit to reach surplus of trust fund, where judgment has not been recovered against debtor or execution been returned; *O'Donoghue*

hue v. Boies, 159 N. Y. 99, 53 N. E. 537, holding judgment of partition and sale of real estate held in trust for infant, being contrary to will and forbidden by statute, open to collateral attack in subsequent action, on account of want of jurisdiction of court in particular case; **Patchen v. Rofkar**, 12 App. Div. 477, 42 N. Y. Supp. 35, holding that court of equity will take jurisdiction of creditor's suit to set aside assignment of nonresident debtor and subject property within state to equitable lien for his claim; **Scharmann v. Schoell**, 23 App. Div. 402, 48 N. Y. Supp. 306, holding court having jurisdiction of subject of action may render effective judgment against absconding executrix on her bond, holding sureties liable for her default.

Attachment.

Distinguished in **Dunn v. Arkenburgh**, 48 App. Div. 520, 62 N. Y. Supp. 861, holding action maintainable in aid of attachment upon interest of legatee which has been ascertained by probate court.

18 L. R. A. 242, **BOLTON v. SCHRIEVER**, 135 N. Y. 65, 47 N. Y. S. R. 870, 31 N. E. 1001.

Collateral attack on judgments.

Cited in **Kelly v. Jay**, 79 Hun, 540, 29 N. Y. Supp. 933, holding judgment of surrogate court appointing administrators not open to collateral attack in suit between heir and mortgagee of deceased; **O'Connor v. Felix**, 87 Hun, 184, 33 N. Y. Supp. 1074, holding judgment of court of general jurisdiction, rendered in due form and after lawful hearing, not open to collateral attack in absence of fraud and collusion; **O'Donoghue v. Bois**, 159 N. Y. 106, 53 N. E. 537, holding judgment of partition and sale of infant's estate open to collateral attack in action by him on coming of age, against purchaser; **Soules v. Robinson**, 158 Ind. 99, 92 Am. St. Rep. 301, 62 N. E. 999, holding jurisdiction of circuit court as to person will be presumed, in collateral attack on judgment; **Re Law**, 56 App. Div. 458, 67 N. Y. Supp. 857, holding decree of foreign probate court admitting will to probate subject to collateral attack.

Cited in footnote to **Springer v. Shavender**, 33 L. R. A. 772, which holds void and subject to collateral attack judgment for sale of living person's land as that of decedent.

Cited in note (21 L. R. A. 682) on conclusiveness of probate as *res judicata*.

Distinguished in **Re Patterson**, 146 N. Y. 331, 40 N. E. 990, holding unrevoked letters of administration to one claiming to be surviving husband not estop next of kin from asking that estate be turned over to them; **Plant v. Harrison**, 36 Misc. 690, 74 N. Y. Supp. 411, holding decree of Connecticut probate court open to collateral attack by legatee claiming deceased's domicile was in another jurisdiction.

The annotation in 18 L. R. A. 242, was referred to with approval in **Ames v. Williams**, 72 Miss. 771, 17 So. 762, holding appointment of clerk of chancery court as guardian of a minor on ground that minor was not a resident of the county, not open to collateral attack.

Proceedings in probate court.

Cited in **Carr v. Brown**, 20 R. I. 222, 38 L. R. A. 296, footnote p. 294, 78 Am. St. Rep. 855, 38 Atl. 9, holding statute authorizing administration on estate of person not heard from in seven years not constitutional; **Doe Brass Mfg. Co. v. Savlik**, 35 C. C. A. 392, 93 Fed. 521, holding it error of court of foreign jurisdiction to grant letters of administration upon estate of nonresident having no property within its

jurisdiction at time of death; *Re Killan*, 172 N. Y. 564, 63 L. R. A. 112, 65 N. E. 561 (dissenting opinion), majority upholding right of unknown brother of intestate, not cited or appearing at judicial settlement, to independent accounting; *Knox v. Nobel*, 77 Hun, 232, 28 N. Y. Supp. 355, holding jurisdiction of surrogate to appoint administrator does not depend upon any inquiry as to age of proposed administrator.

Validity of acts of executor or administrator.

Cited in footnote to *Smith v. Wildman*, 36 L. R. A. 834, which holds sale by administrator to pay debt barred by limitation, void.

Cited in note (21 L. R. A. 157) on validity of acts done by executor or administrator under letters testamentary, or of administration afterwards revoked or held invalid.

18 L. R. A. 249, *FARR v. GRAND LODGE*, A. O. U. W. 83 Wis. 446, 35 Am. St. Rep. 73, 53 N. W. 738.

Joint tenancy.

Cited in *Noble v. Teeple*, 58 Kan. 400, 49 Pac. 598, holding that upon death of one joint tenant, estate passes *ipso facto* to surviving tenants; *Fiedler v. Howard*, 99 Wis. 393, 67 Am. St. Rep. 865, 75 N. W. 163, holding that there may be joint tenancy of personalty; *Citizens Loan & T. Co. v. Witte*, 116 Wis. 63, 92 S. W. 443, holding agreement of husband and wife in deed running to them jointly, to assume and pay mortgage, binding upon each.

Distinguished in *Brown v. Iowa L. of H.* 107 Iowa, 443, 78 N. W. 73, holding insurance policies bequeathed to "legal heirs" does not create estate of joint tenancy; *Wallace v. St. John*, 119 Wis. 596, 97 N. W. 197, holding that under statute, deed to husband and wife conveys estate in joint tenancy.

18 L. R. A. 252, *BUCKEYE MARBLE & FREESTONE CO. v. HARVEY*, 92 Tenn. 115, 36 Am. St. Rep. 71, 20 S. W. 427.

Ultra vires.

Cited in *Louisville, N. A. & C. R. Co. v. Ohio Valley Improv. & Contract Co.* 69 Fed. 435, holding, in absence of statutory authority, corporation guaranteeing bonds of another acts *ultra vires*; *Byrne v. Schuyler Electric Mfg. Co.* 65 Conn. 350, 28 L. R. A. 308, 31 Atl. 937, holding contract of purchase by one corporation of stock of another *ultra vires* and void; *McCutcheon v. Merz Capsule Co.* 31 L. R. A. 419, 19 C. C. A. 113, 37 U. S. App. 586, 71 Fed. 792, holding sale of entire properties of manufacturing corporation to another, in consideration of shares of stock to be held as investment, *ultra vires*; *Marbury v. Kentucky Union Land Co.* 10 C. C. A. 401, 22 U. S. App. 267, 62 Fed. 342, holding it not *ultra vires* for corporation to guarantee bonds and dividends on preferred stock of subsidiary corporation, where relation is such as to render actual existence of one dependent upon guaranty; *Humboldt Min. Co. v. American Mfg. Min. & Mill. Co.* 10 C. C. A. 420, 22 U. S. App. 334, 62 Fed. 361, holding guaranty of contract or debt of one corporation by another *ultra vires* and void; *Tennessee Ice Co. v. Raine*, 107 Tenn. 151, 64 S. W. 29, holding corporation having received benefit of contract made beyond scope of its powers will not be allowed to escape liability thereon by plea of *ultra vires*; *Tod v. Kentucky Union Land Co.* 57 Fed. 51, holding whether particular contract of corporation is beyond scope of corporate powers determinable by its charter.

Cited in footnotes to *Trust Co. v. State*, 48 L. R. A. 520, which sustains consolidation of street railway companies, resulting in giving increased facilities at less cost to public; *San Diego Water Co. v. San Diego Flume Co.* 29 L. R. A. 839, which holds valid, appointment of other corporation to act as sole agent for sale of water within city by plants of both corporations; *Farmers' Loan & T. Co. v. New York & N. R. Co.* 34 L. R. A. 76, which denies right to corporation owning majority of other company's stock to cause default on mortgage given by latter; *Joseph Bancroft & Sons Co. v. Bloede*, 52 L. R. A. 734, which sustains power of cotton manufacturing company to purchase stock in company manufacturing dyes used by former; *Bank of Commerce v. Hart*, 20 L. R. A. 780, which denies right of banking corporation to own stock in insurance company.

Distinguished in *Coal Creek Min. & Mfg. Co. v. Tennessee Coal, Iron & R. Co.* 106 Tenn. 669, 62 S. W. 162, holding lease of corporate property not *ultra vires*.

— As valid defense.

Cited in *De La Vergne Refrigerating Mach. Co. v. German Sav. Inst.* 175 U. S. 59, 44 L. ed. 72, 20 Sup. St. Rep. 20, holding plea of *ultra vires* good defense against enforcement of contract made by corporation contrary to statute of public policy; *Miller v. American Mut. Acci. Ins. Co.* 92 Tenn. 176, 20 L. R. A. 769, 21 S. W. 39, holding no recovery can be had on accident policy issued by company in excess of its corporate powers; *Williams v. Bank of Commerce*, 71 Miss. 868, 42 Am. St. Rep. 503, 16 So. 238, holding defense of *ultra vires* no bar to recovery in equity, where corporation has had full benefit of contract.

Distinguished in *Goodland v. Bank of Darlington*, 74 Mo. App. 378, holding defense of *ultra vires* not available in favor of corporation in case contract is executed in part, and not contrary to public policy.

18 L. R. A. 256, *NEW HAVEN v. NEW HAVEN & D. R. CO.* 62 Conn. 252, 25 Atl. 316.

Requirement that railway pave street.

Cited in *Central R. & Electric Co's Appeal*, 67 Conn. 222, 35 Atl. 32, holding municipality, being trustee and custodian of public highways, may exact equitable compensation from railway to cover extra cost of repairing street; *Snouffer v. Cedar Rapids & M. C. R. Co.* 118 Iowa, 307, 92 N. W. 79, holding requirement that street railway remove tracks to middle of street, place at grade, and pave space occupied, reasonable.

Municipality as trustee.

Cited in footnote to *Clayton v. Hallett*, 59 L. R. A. 407, which sustains city's power to take property in trust for education of poor white male orphans.

Obstruction of street.

Cited in footnote to *Smith v. McDowell*, 22 L. R. A. 393, which holds stone wall inclosing areaway obstructing street, a nuisance.

Taking easement for private use.

Cited in footnote to *Van Witsen v. Gutman*, 24 L. R. A. 403, which denies right to take away for private use abutter's easement in public alley.

Compensation for use of private property.

Cited in *Canastota Knife Co. v. Newington Tramway Co.* 69 Conn. 176, 36 Atl. 1107, holding grant of franchise to railway to use public highway, valuable property right for which compensation is due adjoining property owners.

Interest of third person in contract.

Cited in *Carpenter v. Reliance Realty Co.* 103 Mo. App. 502, 77 S. W. 1004, holding that contractor's bond to protect adjoining property did not inure to benefit of adjoining owner.

Distinguished in *St. Louis use of Glencoe Lime & Cement Co. v. Von Phul*, 133 Mo. 573, 54 Am. St. Rep. 695, 34 S. W. 843, holding contract between two parties, with conditions for benefit of third person, may be enforced by such third person, even though not named in the contract.

18 L. R. A. 260, *LOUISVILLE & N. R. CO. v. BOLAND*, 96 Ala. 626, 11 So. 667.

Interchange of railroad cars.

Cited in *Chicago, B. & Q. R. Co. v. Curtis*, 51 Neb. 450, 66 Am. St. Rep. 456, 71 N. W. 42, holding it matter of common knowledge that railroads haul cars of other companies over their lines; *Missouri, K. & T. R. Co. v. Merrill*, 61 Kan. 676, 60 Pac. 819, holding demands of commerce necessitate interchange and hauling of cars of various railroad lines.

Risks of employment.

Followed in *Boland v. Louisville & N. R. Co.* 106 Ala. 645, 18 So. 99, holding railroad company need not warn employee of increased risk of using coupling apparatus.

Cited in *East Tennessee, V. & G. R. Co. v. Turvaille*, 97 Ala. 125, 12 So. 63, holding master not liable for failure to instruct servant of increased danger incident to coupling cars having double bumpers; *Louisville & N. R. Co. v. Banks*, 104 Ala. 516, 16 So. 547, holding master not liable for injuries to servant, resulting from dangers so obvious as to be seen and known by servant exercising reasonable care; *Louisville & N. R. Co. v. Stutts*, 105 Ala. 376, 53 Am. St. Rep. 127, 17 So. 29, holding master not liable for death of servant due to his own negligence while engaged in service particularly hazardous, the nature of which he had knowledge of; *Davis v. Western R. Co.* 107 Ala. 630, 18 So. 173, holding servant guilty of contributory negligence in going between cars equipped with double deadwoods or buffers, he having seen and known of extra risk incident to their use; *Whitcomb v. Standard Oil Co.* 153 Ind. 518, 55 N. E. 440, holding handling and coupling of cars equipped with double bumpers risk incident to brakeman's employment; *Southern R. Co. v. Arnold*, 114 Ala. 189, 21 So. 954, holding switchman having knowledge of extraordinary dangers incident to coupling cars equipped with double bumpers cannot recover for personal injury due to his carelessness.

Cited in footnote to *Mason v. Richmond & D. R. Co.* 18 L. R. A. 845, which holds railroad company liable for injury while coupling freight cars without bumpers.

Master's duty to warn servant of danger.

Cited in *Louisville & N. R. Co. v. Binion*, 107 Ala. 655, 18 So. 75, holding it duty of employer to inform servant of latent defects; *Louisville & N. R. Co. v. Binion*, 107 Ala. 655, 18 So. 75, holding it duty of employer to ascertain and inform servant of dangers incident to appliances used and services engaged in; *Robinson Min. Co. v. Tolbert*, 132 Ala. 466, 31 So. 519, holding it duty of master to inform servant of obvious and known dangers incident to employment, of which servant had no knowledge; *Alabama Steel & Wire Co. v. Wrenn*, 136 Ala. 493, 34 So. 970, holding question whether inexperienced serv-

ant had been properly warned of dangers of employment correctly submitted to jury on conflicting testimony.

Cited in note (44 L. R. A. 53, 66, 82) on master's duty to instruct and warn servants as to perils of employment.

Failure to inspect.

Cited in footnote to *Budge v. Morgan's L. & T. R. & S. S. Co.* 58 L. R. A. 333, which holds master failing to inspect foreign cars liable for consequences of defects discoverable by ordinary inspection.

18 L. R. A. 264, *ANGEVINE v. KNOX-GOODRICH* (Cal.) 31 Pac. 529.

Recovery by injured servant against other than master.

Cited in note (46 L. R. A. 92) on right of servant to recover damages from persons other than his master for injuries received in performance of duties.

Implied warranty.

Cited in note (33 L. R. A. 452) on implied covenant in lease as to fitness of property for purpose intended.

18 L. R. A. 266, *LEIGHTON v. YOUNG*, 3 C. C. A. 176, 10 U. S. App. 298, 52 Fed. 439.

Federal practice.

Cited in *Indianapolis v. Navin*, 151 Ind. 159, 41 L. R. A. 344, 51 N. E. 80, holding construction put upon state statute by highest state court, if constitutional, will be followed by Federal courts; *Frey v. Willoughby*, 11 C. C. A. 464, 27 U. S. App. 417, 63 Fed. 866, holding Federal court will not entertain equitable action to regain possession of real property, where there is plain and adequate remedy at law.

Statutory lien for land improvements.

Cited in *McIntire v. Pryor*, 10 App. D. C. 438, upholding statute giving one in possession of lands under claim of title, making valuable improvements thereon, in good faith, a lien thereon until compensation by real owner, in case of ejectment; *Lindt v. Uihlein*, 116 Iowa, 58, 89 N. W. 214, holding lien for improvements under claimant's act lost by surrendering possession before filing petition.

Distinguished in *Hardeman v. Turner*, 50 C. C. A. 112, 112 Fed. 43, holding, after judgment determining title in ejectment against occupant and fixing lien, that he is chargeable with rental value of land and improvements.

Purchaser's notice of defects in title.

Cited in *Henderson v. Wanamaker*, 25 C. C. A. 183, 49 U. S. App. 174, 79 Fed. 739, holding purchaser of land from one not in possession bound to take notice of defects in title, even to defenses such occupant might make as against vendor's title.

Partition.

Cited in *Truth Lodge No. 213 A. F. & A. M. v. Barton*, 119 Iowa, 239, 97 Am. St. Rep. 303, 93 N. W. 106, holding that partition may be ordered where parties own land jointly, and buildings thereon in severalty.

18 L. R. A. 275, *MARK v. HYATT*, 135 N. Y. 306, 48 N. Y. S. R. 70, 31 N. E. 1099.

Damages caused by injunction or unauthorized judgment.

Cited in *Harless v. Consumers' Gas Trust Co.* 14 Ind. App. 548, 43 N. E. 456, holding one maliciously enjoined may recover damages; *Burt v. Smith*, 84 App. Div. 50, 82 N. Y. Supp. 186, holding mere issue of injunction *pendente lite* not evidence of probable cause sufficient to defeat action for malicious prosecution.

Cited in footnote to *Columbus, H. Valley & T. R. Co. v. Burke*, 32 L. R. A. 329, which denies liability on injunction bond on dissolution of injunction by consent.

Cited in note (45 L. R. A. 800, 801) on liability for tort in doing acts authorized by subsisting judgment which is afterwards reversed.

18 L. R. A. 278, *RAMSEY COUNTY v. MACALASTER COLLEGE*, 51 Minn. 437, 53 N. W. 704.

Property exempt from taxation.

Cited in *Yale University v. New Haven*, 71 Conn. 328, 43 L. R. A. 494, 42 Atl. 87, holding buildings used as dormitories and dining-halls, being part of college equipment, free from taxation; *Academy of Sacred Heart v. Ireys*, 51 Neb. 757, 71 N. W. 752, holding property used directly for educational purposes exempt from taxation, although portion of grounds were used for raising vegetables for school tables.

Cited in note (19 L. R. A. 292) on effect of using property of religious, charitable, or educational institution in secular business or for revenue, on its right to exemption from taxation.

18 L. R. A. 281, *FARWELL v. COHEN*, 138 Ill. 216, 32 N. E. 893, 28 N. E. 35.

Jurisdiction of county court over assignment proceedings.

Cited in *Howe v. Warren*, 154 Ill. 244, 40 N. E. 472, Affirming 44 Ill. App. 173, holding that by terms of general assignment act (May 22, 1877) of Illinois, county court is vested with primary exclusive jurisdiction to make equitable adjustment of creditor's claims; *First Nat. Bank v. North Wisconsin Lumber Co.* 41 Ill. App. 391, holding proceedings in voluntary assignment before county court which has not jurisdiction are without legal effect; *Pease v. Francis*, 63 Ill. App. 339, holding voluntary assignment having been made, court possessed jurisdiction to protect property from levy under execution against assignor; *John V. Farwell v. Patterson*, 76 Ill. App. 607, holding administration of estate in voluntary assignment proceedings being vested in county court is nevertheless governed by rules of equity; *Harbaugh v. Costello*, 184 Ill. 116, 75 Am. St. Rep. 147, 56 N. E. 363, holding state statute relative to assignments being construed to be insolvency law, its operation being suspended by enactment of national bankruptcy act, jurisdiction of county court under state statute is also suspended; *Baer v. John V. Farwell Co.* 66 Ill. App. 404, holding county court without jurisdiction to declare transfer of property by debtor to certain creditors voluntary assignment for benefit of all creditors.

— Prerequisites to jurisdiction.

Cited in *Cantrell v. Seaverns*, 64 Ill. App. 276, holding that, before county court has jurisdiction to compel assignee to settle claims of creditors, there must

have been made a valid assignment; *Osborne v. Williams*, 34 Ill. App. 423, holding recording of deed of assignment in county recorder's office sufficient to perfect assignment and give county court exclusive jurisdiction.

Voluntary assignments.

Cited in *Walker v. Ross*, 150 Ill. 57, 36 N. E. 986, Affirming 52 Ill. App. 143, holding mortgage executed to secure certain creditors, containing power of immediate sale, an assignment for benefit of all debtor's creditors; *Leeper v. Greensfelder*, 48 Ill. App. 548, holding instrument in form of power of attorney, assignment for benefit of creditors generally when it assigns choses in action to be converted into money to pay specified debts; *Price v. Laing*, 152 Ill. 384, 38 N. E. 921, holding constructive assignment of personal property for benefit of particular creditors not sanctioned by statute relative to voluntary assignments; *Smith v. Goodman*, 149 Ill. 80, 36 N. E. 621, holding leasehold interest of insolvent debtor passes by assignment, though not included in schedule of property attached to assignment; *Wright v. Hutchinson*, 54 Ill. App. 540, holding partner not standing in attitude of a creditor not entitled to have assignment made by his copartner for benefit of his individual creditors declared assignment for benefit of all his creditors.

Distinguished in *Chicago Title & T. Co. v. Smith*, 158 Ill. 427, 41 N. E. 1076, holding preferential voluntary assignment of portion of corporation's estate to meet particular indebtedness not affected by statute prohibiting voluntary assignments; *Moore v. Meyer*, 47 Fed. 105, holding voluntary transfer of property specifically described to particular creditors not converted into general assignment by force of statute pertaining to assignments; *Morriss v. Blackman*, 179 Ill. 106, 53 N. E. 547, holding instrument lacking defeasance clause is mortgage, and not assignment.

Excessive costs.

Cited in *Fox v. Oriel Cabinet Co.* 70 Ill. App. 325, holding it proper for trial court to disallow excessive fees for services rendered in procuring dissolution of injunction.

Preferential assignments.

Cited in *Cutter v. Pollock*, 4 N. D. 213, 25 L. R. A. 381, 50 Am. St. Rep. 644, 59 N. W. 1062, holding that giving of mortgages to particular creditors to secure claims, with power of immediate foreclosure, not illegal preferential assignment; *Einstein v. Lewis*, 54 Ill. App. 522, holding partial assignment for particular creditors attaches only to property mentioned; *Sweet v. Scherber*, 42 Ill. App. 249, holding judgment creditors not entitled to priority in distribution of assets of insolvent estate under law of assignments of 1877, which requires *pro rata* distribution among creditors; *Farwell v. Nilsson*, 35 Ill. App. 109, holding assignment act of 1887 merely prohibits preferential assignments; *Marshall v. Livingston Nat. Bank*, 11 Mont. 363, 28 Pac. 312, holding instrument purporting to be chattel mortgage, but in fact assignment, void, so far at least as it affects preference given to employees for wages; *Wright v. Hutchinson*, 156 Ill. 583, 41 N. E. 172, holding deed of trust executed for benefit of certain creditors, together with pledge of personal property, not general assignment for benefit of all debtor's creditors; *Juillard v. Walker*, 54 Ill. App. 520, holding preference to creditors made by insolvent corporation winding up through a receiver in concert with creditors not void.

Cited in footnote to *Sandwich Mfg. Co. v. Max*, 24 L. R. A. 524, which holds conveyance in absolute payment of debt not unlawful preference.

Cited in note (37 L. R. A. 342, 343) on whether preference by mortgage or sale is assignment for creditors.

Acknowledging and recording assignment.

Cited in *Mann v. Reed*, 49 Ill. App. 411, holding failure to acknowledge and record assignment otherwise valid will not render it inoperative; *Feltenstein v. Stein*, 157 Ill. 30, 45 N. E. 502, holding failure to record deed of assignment will not invalidate trust, where assignee has taken possession of property assigned.

18 L. R. A. 298, *DEELEY v. DWIGHT*, 132 N. Y. 59, 43 N. Y. S. R. 409, 30 N. E. 258.

Mortgage or lease as affecting after-acquired property.

Cited in *People ex rel. Mathews v. Woodruff*, 75 App. Div. 93, 77 N. Y. Supp. 722, holding failure to demand execution of mortgage as agreed upon, no extinguishment of right to enforce lien; *Stewart v. Fidelity Loan Asso.* 19 Misc. 51, 40 N. Y. Supp. 705, holding chattel mortgage of property not *in esse*, and not belonging at execution of mortgage to mortgagor, ineffective to support action at law thereon; *Stewart v. Fidelity Loan Asso.* 19 Misc. 51, 40 N. Y. Supp. 705, holding chattel mortgage on stock of goods, constantly changing, only affects property in existence at time mortgage executed; *Graves Elevator Co. v. Callanan*, 11 App. Div. 304, 42 N. Y. Supp. 930, holding mortgagee of vendee under conditional sale of elevator in process of erection by vendor on premises of mortgagor takes property mortgaged subject to conditions of sale; *Anchor Brewing Co. v. Burns*, 32 App. Div. 273, 52 N. Y. Supp. 1005, holding liquor-tax license certificate not yet in existence not recoverable by action of replevin on lien created by chattel mortgage; *Fleetham v. Reddick*, 82 Hun, 391, 31 N. Y. Supp. 342, holding grain not potentially in existence not subject to chattel mortgage; *Perkins v. Batterson*, 66 Hun, 586, 21 N. Y. Supp. 815, holding appointment of receiver of defunct corporation did not divest mortgagees of right to after-acquired property of mortgagor nor proceeds arising from sale thereof; *Re Sentenne & G. Co.* 120 Fed. 438, holding provision in chattel mortgage on machinery to include after-acquired property valid as between parties; *National Bank of Deposit v. Rogers*, 166 N. Y. 390, 59 N. E. 922, holding equity will enforce mortgage lien upon after-acquired property.

Cited in footnotes to *New Lincoln Hotel Co. v. Shears*, 43 L. R. A. 588, which holds ineffectual as against mortgage, provision in lease for lien for rent on personal property subsequently brought on premises; *Brown v. Neilson*, 54 L. R. A. 328, which holds stipulation for lien for rent on all property then or thereafter on leased premises does not create lien for rent in arrears on crops and other property not in being at time of lease; *Horner-Gaylord Co. v. Fawcett*, 57 L. R. A. 869, which holds deed of trust to secure bona fide debt on stock of goods covering after-acquired property not fraudulent *per se*; *Townsend Brick & Contracting Co. v. Allen*, 52 L. R. A. 323, which holds unmanufactured clay not covered by mortgage on clay and brick materials; *New England Nat. Bank v. Northwestern Nat. Bank*, 60 L. R. A. 256, which holds mortgage of chattels to be acquired invalid against one taking possession under other mortgage executed by mortgagor after acquiring them.

Cited in note (23 L. R. A. 477) on sale or mortgage of future crops.

Action for conversion.

Cited in *Hoff v. Coumeight*, 14 Misc. 316, 35 N. Y. Supp. 1052, holding that complainant must show legal right of possession to deposit in bank in order to maintain action for its conversion.

Cited in footnote to *Dean v. Cushman*, 55 L. R. A. 959, which denies liability for conversion without demand, of purchaser in good faith of mortgaged chattels from mortgagor in possession.

Replevin.

Approved in *National Bank of Deposit v. Rogers*, 1 App. Div. 627, 37 N. Y. Supp. 365, holding mere equitable right of possession to satisfy lien created by chattel mortgage not sufficient to support action of replevin; *Haas v. Altieri*, 2 Misc. 253, 21 N. Y. Supp. 950, holding drawer of check may maintain replevin against one wrongfully retaining it.

Validity of oral agreement.

Approved in *Mathews v. Hardt*, 79 App. Div. 576, 80 N. Y. Supp. 462, Affirming 37 Misc. 655, 76 N. Y. Supp. 134, holding oral agreement by president of corporation with one loaning money to enable it to continue business valid as against trustee in bankruptcy of corporation, unless made within four months before petition filed.

18 L. R. A. 305, *TOD v. KENTUCKY UNION R. CO.* 3 C. C. A. 60, 6 U. S. App. 186, 52 Fed. 241.

Who are laborers or employees.

Cited in *Clark v. Renninger*, 89 Md. 71, 44 L. R. A. 415, footnote p. 413, 42 Atl. 928, holding person cutting timber, part of whose earnings are retained till completion of work, not employee within laborers' lien law; *Gulf & B. Valley R. Co. v. Berry*, 31 Tex. Civ. App. 410, 72 S. W. 1049, holding civil engineer not entitled to lien as laborer for wages earned in construction of railroad; *Farmer v. St. Croix Power Co.* 117 Wis. 89, 98 Am. St. Rep. 914, 93 N. W. 830, holding second subcontractor not employee of first subcontractor within lien law.

Distinguished in *Van Frank v. St. Louis, C. G. & Ft. S. R. Co.* 93 Mo. App. 423, 67 S. W. 688, holding civil engineer entitled to lien for services for surveying and staking out line of roadbed.

Preferential lien for services.

Cited in *Lewis v. Fisher*, 80 Md. 143, 26 L. R. A. 280, footnote p. 278, 45 Am. St. Rep. 327, 30 Atl. 608, holding compensation for services of attorney for insolvent corporation not entitled to statutory preference.

Cited in footnotes to *Palmer v. Van Santvoord*, 38 L. R. A. 402, which holds employee at monthly salary to sell and set up machines and unpack and repack them when necessary entitled to preference as employee; *Cawood v. Wolfley*, 31 L. R. A. 538, which holds wages due clerk before and during employer's last illness within statute classifying claims against estate; *Falconio v. Larsen*, 37 L. R. A. 254, which holds preference of claims for wages assignable; *Latta v. Lonsdale*, 52 L. R. A. 479, which denies right of attorney employed by railroad company on yearly salary, to preference as laborer.

Statutory requirement that wages be paid in lawful money.

Cited in note (28 L. R. A. 276) on validity and effect of statutes requiring wages to be paid in lawful money.

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18 L. R. A. 313, *STATE ex rel. SUMMERFIELD v. CLARKE*, 21 Nev. 333, 37 Am. St. Rep. 517, 31 Pac. 545.

Eligibility of Federal officer to hold state office.

Cited in *State ex rel. McMillan v. Sadler*, 25 Nev. 173, 83 Am. St. Rep. 573, 58 Pac. 284, holding under Constitution of Nevada, person appointed or elected to lucrative office under United States government precluded, *ipso facto*, from accepting or retaining state office.

Gubernatorial power of appointment.

Cited in footnote to *Fox v. McDonald*, 21 L. R. A. 529, which holds power to appoint to fill vacancy not inherent in governor.

Statutory construction.

Cited in *State ex rel. Thompson v. Washoe County*, 23 Nev. 258, 45 Pac. 529. (dissenting opinion by Bonfield, J.), who holds plain and unambiguous language of statute must control in its construction.

18 L. R. A. 315, *BLAGEN v. THOMPSON*, 23 Or. 239. 31 Pac. 647.

Measure of damages for breach of contract.

Cited in *Ironton Land Co. v. Butchart*. 73 Minn. 49, 75 N. W. 749, holding measure of damages upon breach of land contract is difference in value of land as it was, and as it would have been upon fulfilment of contract; *Fraser v. Echo Min. & Smelting Co.* 9 Tex. Civ. App. 213, 28 S. W. 714, holding measure of damages upon breach of contract to furnish machinery, proximate and natural loss flowing from breach; *McLane v. Maurer*, 28 Tex. Civ. App. 77, 66 S. W. 693, holding commissions that agents would have earned from sale of land but for breach of contract recoverable as damages; *Occidental Consol. Min. Co. v. Comstock Tunnel Co.* 125 Fed. 246, holding general damages necessarily resulting from breach of contract, recoverable; *Lanahan v. Heaver*, 79 Md. 422, 29 Atl. 1036, holding, in action for breach of contract to build houses, anticipated profits from their possible sale not recoverable.

Cited in note (53 L. R. A. 40, 42, 96) on loss of profits as element of damages for breach of contract.

Distinguished in *Coos Bay R. Co. v. Nosler*, 30 Or. 556, 48 Pac. 361, holding speculative profits anticipated from completion of railroad, being too remote, are not recoverable or available as set-off in action on contract of subscription.

18 L. R. A. 323, *MILLER v. GEORGIA R. & BKG. CO.* 88 Ga. 563, 30 Am. St. Rep. 170, 15 S. E. 316.

Charge for storage.

Cited in *Dixon v. Central R. Co.* 110 Ga. 184, 35 S. E. 369, holding common carrier may lawfully charge reasonable sum for storing property of shipper, whether it be in cars or warehouse.

Demurrage charge.

Cited in *Norfolk & W. R. Co. v. Adams*, 90 Va. 395, 22 L. R. A. 534, 44 Am. St. Rep. 916, 18 S. E. 673, and *Kentucky Wagon Mfg. Co. v. Ohio & M. R. Co.* 98 Ky. 162, 36 L. R. A. 855, 56 Am. St. Rep. 326, 32 S. W. 595, holding charge of \$1 per day car service not an unreasonable charge upon shipper for delay in loading or unloading cars; *Swan v. Louisville & N. R. Co.* 106 Tenn. 234, 61 S. W. 57, holding valid, regulation of common carrier to charge reasonable compensa-

tion for unreasonable delay of consignee in unloading cars; *Schumacher v. Chicago & N. W. R. Co.* 207 Ill. 208, 69 N. E. 825, Affirming 108 Ill. App. 523, upholding right of railroad to demurrage for unreasonable detention of cars; *Darlington v. Missouri P. R. Co.* 99 Mo. App. 14, 72 S. W. 122, holding that right to demurrage exists, independent of contract.

Cited in note (22 L. R. A. 531) on right of railroad company to make charge for detention of its cars by consignees, "demurrage."

18 L. R. A. 329, *Re ALBRECHT*, 136 N. Y. 91, 32 Am. St. Rep. 700, 49 N. Y. S. R. 65, 32 N. E. 632.

Tenancy by entirety and cotenancy.

Cited in *Carey v. Griffin*, 36 Misc. 470, 73 N. Y. Supp. 766, holding conveyance to husband and wife as tenants by entirety entitles survivor to entire estate; *Wilcox v. Murtha*, 41 App. Div. 409, 58 N. Y. Supp. 783, holding wife's executors entitled to whole of estate left to her as surviving tenant by entirety of her husband; *Re Meehan*, 59 App. Div. 158, 69 N. Y. Supp. 9, holding deposits in bank in name of husband and wife inure absolutely on death of one to survivor; *Hiles v. Fisher*, 67 Hun, 236, 22 N. Y. Supp. 795 (concurring opinion), majority holding deed to husband and wife creates estate by entirety, entitling survivor to make valid mortgage of whole estate; *Luttermoser v. Zeuner*, 110 Mich. 188, 68 N. W. 117, holding wife's interest in mortgage held in joint tenancy with husband passes upon her death to her executor; *Baumann v. Guion*, 21 Misc. 123, 46 N. Y. Supp. 715, holding husband and wife owners in common of personal estate; *Wetherow v. Lord*, 41 App. Div. 417, 58 N. Y. Supp. 778, holding husband unable to make gift of bank deposit made to credit of himself and wife jointly, in excess of one half interest therein; *Johnston v. Johnston*, 173 Mo. 105, 61 L. R. A. 171, 96 Am. St. Rep. 486, 73 S. W. 202, holding that estates by entirety may be created in personal property.

Cited in footnote to *Thornburg v. Wiggins*, 22 L. R. A. 42, which holds tenancy by entirety not created by conveyance to husband and wife "in joint tenancy."

Cited in notes (22 L. R. A. 595) on tenancy by entireties in personal property; (30 L. R. A. 318) on tenancy by entireties.

18 L. R. A. 331, *KENT v. CHURCH OF ST. MICHAEL*, 136 N. Y. 10, 49 N. Y. S. R. 19, 32 Am. St. Rep. 693, 32 N. E. 704.

Jurisdiction of equity to compel execution of instruments.

Cited in *Engelbach v. Simpson*, 12 Tex. Civ. App. 194, 33 S. W. 596, holding that equity will compel holder of record title to realty to execute new deed upon loss or destruction of old; *Miles v. Graham*, 181 Mass. 48, 62 N. E. 980, holding re-execution of instrument wrongfully mutilated may be decreed.

Distinguished in *Dull v. Rohr*, 13 Misc. 531, 35 N. Y. Supp. 523, holding that infant heirs will not be compelled in equity to execute conveyance of land, title to which they do not adversely claim.

Contingent estates.

Cited in *Perkins v. Burlington Land & Improv. Co.* 112 Wis. 522, 88 N. W. 648, holding unborn children of *cestui que trust* bound by judgment in suit against trustee; *Ruggles v. Tyson*, 104 Wis. 507, 48 L. R. A. 812, 79 N. W. 766, holding that for all purposes of rendering effective judgment, court has jurisdiction if con-

tingent interests in estate are represented by those in being having vested interest therein; *Adami v. Backer*, 29 Misc. 95, 60 N. Y. Supp. 683, holding afterborn grandchildren bound by judgment of sale directed as against their contingent interests, which were properly represented in litigation by persons in being; *Ridley v. Halliday*, 106 Tenn. 616, 53 L. R. A. 481, footnote p. 477, 82 Am. St. Rep. 902, 61 S. W. 1025, and *Springs v. Scott*, 132 N. C. 556, 44 S. E. 116, holding judgment of sale of estate effective as against unborn children whose contingent interests were represented by living owners of inheritance; *Boskowitz v. Held*, 15 App. Div. 312, 44 N. Y. Supp. 136, holding that living persons, trustees of express trust, or parent, cannot, either by collusion or neglect, so deal with property in trust as to cut off contingent interests of unborn children for whom trust was in fact created; *Gray v. Smith*, 76 Fed. 532, holding contingent interests of afterborn children effectually cut off by judgment against those living, in whom is vested present estate of inheritance; *Kirk v. Kirk*, 137 N. Y. 516, 33 N. E. 552, holding contingent interests of unborn children concluded by judgment of partition and sale of estate in which those living represented full vested interest, and were made parties to action; *Myers v. McCullagh*, 63 App. Div. 327, 71 N. Y. Supp. 520, holding interests of afterborn children sufficiently cared for under judgment of partition and sale, if proceeds are properly secured in behalf of such contingent interests; *Barnes v. Luther*, 77 Hun, 236, 28 N. Y. Supp. 400, holding that judgment of partition and sale may effectually cut off contingent interests of persons not in being, provided those interests are provided for and protected in some equitable manner; *Smith v. Secor*, 157 N. Y. 405, 52 N. E. 179, holding judgment of partition ineffectual to cut off contingent interests of afterborn children; *Fox v. Fee*, 24 App. Div. 323, 49 N. Y. Supp. 292, holding judgment of partition and sale not defective because of failure to provide for unborn children who in fact could have no interest in estate partitioned and sold; *Rhodes v. Caswell*, 41 App. Div. 232, 58 N. Y. Supp. 470, holding contingent remainder interests of unborn children concluded by judgment against living representatives; *Re Asch*, 75 App. Div. 495, 78 N. Y. Supp. 561, holding judgment of sale affecting contingent interest of unborn children valid, rights of such being fully represented by their parents; *Janpole v. Lasky*, 94 App. Div. 356, 88 N. Y. Supp. 50, holding partition sale decree involving trust estate, substituting trust fund for land, conclusive upon all interests.

Cited in footnotes to *Harrison v. Turnbull*, 41 L. R. A. 703, which holds unborn heirs bound by decree in action to establish claims against estate to which living heirs of same class are parties; *Gavin v. Curtin*, 40 L. R. A. 776, which holds afterborn children bound by decree directing sale of land to preserve remainderman's interest; *Hale v. Hale*, 20 L. R. A. 247, which authorizes court to order conversion into personalty of land in which persons not in being may have interest; *Loring v. Hildreth*, 40 L. R. A. 127, which holds representation of unborn children by guardian *ad litem* sufficient in suit to remove cloud.

Necessary parties.

Cited in footnote to *Brown v. Brown*, 33 L. R. A. 810, which denies right to cancel deed on ground of nondelivery without making party, persons *in esse* having remainder interest.

Contracts affecting interests of afterborn child.

Distinguished in *McGillis v. McGillis*, 154 N. Y. 548 49 N. E. 145, *Modifying*

11 App. Div. 369, 42 N. Y. Supp. 921, holding afterborn child not bound by contract made by legatee having no vested interest in estate.

Vesting of contingent estate.

Cited in *Re Brown*, 154 N. Y. 328, 48 N. E. 537, holding that estates in remainder, to be held in trust until termination of life estates, will become vested in issue of children of testator, in being at time of his death, subject to life estates created by will.

Power of legislature over contingent interests in property.

Cited in *Ebling v. Dreyer*, 149 N. Y. 467, 44 N. E. 155, Reversing 79 Hun, 324, 29 N. Y. Supp. 459, holding it competent for state legislature to authorize sale of contingent interests of persons not *in esse*.

Cited in note (19 L. R. A. 248) on legislative power to defeat contingent interests in property.

Right of possessor of land under verbal agreement.

Cited in *Brown v. Crabb*, 156 N. Y. 450, 51 N. E. 306, holding one in possession of real property under verbal agreement to purchase entitled to maintain action to determine title to property.

18 L. R. A. 335, *MAHONEY v. DETROIT STREET R. CO.* 93 Mich. 612, 32 Am. St. Rep. 528, 53 N. W. 793.

Right to ride on cars.

Cited in *Van Dusan v. Grand Trunk R. Co.* 97 Mich. 442, 37 Am. St. Rep. 354, 56 N. W. 848, holding passenger upon boarding train without evidence of right to ride may be ejected on refusal to pay fare; *Evansville & T. H. R. Co. v. Cates*, 14 Ind. App. 173, 41 N. E. 712, holding face of passenger's ticket conclusive evidence of his right to ride.

Cited in footnotes to *Nashville Street R. Co. v. Griffin*, 49 L. R. A. 451, which denies authority to eject passenger who, after paying fare inside station, enters car which has stopped just outside station; *O'Rourke v. Citizens' Street R. Co.* 46 L. R. A. 614, which holds void, conditions on transfer check requiring passengers to ascertain correctness of date, time, and direction; *Curtis v. Louisville City R. Co.* 21 L. R. A. 649, which denies right to eject for nonpayment of fare, passenger receiving 45 cents as change for 50-cent piece.

Cited in note (43 L. R. A. 711) on passenger's duty to pay fare wrongfully demanded, in order to avoid expulsion and lessen damages.

Distinguished in *Vining v. Detroit, Y. & A. A. R. Co.* 122 Mich. 250, 80 N. W. 1080, holding carrier liable to passenger for his wrongful eviction from car before reaching point to which his ticket entitled him to be carried.

Damages for ejection.

Cited in *Brown v. Rapid R. Co.* 130 Mich. 487, 90 N. W. 290, holding only extra fare paid by reason of ejection recoverable, where by reason of error of conductor on outward trip, wrong coupons were presented on return.

Passenger giving away transfer.

Cited in footnote to *Ex parte Lorenzen*, 50 L. R. A. 55, which sustains penal ordinance against passenger selling or giving away street railway transfer.

18 L. R. A. 337, *PEOPLE ex rel. CHADDOCK v. BARRY*, 93 Mich. 342, 53 N. W. 785.

Computation of time.

Cited in *Aultman & T. Co. v. Syme*, 163 N. Y. 63, 79 Am. St. Rep. 565, 57 N. E. 168, and *Crozier v. Allen*, 117 Mich. 172, 75 N. W. 300 holding that on computation of time of service of process, day of service and Sundays excluded, and day of appearance included; *Lemon v. Hampton*, 128 Mich. 183, 87 N. W. 53, holding service on 7th, returnable on 10th of month, Sunday intervening, valid under statute requiring service at least two days before appearance.

Cited in note (49 L. R. A. 201, 219) on rule as to first and last days in computation of time.

18 L. R. A. 339, *HENRY GAUS & SONS MFG. CO. v. ST. LOUIS, K. & N. W. R. CO.* 113 Mo. 308, 20 S. W. 658.

Construction of railroad on public street.

Qualified in *Sherlock v. Kansas City Belt R. Co.* 142 Mo. 182, 64 Am. St. Rep. 551, 43 S. W. 629, holding laying of steam railway at established grade of street not additional servitude different from contemplated use in original dedication.

Cited in *D. M. Osborne & Co. v. Missouri P. R. Co.* 147 U. S. 255, 37 L. ed. 159, 13 Sup. Ct. Rep. 299, holding construction and operation of steam railroad on public street not additional servitude entitling abutting property owners to compensation; *Stephenson v. Missouri P. R. Co.* 68 Mo. App. 648, holding abutting lot owner's right to use of street a property right, subservient, however, to public use, even to maintenance of steam railroad; *Montgomery v. Santa Ana Westminster R. Co.* 104 Cal. 193, 25 L. R. A. 657, 43 Am. St. Rep. 89, 37 Pac. 786; *Lockwood v. Wabash R. Co.* 122 Mo. 97, 24 L. R. A. 519, 43 Am. St. Rep. 547, 26 S. W. 698; *Ruckert v. Grand Ave. R. Co.* 163 Mo. 278, 63 S. W. 814, — holding laying of railroad on public street not additional servitude entitling adjoining lot owner to damages therefor; *De Geofroy v. Merchants Bridge Terminal R. Co.* 179 Mo. 705, 64 L. R. A. 963, 101 Am. St. Rep. 524, 79 S. W. 386, holding abutting owner entitled to damages for construction and operation of elevated railroad in street; *Hulett v. Missouri, K. & T. R. Co.* 80 Mo. App. 90, holding railroad liable to abutting owner for damages resulting from cutting in street to reach grade established by city.

Distinguished in *Knapp, S. & Co. v. St. Louis Transfer R. Co.* 126 Mo. 38, 28 S. W. 627, holding that injunction will issue to compel removal of railway constructed on sidewalk space of public street; *Corby v. Chicago, R. I. & P. R. Co.* 150 Mo. 464, 52 S. W. 282, holding void ordinance granting right to construct and operate steam railway on public street, thereby monopolizing its use.

Damages for, or injunction against, unlawful use of street.

Cited in *Steffen v. Fox*, 56 Mo. App. 21 (dissenting opinion), as to right of abutting property owner to damages due to unlawful construction of sidewalk in front of his premises; *Thomas v. Hunt*, 134 Mo. 398, 32 L. R. A. 859, 35 S. W. 581, holding that abutting lot owner upon highway has peculiar incorporeal interest in highway in nature of easement, for violation of which appropriate action will lie.

Elevated railroad as railway.

Cited in footnote to Freiday v. Sioux City Rapid Transit Co. 26 L. R. A. 246, which holds elevated railroad a "railway."

18 L. R. A. 343, McDONOUGH v. MARTIN, 88 Ga. 675, 16 S. E. 59.

18 L. R. A. 347, ERICKSON v. BROOKINGS COUNTY, 3 S. D. 434, 53 N. W. 857.

18 L. R. A. 350, BLANK v. NOHL, 112 Mo. 159, 20 S. W. 477.

Contracts as to separation or divorce.

Cited in Gentry v. Gentry, 67 Mo. App. 553, holding agreement between man and wife to secure legal separation void as against public policy; Rosenfeld v. Rosenfeld, 67 Mo. App. 30, holding repudiation of collusive agreement anterior to date of trial not bar to rendition of valid decree of divorce; Palmer v. Palmer, 26 Utah, 48, 61 L. R. A. 647, footnote p. 641, 99 Am. St. Rep. 820, 72 Pac. 3, holding void, contract between husband and wife to secure divorce; Brown v. Brown, 64 Neb. 788, 90 N. W. 860, holding deed from husband and wife, providing for termination of cohabitation at option of wife upon payment of annuity, void; Trammell v. Vaughan, 158 Mo. 222, 51 L. R. A. 856, 81 Am. St. Rep. 302, 59 S. W. 79, holding that state has direct interest in all contracts of marriage, consummation or dissolution of which must be according to law.

Cited in footnotes to Baum v. Baum, 53 L. R. A. 650, which holds void, separation agreement on consideration that husband support wife and children, and assign policies on his life; Henderson v. Henderson, 48 L. R. A. 766, which holds unmodifiable without wife's consent, decree in conformity with separation agreement for payment of stipulated monthly sum for wife's maintenance; Foote v. Nickerson, 54 L. R. A. 554, which denies power to make valid contract of separation.

18 L. R. A. 353, MILWAUKEE S. S. CO. v. MILWAUKEE, 83 Wis. 590, 53 N. W. 839.

Situs of corporate property for purpose of taxation.

Cited in State *ex rel.* Milwaukee Street R. Co. v. Anderson, 90 Wis. 565, 63 N. W. 746, holding proper place to tax property of quasi-public corporation is district in which its "principal office and place of business" is situated.

18 L. R. A. 356, GIFFORD v. WIGGINS, 50 Minn. 401, 52 N. W. 904.

False arrest and imprisonment.

Cited in Hofschulte v. Doe. 78 Fed. 441, holding ministerial officer not personally liable for arrest of individual on warrant regular on its face; Strozzi v. Wines, 24 Nev. 398, 57 Pac. 832, holding person causing arrest of mortgagee in possession liable for false imprisonment; Tillman v. Beard, 121 Mich. 480, 46 L. R. A. 217, 80 N. W. 248, and Whaley v. Lawton, 62 S. C. 101, 56 L. R. A. 651, 40 S. E. 128, holding one not liable for false imprisonment who in good faith states facts charging violation of ordinance afterwards declared void; Niven v. Boland, 177 Mass. 14, 52 L. R. A. 788, 58 N. E. 282, holding physician not liable for signing certificate causing person's commitment to hospital for insane without cause.

Cited in footnote to *Wachsmuth v. Merchants' Nat. Bank*, 21 L. R. A. 278, which holds arrest and imprisonment in civil cause on void process unjustifiable.

18 L. R. A. 359, *MOORE v. NORMAN*, 52 Minn. 83, 38 Am. St. Rep. 526, 53 N. W. 809.

Good faith as affecting tender.

Cited in *Malone v. Wright*, 90 Tex. 57, 36 S. W. 420, holding tender of payment not made in good faith ineffectual to discharge lien created by pledge.

Conditional tender.

Cited in *Fields v. Danenhowe*, 65 Ark. 400, 43 L. R. A. 523, 46 S. W. 938, holding that tender, to be good discharge of mortgage lien, must be without conditions objectionable to creditor; *Davies v. Dow*, 80 Minn. 229, 83 N. W. 50, holding that tender sufficient to discharge lien of mortgage must be unconditional.

18 L. R. A. 361, *KING v. BRIGHAM*, 23 Or. 262, 31 Pac. 601.

Equity jurisdiction as to boundary lines.

Cited in *Norton v. Elwert*, 29 Or. 595, 41 Pac. 926, holding that equity has jurisdiction to grant mandatory relief in boundary line dispute in case legal remedy at law be inadequate and inefficient; *Humboldt County v. Lander County*, 22 Nev. 258, 26 L. R. A. 750, footnote p. 749, 58 Am. St. Rep. 750, 38 Pac. 578, holding suit to determine disputed boundary line between counties not within jurisdiction of equity; *School District No. 70 v. Price*, 23 Or. 296, 31 Pac. 657, holding equitable jurisdiction of confused boundary lines not inclusive of power to try title to land in dispute; *Miner v. Caples*, 23 Or. 304, 31 Pac. 655, holding that jurisdiction of equity to determine boundary line cannot be extended to determination of title; *Williams v. Tschantz*, 88 Iowa, 132, 55 N. W. 202 (dissenting opinion), majority holding court not limited to inquiry as to government lines in statutory proceeding to establish boundaries.

Adverse possession.

Cited in *Gist v. Doke*, 42 Or. 229, 70 Pac. 704, holding unconditional claim of ownership for over ten years to boundary line located by mistake constitutes adverse possession.

18 L. R. A. 367, *FT. WAYNE v. LAKE SHORE & M. S. R. CO.* 132 Ind. 558, 32 Am. St. Rep. 277, 32 N. E. 215.

Vote of public officer as affected by interest.

Cited in footnotes to *Weston v. Syracuse*, 43 L. R. A. 678, which sustains city's right to set up as defense corruption in passage of resolution by city council; *Sylvester v. Webb*, 52 L. R. A. 518, which sustains contract to erect school building, with member of building committee and selectmen of town, although his vote necessary to authorize contract; *State ex rel. Rylands v. Pinkerman*, 22 L. R. A. 653, which holds alderman not deprived by interest of right to vote against confirmation of his successor as police commissioner.

Compensation of officer for extra services.

Cited in footnote to *Tacoma v. Lillis*, 18 L. R. A. 372, which holds councilman not entitled to compensation for extra services in official capacity.

Removal of officer.

Cited in footnote to *State ex rel. Childs v. Kiichli*, 19 L. R. A. 779, which holds president of city council removable at pleasure.

Disposal or use of property devoted to public purpose.

Cited in *Lake County Water & Light Co. v. Walsh*, 160 Ind. 39, 98 Am. St. Rep. 264, 65 N. E. 530, denying right of city to sell water-works plant to private corporation; *De Motte v. Valparaiso*, 161 Ind. 321, 66 L. R. A. 119, 67 N. E. 985, holding that city may sell reserved right to purchase water works; *Baltimore & O. S. W. R. Co. v. State*, 159 Ind. 519, 65 N. E. 508, affirming award of mandamus to compel railroad to construct highway crossing; *Postal Teleg. Cable Co. v. Chicago, I. & L. R. Co.* 30 Ind. App. 658, 66 N. E. 919, upholding right of telegraph company to acquire right of way along and over railroad right of way; *Gold v. Pittsburgh, C. C. & St. L. R. Co.* 153 Ind. 243, 53 N. E. 285, sustaining right to locate highway across railroad track and right of way; *Cincinnati, W. & M. R. Co. v. Anderson*, 139 Ind. 492, 47 Am. St. Rep. 285, 38 N. E. 167, holding that city street cannot be extended across railway tracks, thereby destroying use of its engine house, turntable, and water tank; *Chicago, M. & St. P. R. Co. v. Starkweather*, 97 Iowa, 162, 31 L. R. A. 185, footnote p. 183, 59 Am. St. Rep. 404, 66 N. W. 87, sustaining right to open street across depot grounds; *Terre Haute v. Evansville & T. H. R. Co.* 149 Ind. 178, 37 L. R. A. 192, 46 N. E. 77, holding that municipalities possessed of power to open streets across highways may appropriate land to a second public use, notwithstanding such second use may be inconsistent with existing uses; *Chattanooga Terminal R. Co. v. Felton*, 69 Fed. 280, denying right of one corporation to condemn property already appropriated to public use by another corporation for a similar purpose.

Cited in footnote to *Douglass v. Montgomery*, 43 L. R. A. 376, which denies city's power to grant right to lay railroad across public park, and then abandon it and confirm reversioner's title.

Construction of deed.

Cited in *Waldorf v. Elkhart & W. R. Co.* 13 Ind. App. 136, 41 N. E. 396, holding that reservations and exceptions in deed will be construed against grantor.

Dedication by user.

Cited in footnote to *Sturmer v. County Court*, 36 L. R. A. 300, which holds public square dedicated when used for more than eighty years as such.

18 L. R. A. 372, *TACOMA v. LILIS*, 4 Wash. 797, 31 Pac. 321.

Recovery of money voluntarily paid.

Cited in *Ward v. Barnum*, 10 Colo. App. 498, 52 Pac. 412, holding money paid by town board to attorney for services it had no power to authorize, recoverable; *Frederick v. Douglas County*, 96 Wis. 425, 71 N. W. 798, holding money voluntarily paid by public officer recoverable in equity; *Wiles v. McIntosh County*, 10 N. D. 599, 88 N. W. 710, upholding right of county to recover overpayment of compensation to superintendent of schools, induced by false statements of latter.

Mandamus to compel payment of salary.

Cited in *Bardsley v. Sternberg*, 17 Wash. 255, 49 Pac. 499, holding that mandamus will not issue to compel payment of salary warrants issued without authority.

Compensation for extra services of public officers.

Cited in *James v. Seattle*, 22 Wash. 658, 79 Am. St. Rep. 957, 62 Pac. 84, holding members of city council not entitled to extra compensation for going on tour of inspection to other cities.

Interest as affecting vote of officer.

Cited in note (18 L. R. A. 368) on validity of vote of common council or similar body as affected by personal interests of members.

Estoppel.

Cited in *Johnson v. Cedar*, 117 Iowa, 326, 90 N. W. 713, holding school district accepting benefits of contract estopped from asserting illegality.

18 L. R. A. 375, *FRANKE v. FRANKE* (Cal.) 31 Pac. 571.

18 L. R. A. 381, *GREEN v. GRANT*, 143 Ill. 61, 32 N. E. 369.

Necessary parties.

Cited in *Perkins v. Burlington Land & Improv. Co.* 112 Wis. 522, 88 N. W. 648, holding unborn children of *cestui que trust* bound by judgment in suit by third party on trust deed against trustee.

Trustee as fee owner.

Cited in *King v. King*, 168 Ill. 285, 48 N. E. 582, holding trustee given complete power of disposal takes title in fee; *Security Ins. Co. v. Kuhn*, 207 Ill. 171, 69 N. E. 822, holding widow with equitable life estate and legal title as executrix and trustee, fee owner within terms of insurance policy.

18 L. R. A. 385, *SWAIN v. SCHIEFFELIN*, 134 N. Y. 471, 47 N. Y. S. R. 910, 31 N. E. 1025.

Damages recoverable.

Cited in *Malone v. Weill*, 67 App. Div. 172, 73 N. Y. Supp. 700, holding mere uncertainty in amount of damage suffered by one having rights violated does not preclude recovery; *Florence Oil & Ref. Co. v. Farrar*, 55 C. C. A. 657, 119 Fed. 151, holding measure of damages for breach of contract to furnish machinery is its difference in value in proper and defective condition; *Trapp v. McClellan*, 68 App. Div. 368, 74 N. Y. Supp. 130, holding damages not recoverable when injury is result of efficient intermediate cause operating until injury is produced.

Breach of warranty.

Cited in *Springfield Mill. Co. v. Barnard & L. Mfg. Co.* 26 C. C. A. 395, 49 U. S. App. 438, 81 Fed. 267, and *Accumulator Co. v. Dubuque Street R. Co.* 12 C. C. A. 46, 27 U. S. App. 364, 64 Fed. 79, holding vendee of machinery may recover of manufacturers damages resulting from breach of warranty, also immediate and probable loss resulting from breach; *Detroit White Lead Works v. Knaszak*, 13 Misc. 622, 34 N. Y. Supp. 924, holding, upon breach of warranty in sale of goods to be used for particular purpose, damages recoverable are those naturally flowing from breach; *Bruce v. Fiss, D. & C. Horse Co.* 26 Misc. 473, 56 N. Y. Supp. 234, holding measure of damages recoverable for breach of warranty on sale of horse is loss sustained to person and property of vendee due to horse running away; *Elwood Planing Mills Co. v. Harting*, 21 Ind. App. 412, 52 N. E. 621, holding vendor of coal dust who warrants it free from soft coal dust liable for damage

resulting to vendee from breach of the warranty; *United States Trust Co. v. O'Brien*, 143 N. Y. 288, 38 N. E. 266, holding liability for breach of warranty coextensive with liability for tort, exclusive of punitive damages; *Smith v. Foote*, 81 Hun, 131, 30 N. Y. Supp. 679, holding on breach of warranty to furnish goods "like" sample, measure of damages is actual loss sustained up to discovery of breach; *Tower v. Pauly*, 67 Mo. App. 638, holding damages arising from discomfort and cost of extra fuel recoverable in action for breach of warranty as to heating capacity of furnace.

Distinguished in *American Forcite Powder Mfg. Co. v. Brady*, 4 App. Div. 97, 38 N. Y. Supp. 545, holding dealer not bound by implied warranty against latent defects in goods sold.

What constitutes warranty.

Cited in *Bull v. Bath Iron Works*, 75 App. Div. 385, 78 N. Y. Supp. 181, holding stipulation in contract to build steamship of certain speed, warranty.

Loss of profits.

Cited in *Brauer v. Oceanic Steam Nav. Co.* 66 App. Div. 607, 73 N. Y. Supp. 291, holding damages recoverable for breach of shipping contracts do not include commissions arising from collateral contract; *Rio Grande Western R. Co. v. Rubenstein*, 5 Colo. App. 125, 38 Pac. 76, holding passenger injured while traveling entitled to recover, as element of damage, profits arising from his employment; *Evins v. Metropolitan Street R. Co.* 47 App. Div. 514, 62 N. Y. Supp. 495, holding attorney arrested and maliciously prosecuted may show loss of practice under general allegation of damages; *Laufer v. Boynton Furnace Co.* 84 Hun, 313, 32 N. Y. Supp. 362, holding that to ascertain damages accruing from defective heating apparatus, causing injury to plants in greenhouse, it is competent to show number of cut flowers of previous years.

Cited in notes (52 L. R. A. 50) on damages for tort as affected by loss of profits; (52 L. R. A. 217) on loss of profits of sale or purchase as damages.

18 L. R. A. 390, *JOSEPH SCHLITZ BREWING CO. v. COMPTON*, 142 Ill. 511, 34 Am. St. Rep. 92, 32 N. E. 693.

Damages recoverable for nuisance.

Cited in *Centralia v. Wright*, 156 Ill. 566, 41 N. E. 217, holding that injury resulting from temporary nuisance, damages accruing up to time of suit only are recoverable; *Indiana, I. & I. R. Co. v. Patchette*, 59 Ill. App. 254, holding suit maintainable for recovery of continuing damages; *Cleveland, C. C. & St. L. R. Co. v. Pattison*, 67 Ill. App. 354, holding if infliction of past damages does not abate temporary nuisance successive actions are maintainable; *Chicago N. S. Street R. Co. v. Payne*, 192 Ill. 247, 61 N. E. 467, holding erection of power house temporary nuisance, entitling one injured thereby to damages only to commencement of suit; *Sanitary District v. Ray*, 199 Ill. 67, 93 Am. St. Rep. 102, 64 N. E. 1048, holding land owner entitled to maintain successive actions for damages to land occasioned by continuing nuisances; *Steinke v. Bentley*, 6 Ind. App. 669, 34 N. E. 97, holding obstruction of drainage ditch continuing nuisance entitling land owner to accrued damages only; *Bailey v. Heintz*, 71 Ill. App. 190, holding obstruction placed in channel of stream not permanent nuisance or authorizing recovery of damages accruing subsequent to commencement of suit; *Illinois C. R. Co. v. Ferrell*, 108 Ill. App. 667, denying tenant's right to

recover for overflow of land by water, partly due to permanent dam lawfully built by railroad.

Distinguished in *Peck v. Michigan City*, 149 Ind. 683, 49 N. E. 800, holding action for damages not maintainable until some damages accrue from wrong complained of.

— **Measure of damages.**

Cited in *Cleveland, C. C. & St. L. R. Co. v. King*, 23 Ind. App. 577, 55 N. E. 875, holding measure of damages in case of temporary nuisance not depreciation of property; *Kewanee v. Otley*, 204 Ill. 411, 68 N. E. 388, holding judgment for damages not bar to proceeding by riparian owner to enjoin pollution of stream.

Damages recoverable for trespass.

Cited in *Cosgriff Bros v. Miller*, 10 Wyo. 235, 98 Am. St. Rep. 977, 68 Pac. 206, holding damages after commencement of action, directly due to trespass by pasturing of sheep, recoverable.

18 L. R. A. 393, *ATLANTIC EXP. CO. v. WILMINGTON & W. R. CO.* 111 N. C. 463, 4 Inters. Com. Rep. 294, 32 Am. St. Rep. 805, 16 S. E. 393.

Acts concerning regulations, rates, or prices.

Affirmed in *Leavell v. Western U. Teleg. Co.* 116 N. C. 220, 27 L. R. A. 843, 47 Am. St. Rep. 798, 21 S. E. 391, holding railroad and telegraph commission act authorizing establishment of rates, constitutional.

Cited in *Mayo v. Western U. Teleg. Co.* 112 N. C. 345, 16 S. E. 1006, holding act creating railroad commission, and investing it with power to make rules and regulations and hear complaints, constitutional; *Hendon v. North Carolina R. Co.* 125 N. C. 128, 34 S. E. 227, upholding general regulation that one seeking reissue of lost certificate of stock furnished indemnity bond and leave reissued certificate with company for five years; *State ex rel. Godard v. Johnson*, 61 Kan. 843, 49 L. R. A. 675, 60 Pac. 1068 (dissenting opinion), as to whether delegation of power to railroad commission to make and regulate rules is unconstitutional; *Corporation Commission v. Seaboard Air Line System R. Co.* 127 N. C. 288, 37 S. E. 266, holding valid, rates fixed for transportation of freight.

Cited in note (33 L. R. A. 183) on legislative power to fix tolls, rates, or prices.

Authority of railroad commission.

Cited in *State ex rel. Caldwell v. Wilson*, 121 N. C. 472, 28 S. E. 554, and *State ex rel. Railroad Comrs. v. Western U. Teleg. Co.* 113 N. C. 220, 22 L. R. A. 570, 18 S. E. 389, holding railroad commission, court of record with general jurisdiction over all matters within constituted authority; *Henderson v. Durham Traction Co.* 132 N. C. 787, 44 S. E. 598, raising, but not deciding, question whether act permitting commission to make exemptions from operation of penal statute is constitutional.

Cited in footnote to *State ex rel. Tompkins v. Chicago, St. P. M. & O. R. Co.* 47 L. R. A. 569, which sustains railroad commissioner's authority to require building of depot.

— **To punish for contempt.**

Cited in *State ex rel. Pate v. Wilmington & W. R. Co.* 122 N. C. 880, 29 S. E. 334, holding railroad commission a court of record capable of administering punishment for contempt.

Discrimination in facilities.

Cited in footnote to *Barrington v. Commercial Dock Co.* 33 L. R. A. 116, which denies power to discriminate between similar vessels using wharf for landing place.

Delegation of power.

Cited in *Blue v. Beach*, 155 Ind. 133, 50 L. R. A. 70, 80 Am. St. Rep. 195, 56 N. E. 89, upholding power of board of health to exclude unvaccinated child from public schools during epidemic.

18 L. R. A. 398, *INSTITUTION FOR EDUCATION OF MUTE & BLIND v. HENDERSON*, 18 Colo. 98, 31 Pac. 714.

Appropriation and payment of public moneys.

Cited in *Goodykoontz v. Acker*, 19 Colo. 363, 35 Pac. 911, holding appropriation necessary prerequisite to payment of public moneys; *Re Bounties*, 18 Colo. 273, 32 Pac. 423, upholding power of legislature to make appropriation to reimburse county treasurers for moneys paid out under unconstitutional bounty act, when act was void simply as to manner of payment of premiums; *Carlile v. Hurd*, 3 Colo. App. 15, 31 Pac. 952, holding it duty of state treasurer to investigate and determine legality of all claims against state funds; *State ex rel. Orr v. New Orleans*, 50 La. Ann. 892, 24 So. 666, holding city ordinance appropriating public moneys for charitable purposes unconstitutional; *Ingram v. Colgan*, 106 Cal. 119, 28 L. R. A. 191, footnote p. 187, 46 Am. St. Rep. 221, 39 Pac. 437, holding statute providing bounty of \$5 for each coyote destroyed, payable out of general fund in treasury, not appropriation.

Cited in footnotes to *Patty v. Colgan*, 18 L. R. A. 744, which holds appropriation for sufferers from flood illegal; *Conlin v. San Francisco*, 21 L. R. A. 474, which holds void, act for relief of street contractor; *Re Clark*, 19 L. R. A. 138, which holds suit maintainable to compel investment of taxes from railroads in sinking fund to pay railroad-aid bonds; *Michigan Sugar Co. v. Dix*, 56 L. R. A. 329, which holds beet sugar bounty unconstitutional; *Board of Education v. State* 25 L. R. A. 770, which holds unconstitutional, act authorizing board of education to levy tax to pay claim for which no obligation exists.

Cited in note (42 L. R. A. 37, 63) on what claims constitute valid demands against state.

— Preferred claims.

Cited in *Collier & C. Lithographing Co. v. Henderson*, 18 Colo. 263, 32 Pac. 417, holding claim for public printing not preferred claim upon public funds, in absence of specific appropriation therefor; *Parks v. Soldiers' & Sailors' Home*, 22 Colo. 91, 43 Pac. 542, holding, in case appropriations exceed revenues, salaries of public officers are preferred claims; *Stuart v. Nance*, 28 Colo. 200, 63 Pac. 323, Affirming 12 Colo. App. 130, 54 Pac. 867, holding state treasurer bound to pay warrants for salaries of public officers according to priority of issue.

— Excessive appropriations.

Cited in *Re Loan of School Fund*, 18 Colo. 200, 32 Pac. 273, holding attempted appropriation of public money in excess of constitutional limit of revenue unconstitutional.

18 L. R. A. 401, *STATE ex rel. FOWLER v. FINLEY*, 30 Fla. 325, 11 So. 674.

Disbarment of attorneys.

Cited in *Re Boone*, 83 Fed. 947, and *State ex rel. Johnson v. Gebhardt*, 87 Mo. App. 548, holding allegations against attorney to disbar him should be clear and specific, enabling him to know exactly charges made, and giving him opportunity to defend; *Re Duncan*, 64 S. C. 482, 42 S. E. 433, holding mere depositing of client's money by attorney in his own name and checking against it not sufficient misconduct to authorize disbarment.

Cited in footnotes to *Re Evans*, 53 L. R. A. 952, authorizing disbarment of attorney for champerty and agreement against public policy; *Re Kirby*, 39 L. R. A. 856, which authorizes disbarment for receiving stolen government property, with intent to convert to own use; *People ex rel. Atty. Gen. v. MacCabe*, 19 L. R. A. 231, which holds anonymous advertisement as to obtaining divorce, ground for disbarment; *Re Thompson*, 40 L. R. A. 194, which holds disbarment not precluded by attorney's resignation pending disbarment proceedings; *Re Lentz*, 50 L. R. A. 415, which denies right to disbar attorney for single wrongful appropriation without actual intent to defraud, for which full restitution has been made.

Rights of accused in disbarment proceedings.

Cited in *Re Duncan*, 64 S. C. 479, 42 S. E. 433, holding accused attorney in disbarment proceedings entitled to have witnesses against him examined in open court.

18 L. R. A. 409, *BLANCHARD v. STATE*, 30 Fla. 223, 11 So. 785.

License tax on lawyers.

Cited in footnotes to *Ex parte Williams*, 21 L. R. A. 783, which holds lawyers subject to occupation tax; *Petersburg v. Cocke*, 36 L. R. A. 432, which holds attorney having office within, though residing outside of, city subject to license tax.

18 L. R. A. 410, *STATE ex rel. ATTY. GEN. v. JOHNSON*, 30 Fla. 433, 11 So. 845.

Suspension or removal from office.

Cited in *Cameron v. Parker*, 2 Okla. 329, 38 Pac. 14, holding power of suspending public officer rests primarily with governor; *Re Advisory Opinion*, 31 Fla. 4, 18 L. R. A. 595, 12 So. 114, holding ultimate end of suspension from public office can be no more than removal for remainder of term.

Cited in footnotes to *People ex rel. Engley v. Martin*, 24 L. R. A. 201, which holds governor's power to remove member of fire and police board dependent on terms of charter; *Speed v. Detroit*, 22 L. R. A. 842, which holds misconduct before appointment no ground for removal.

Cited in note (29 L. R. A. 415) on poll taxes, as to governor's power of suspension of collector for neglect of duty.

Mandamus to secure possession of public office.

Cited in *State ex rel. Moore v. Archibald*, 5 N. D. 383, 66 N. W. 234, and *Cruse v. State*, 52 Neb. 832, 73 N. W. 212, holding mandamus proper remedy to compel suspended public officer to deliver property, books, etc., to successor; *State ex rel. Ayers v. Kipp*, 10 S. D. 498, 74 N. W. 440, holding that mandamus will not issue to try title to public office, but is proper to secure possession of

property of office; *State ex rel. Atty. Gen. v. Johnson*, 35 Fla. 12, 31 L. R. A. 370, 16 So. 786, holding title to public office not determinable by mandamus; *Stevens v. Carter*, 27 Or. 556, 31 L. R. A. 352, 40 Pac. 1074, holding duty of incumbent of public office on expiration of term, to surrender insignia of office to successor, enforceable by mandamus.

Cited in note (31 L. R. A. 343, 345, 362) on mandamus to compel surrender of office.

Constitutional construction.

Cited in *Godwin v. King*, 31 Fla. 533, 13 So. 108, holding, to ascertain intent embodied in Constitution, it is proper to refer to construction of former instrument of which latter is revision.

18 L. R. A. 419, *ANDERSON v. CRISP*, 5 Wash. 178, 31 Pac. 638.

Passing of title on sale.

Cited in footnote to *H. M. Tyler Lumber Co. v. Charlton*, 55 L. R. A. 301, which holds title does not pass by acceptance of offer to sell lumber piled at mill, to be inspected by common employee.

18 L. R. A. 421, *EVERS v. STATE*, 31 Tex. Crim. Rep. 318, 37 Am. St. Rep. 811, 20 S. W. 744.

Later appeal in 32 Tex. Crim. Rep. 283, 22 S. W. 1019.

Intoxication or resulting insanity as defense for crime.

Cited in *Hernandez v. State*, 32 Tex. Crim. Rep. 272, 22 S. W. 972, holding refusal to charge on trial for assault with intent to murder, that mental state of defendant, caused by intoxication, could be taken into consideration in determining question of intent, not error; *Wright v. State*, 37 Tex. Crim. Rep. 632, 40 S. W. 491, holding intoxication no defense against charge of theft; *Tipsett v. State*, 37 Tex. Crim. Rep. 192, 39 S. W. 120, holding it error of court to charge jury that temporary insanity, superinduced by drunkenness, complete defense to charge of murder; *Delgado v. State*, 34 Tex. Crim. Rep. 159, 29 S. W. 1070, holding instruction that mental condition of defendant, due to intoxication produced by voluntary recent use of spirits, might be considered as to degree of murder, more favorable to defendant than he was entitled to; *DeAlberty v. State*, 34 Tex. Crim. Rep. 510, 31 S. W. 391, upholding charge that neither intoxication nor temporary insanity induced by recent use of intoxicating liquors constitutes any excuse for crime.

Cited in note (36 L. R. A. 466) on what intoxication will excuse crime.

Definition of crimes by trial court.

Cited in *Brittain v. State*, 36 Tex. Crim. Rep. 412, 37 S. W. 758, holding it not error for court on trial of one charged with murder in second degree, to fail to define manslaughter or justifiable homicide.

Record in criminal cause.

Cited in *Arrano v. People*, 24 Colo. 236, 49 Pac. 271, holding record in criminal cause must show essential steps taken precedent to rendition of judgment of conviction.

18 L. R. A. 425, *SANDERS v. McMILLIAN*, 98 Ala. 144, 39 Am. St. Rep. 19, 11 So. 750.

Dower right in surplus.

Cited in footnote to *Holden v. Dunn*, 19 L. R. A. 481, which holds widow entitled to dower in excess paid at foreclosure sale after husband's death.

18 L. R. A. 428, *DORSEY v. WOLFF*, 142 Ill. 589, 34 Am. St. Rep. 99, 32 N. E. 495.

Promissory notes.

Cited in *Smith v. Myers*, 207 Ill. 132, 69 N. E. 858, Affirming 107 Ill. App. 412, holding written promise to pay fixed sum, interest and taxes, not promissory note; *Beatty v. Western College*, 177 Ill. 289, 42 L. R. A. 801, 69 Am. St. Rep. 242, 52 N. E. 432, Affirming 71 Ill. App. 597, holding written instrument containing promise to pay on or before certain date, valid promissory note.

Negotiability of note.

Cited in *Leader v. Plante*, 95 Me. 342, 85 Am. St. Rep. 415, 50 Atl. 54, holding writing "within one year after date I promise," etc., a valid negotiable promissory note; *Sylvester Bleckley Co. v. Alewine*, 48 S. C. 311, 37 L. R. A. 88, 26 S. E. 609; *Shenandoah Nat. Bank v. Marsh*, 89 Iowa, 276, 48 Am. St. Rep. 331, 56 N. W. 458; *Lockwood v. Lindsey*, 6 App. D. C. 400,—holding stipulation for attorney's fees not destructive of negotiability of promissory note; *Stapleton v. Louisville, Bkg. Co.* 95 Ga. 804, 23 S. E. 81, holding stipulation to pay "all costs and 10 per cent on amount for counsel fees," etc., not destructive of negotiability of promissory note; *Seiberling v. Lewis*, 93 Ill. App. 551, holding contract to pay weekly sum on contract price, evidenced by promissory notes, not inconsistent with their negotiability; *Cowing v. Cloud*, 16 Colo. App. 330, 65 Pac. 417, holding negotiability of note not destroyed by agreement to pay attorney's fee; *Gehlbach v. Carlinville Nat. Bank*, 83 Ill. App. 137, and *Hunter v. Clarke*, 184 Ill. 162, 75 Am. St. Rep. 160, 56 N. E. 297, Affirming 83 Ill. App. 106, holding condition in note permitting maker to pay before date of maturity does not affect negotiability; *Bowie v. Hume*, 13 App. D. C. 311, holding commercial character of promissory note not affected by option permitting maker to pay before date of maturity.

Liability for attorney's fee.

Cited in *Merchants' Bank v. Thomas*, 57 C. C. A. 380, 121 Fed. 312, holding attorney's fee stipulated for in note provable against bankrupt maker's estate.

Cited in footnote to *Pattillo v. Alexander*, 29 L. R. A. 616, which sustains payee's guaranty of attorney's fees if note has to be collected by law.

18 L. R. A. 431, *VAN WALTERS v. CHILDRENS' GUARDIANS*, 132 Ind. 567, 32 N. E. 568.

Custody and guardianship of children.

Cited in *Wilkison v. Children's Guardians*, 158 Ind. 9, 62 N. E. 481, reaffirming constitutionality of act of 1889, creating board of children's guardians.

Cited in footnotes to *State v. Bailey*, 59 L. R. A. 435, which holds parents' rights not infringed by compulsory education law; *Re Reiss*, 25 L. R. A. 798, which denies power of court to compel father to send children to visit their grandmother; *People v. Ewer*, 25 L. R. A. 794, which holds valid, act prohibiting employment

of girls under fourteen as dancers or in theatrical exhibitions; *Stapleton v. Poynter*, 53 L. R. A. 784, which holds custody of child will be taken against its will from wealthy grandparent and given to parent of moral habits; *Hibbette v. Bains*, 51 L. R. A. 839, which sustains father's right to custody of child, notwithstanding assent to wife's deathbed contract to give custody to her relatives; *State ex rel. Lasserre v. Michel*, 54 L. R. A. 927, which denies father's absolute right to custody of minor child.

18 L. R. A. 433, ALABAMA G. S. R. CO. v. CARROLL, 97 Ala. 126, 38 Am. St. Rep. 163, 11 So. 803.

Same cause in Federal court, 28 C. C. A. 211, 52 U. S. App. 442, 84 Fed. 776.

Presumption as to common law.

Cited in note (21 L. R. A. 472) on presumption as to law of other states.

Negligence of fellow servants.

Cited in *Laughran v. Brewer*, 113 Ala. 518, 21 So. 415, holding, under employees' liability act, master not liable for injury suffered by servant, due to negligence of fellow servant disobeying master's instructions; *Louisville & N. R. Co. v. Woods*, 105 Ala. 569, 17 So. 41, allowing amendment to complaint under employers' liability act, alleging that injury to brakeman was due to negligence of defendant's engineer, a fellow servant of plaintiff; *Dormidy v. Sharon Boiler Works*, 127 Fed. 486, holding master liable under Alabama statute for injury to servant by negligence of fellow servant; *Woodward Iron Co. v. Cook*, 124 Ala. 353, 27 So. 455, holding that to render master liable for maintenance of defective tram track in charge of fellow servants, want of care in selection of such servants must be shown.

Who are fellow servants.

Cited in note (18 L. R. A. 793, 797) on who are fellow servants.

Vice principalship.

Cited in note (54 L. R. A. 153) on vice principalship as determined with reference to character of act which caused injury.

Conflict of laws in negligence causes.

Cited in *Baltimore & O. S. W. R. Co. v. Reed*, 158 Ind. 28, 56 L. R. A. 470, footnote p. 468, 92 Am. St. Rep. 293, 62 N. E. 488, denying right to recover in other state for injury from fellow servant's negligence in state where no remedy given; *Louisville & N. R. Co. v. Williams*; 113 Ala. 404, 21 So. 938, holding maintenance of action for death of person, caused by wrongful act of another, governed by law of place where act was committed.

Cited in footnotes to *Chicago & E. I. R. Co. v. Rouse*, 44 L. R. A. 410, which holds master's liability for fellow servant's act governed by law of place where cause of action arises; *Jones v. Chicago, St. P. M. & O. R. Co.* 49 L. R. A. 640, which holds statute of state where railroad employee was injured, as to presumptive evidence of employer's knowledge of defect in appliance, not govern in action in other state; *Turner v. St. Clair Tunnel Co.* 36 L. R. A. 134, which upholds master's liability for injury to employee sent from Michigan side to work on Canadian side without warning of dangers governed by law of Canada.

Cited in note (56 L. R. A. 195, 216, 217) on conflict of laws as to action for death or bodily injury.

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Limitation of carrier's liability.

Cited in footnotes to *Central R. Co. v. Murphey*, 53 L. R. A. 720, which holds negligent carrier liable for true value, notwithstanding arbitrary preadjustment in bill of lading assented to by shipper; *Tecumseh Mills v. Louisville & N. R. Co.* 49 L. R. A. 558, which holds prohibition against carriers' limiting liability inapplicable to contract by domestic corporation in other state for transportation entirely outside of state.

18 L. R. A. 440, *McCANDLESS v. RICHMOND & D. R. CO.* 38 S. C. 103, 16 S. E. 429.

Police power.

Cited in *Darlington v. Ward*, 48 S. C. 581, 38 L. R. A. 338, 26 S. E. 906 (dissenting opinion by Pope, J.), who holds town ordinance forbidding keeping of hogs within corporate limits not valid exercise of police power; *Thomas v. Moultrieville*, 52 S. C. 184, 29 S. E. 647, holding tax of \$8 per year on each lot owner within incorporated town, to keep streets in repair, proper exercise of police power; *State ex rel. George v. Aiken*, 42 S. C. 264, 26 L. R. A. 363, 20 S. E. 221 (dissenting opinion), majority holding dispensary act of South Carolina (act of 1893) valid exercise of police power; *Stehmeyer v. Charleston*, 53 S. C. 279, 31 S. E. 322, denying right of city in exercise of police power to assess cost of water mains upon owners of lots abutting on streets in which pipes are laid.

Alteration or amendment of corporate charter.

Cited in *Mathis v. Southern R. Co.* 53 S. C. 257, 31 S. E. 240, holding charter of private corporation subject to alteration or amendment as state legislature may declare.

Equal protection and privileges.

Cited in note (21 L. R. A. 790) on class legislation.

— Making railroads absolutely liable for fires or stock killed.

Cited in *Simmons v. Western U. Teleg. Co.* 63 S. C. 432, 57 L. R. A. 610, 41 S. E. 521, holding statute making all railroads liable for damages by fire not unconstitutional on account of affecting particular class of interests; *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 21, 41 L. ed. 619, 17 Sup. Ct. Rep. 243, upholding statute of Missouri fixing liability upon railroads for damages sustained by fires emanating from locomotives; *Dean v. Charleston & W. Car. R. Co.* 55 S. C. 506, 33 S. E. 579; *Mobile Ins. Co. v. Columbia & G. R. Co.* 41 S. C. 414, 44 Am. St. Rep. 725, 19 S. E. 858; *Lipfeld v. Charlotte, C. & A. R. Co.* 41 S. C. 287, 19 S. E. 497; *Hunter v. Columbia N. & L. R. Co.* 41 S. C. 89, 19 S. E. 197,—upholding statute fixing liability of railroads for fires caused by sparks from locomotives; *McCullough v. Brown*, 41 S. C. 242, 23 L. R. A. 419, 19 S. E. 458, holding statute fixing upon railroad liability for fire originating from locomotives, valid exercise of police powers; *Brown v. Carolina Midland R. Co.* 67 S. C. 486, 100 Am. St. Rep. 756, 46 S. E. 283, upholding statute fixing liability for communicated fires.

Cited in footnote to *Wadsworth v. Union P. R. Co.* 23 L. R. A. 812, which holds unconstitutional, act creating absolute liability for stock killed or injured by trains.

Cited in notes (25 L. R. A. 161) on constitutionality of statutes making railroad companies absolutely liable for damage by fires set out by them, or for stock killed by them, irrespective of negligence.

— Discrimination against carriers.

Cited in *Porter v. Charleston & S. R. Co.* 63 S. C. 179, 90 Am. St. Rep. 670, 41 S. E. 108, upholding act making carriers liable for penalty for failure to pay loss caused by breakage in transit.

Statute imposing liability on county for injury on highway.

Cited in *Blum v. Richland County*, 38 S. C. 294, 17 S. E. 20, holding constitutional, act permitting person injured on defective highway to recover damages from county.

Liability of railroad for fire.

Cited in *Wilson v. Southern R. Co.* 65 S. C. 426, 43 S. E. 964, holding railroad liable under statute for fire communicated by locomotive or originating within right of way.

State interference with interstate commerce.

Cited in *Burrows v. Delta Transp. Co.* 106 Mich. 596, 29 L. R. A. 473, 64 N. W. 501, holding act of legislature making steamboat company liable for damages by fire not regulation of commerce among states.

Contracts made with reference to existing laws.

Cited in *Geiger v. Geiger*, 57 S. C. 526, 35 S. E. 1031, holding homestead acts giving exemption to widow not unconstitutional as to debts created since adoption of laws.

18 L. R. A. 447, *MILLIKIN v. EDGAR COUNTY*, 142 Ill. 528, 32 N. E. 493.

Power of municipality as to contracts.

Cited in *Carlyle v. Carlyle Water, Light & P. Co.* 52 Ill. App. 582, holding city ordinance repudiating contract to supply water for fixed time and rate, void; *Illinois Central Hospital v. Jacksonville*, 61 Ill. App. 202, holding contract of municipality to furnish water for specific period at fixed rate *ultra vires*, as limiting its governmental powers; *Danville v. Danville Water Co.* 178 Ill. 313, 69 Am. St. Rep. 304, 53 N. E. 118, holding it not to be within constitutional power of municipality to contract for supply of water at fixed rate for fixed period.

Distinguished in *Freeport Water Co. v. Freeport City*, 180 U. S. 615, 45 L. ed. 694, 21 Sup. Ct. Rep. 493 (dissenting opinion by Justice White), who holds contract to supply water for given time at fixed rate not subject of abrogation by changes of rates during existence of contracts.

Power of regents to remove teacher.

Cited in footnote to *Gillan v. Normal Schools*, 24 L. R. A. 336, which holds power of board of regents to remove normal school teacher at pleasure cannot be limited by by-law or contract of board.

18 L. R. A. 449, *WILSON v. TROY*, 135 N. Y. 96, 48 N. Y. S. R. 364, 31 Am. St. Rep. 817, 32 N. E. 44.

Implied notice.

Cited in *Stedman v. Rome*, 88 Hun. 281, 34 N. Y. Supp. 737, holding notice of dangerous condition of cross-walk imputed to city whose officers were negligent in constructing said walk; *Stephani v. Manitowoc*, 89 Wis. 472, 62 N. W. 176, holding absolute duty of city to render bridge safe, failure so to do being negligence, notice of which is imputable to it; *Akers v. New York*, 14 Misc. 526, 35 N. Y. Supp.

1099, holding notice of dangerous character of excavation made under direction of city, and improperly guarded, attributable to it; *Ludlow v. Fargo*, 3 N. D. 491, 37 N. W. 506, holding plaintiff not bound to show actual or constructive notice to city of fact that ditch dug by its authority across public street was unguarded; *Tinker v. New York, O. & W. R. Co.* 71 Hun, 434, 24 N. Y. Supp. 977, holding knowledge of foreman that sticks of timber were placed in ditch along highway on railroad company's land imputable to company, and question of notice, therefore, unimportant; *Twist v. Rochester*, 37 App. Div. 317, 55 N. Y. Supp. 850, holding actual notice to city as to negligent construction of patrol line operated by it, unnecessary.

Interest as damages.

Cited in *Laycock v. Parker*, 103 Wis. 182, 79 N. W. 327, holding creditor entitled to recover interest on claim against debtor from date of demand; *Coughlin v. New York*, 35 Misc. 448, 71 N. Y. Supp. 91, holding contractor entitled to interest on claim for work done, payment of which was unreasonably delayed; *Lakeside Paper Co. v. State*, 55 App. Div. 210, 66 N. Y. Supp. 959, holding interest recoverable on claim of trespass from date of filing; *Gulf, C. & S. F. R. Co. v. Johnson*, 4 C. C. A. 454, 10 U. S. App. 629, 54 Fed. 481, holding it not prejudicial error of trial court to charge that jury "will allow" interest on claim for damages, instead of "may allow;" *Lakeside Paper Co. v. State*, 45 App. Div. 114, 60 N. Y. Supp. 1081, holding interest recoverable on damage claim from date of filing; *Devlin v. New York*, 4 Misc. 120, 24 N. Y. Supp. 116, holding interest recoverable as element of damages on loss sustained for breach of contract by municipality; *Gray v. Central R. Co.* 157 N. Y. 492, 52 N. E. 555 (dissenting opinion by O'Brien, J.), who holds interest recoverable on sum representing damage sustained for breach of contract.

Cited in footnotes to *Norcross v. Cambridge*, 33 L. R. A. 843, which sustains eminent domain statute, notwithstanding failure to provide for interest from time of formal taking to date of actual entry; *Sargent v. Tuttle*, 32 L. R. A. 822, which denies right to interest on sewer assessments, unless law so provides.

Question for jury.

Cited in *State ex rel. Roberts v. Hope*, 121 Mo. 39, 25 S. W. 893, holding allowance of interest on claim for damages from trespass, question for jury.

Cited in footnote to *King v. Southern P. Co.* 29 L. R. A. 755, which holds allowance of interest on value of property negligently destroyed within discretion of jury.

18 L. R. A. 458, *HOPE v. BREWER*, 136 N. Y. 126, 48 N. Y. S. R. 834, 32 N. E. 558.

Conversion of realty into personalty.

Cited in *Trask v. Sturges*, 31 Misc. 200, 63 N. Y. Supp. 1084, holding valid, trust created in personalty which, by terms of will, is to be converted from sale of realty; *Re Hogarty*, 62 App. Div. 83, 70 N. Y. Supp. 839, holding provision in will directing sale of realty operates as equitable conversion into personalty, notwithstanding failure of executor to carry out said provision; *Re Russell*, 59 App. Div. 246, 69 N. Y. Supp. 563, holding direction to executor to sell real estate for specified purposes of distribution, equitable conversion of real estate into personalty.

Unlawful perpetuities.

Cited in *Deegan v. Wade*, 144 N. Y. 576, 39 N. E. 692, holding provision in will

directing executor to sell lands at certain time within statutory period not creation of unlawful perpetuity.

Cited in footnote to *Murphy v. Whitney*, 24 L. R. A. 123, which holds agreement that land descending to brothers and sisters shall on death of last survivor pass to child of only married one not void as perpetuity.

Definiteness of trust.

Cited in *Re Botsford*, 23 Misc. 391, 52 N. Y. Supp. 238, holding bequest to public officer in trust for poor widows and orphans void for indefiniteness.

Conflict of laws.

Cited in *Re Leo-Wolf*, 25 Misc. 470, 55 N. Y. Supp. 650, holding legality of bequest to foreign religious society depends upon legatee's ability to take under laws of its domicile; *Re Sturges*, 28 Misc. 111, 59 N. Y. Supp. 783, holding illegal bequest to foreign legatee valid if he is competent to take under laws of his domicile; *Kurzman v. Lowy*, 23 Misc. 383, 52 N. Y. Supp. 83, upholding trust in personalty is to be executed in foreign jurisdiction according to its laws; *Re Lang*, 9 Misc. 529, 30 N. Y. Supp. 388, holding law of foreign legatee's domicile controls as to validity of bequest.

Distinguished in *Dammert v. Osborn*, 140 N. Y. 41, 35 N. E. 407, holding bequest by foreign testator to domestic charity not void because of testator's failure to provide specifically for execution of trust under domestic laws; *Re Robertson*, 23 Misc. 454, 51 N. Y. Supp. 502, holding bequest to foreign corporation, valid by law of testator's domicile, void, where law of domicile of corporation forbids it to take.

Denied in *Congregational Church Bldg. Soc. v. Everitt*, 85 Md. 107, 35 L. R. A. 697, 36 Atl. 654, holding validity of bequest to foreign corporation determinable by law of testator's domicile.

18 L. R. A. 465, *SAN GABRIEL VALLEY LAND & WATER CO. v. WITMER BROS.* CO. 96 Cal. 623, 31 Pac. 588, 29 Pac. 500.

Recovery of money paid under duress.

Cited in *Hoadley v. Dumois*, 11 Misc. 55, 31 N. Y. Supp. 853, holding money paid under duress to protect one's interests, which ought to have been paid by another, recoverable.

Recovery of tax money.

Cited in *Colusa County v. Glenn*, 124 Cal. 503, 57 Pac. 477, holding taxes paid to county not entitled thereto recoverable by county so entitled; *Kessler v. Kedzie*, 106 Ill. App. 4, holding taxes paid on mortgaged property by mortgagor not recoverable from mortgagee after discharge of mortgage; *Angus v. Plum*, 121 Cal. 608, 54 Pac. 97, holding mortgagor entitled to recover money paid for taxes of mortgagee; *Anglo-Californian Bank v. Eudey*, 59 C. C. A. 122, 123 Fed. 42, holding assignee of mortgage bound by agreement of prior assignee assuming and agreeing to pay taxes on mortgaged property.

Distinguished in *McPike v. Heaton*, 131 Cal. 111, 82 Am. St. Rep. 335, 63 Pac. 179, holding taxes paid on land subsequently sold or assigned not recoverable by succeeding grantee or assignee, upon covenant against encumbrances implied from deed.

Taxation of judgments.

Cited in footnote to *Hamilton v. Wilson*, 48 L. R. A. 238, which holds void, statute for taxation of personal judgments with specified exceptions.

18 L. R. A. 473, *JEWELL v. JEWELL*, 84 Me. 304, 24 Atl. 858.

Qualifications of jurors.

Cited in footnotes to *State v. Pickett*, 39 L. R. A. 302, which holds juror's inability to read or write English not ground for new trial; *Coughlin v. People*. 19 L. R. A. 57, which holds trial court's determination that juror not disqualified by opinion reviewable on appeal.

Waiver of forfeiture.

Cited in *Hanscom v. Home Ins. Co.* 90 Me. 339, 38 Atl. 324, holding defense of forfeiture for nonoccupancy waived by call for schedule of property lost, and conduct leading insured to believe for four months after fire that loss would be paid.

18 L. R. A. 479, *BURT v. DOUGLAS COUNTY STREET R. CO.* 83 Wis. 229, 53 N. W. 447.

Injuries arising from electrical appliances.

Cited in *Eickhof v. Chicago N. S. Street R. Co.* 77 Ill. App. 199, holding electric railway company prima facie guilty of negligence in permitting electricity to escape, causing injury to passengers.

Cited in footnote to *Baltimore City Pass. R. Co. v. Nugent*, 39 L. R. A. 161, which denies carrier's liability for injury to passenger by breaking of trolley wire, which comes in contact with him.

Care of electric wires.

Cited in footnote to *Illingsworth v. Boston Electric Light Co.* 25 L. R. A. 552, which holds reasonable care to keep electric wires safe, due towards persons licensed to approach them.

Injunction against erection of wires.

Cited in footnote to *Rutland Electric Light Co. v. Marble City Electric Light Co.* 20 L. R. A. 821, which holds electric light company entitled to injunction against erection of wires carrying dangerous current.

Liability for injury to passenger.

Cited in footnote to *Proud v. Philadelphia & R. R. Co.* 50 L. R. A. 468, which denies liability for injury by filth on car step in nighttime within half hour after car inspected.

Negligence of passenger.

Cited in note (34 L. R. A. 720) on negligence of passenger in passing from one car to another.

18 L. R. A. 481, *BEEBE v. OHIO FARMERS' INS. CO.* 93 Mich. 514, 32 Am. St. Rep. 519, 53 N. W. 818.

Ownership for insurance purposes.

Cited in footnotes to *Hamilton v. Dwelling House Ins. Co.* 22 L. R. A. 527, which holds vendor not sole and unconditional owner of insured building; *Weber v. Dwelling House Ins. Co.* 30 L. R. A. 719, which holds warranty of joint ownership of husband and wife not untrue because title of family homestead in wife, and of personalty in husband; *Germania F. Ins. Co. v. Home Ins. Co.* 26 L. R. A. 591, which holds policy avoided by sale of interest to one taken in as partner.

Severability of insurance.

Cited in note (19 L. R. A. 218) on severability of insurance in same policy.

Waiver of or estoppel to rely on conditions.

Followed in *Rediker v. Queen Ins. Co.* 107 Mich. 227, 65 N. W. 105, holding condition in policy against encumbrances waived by agent issuing same with knowledge of existing mortgage.

Cited in *Cronin v. Fire Asso.* 119 Mich. 77, 77 N. W. 648, holding knowledge of encumbrance and consent to foreclosure thereof by insurer's agent valid waiver of condition in policy against encumbrances and foreclosure; *Raymond v. Farmers' Mut. F. Ins. Co.* 114 Mich. 389, 72 N. W. 254, holding insurer estopped to deny liability on policy of insurance issued by its secretary having full knowledge of condition of title of property insured; *Robison v. Ohio Farmers' Ins. Co.* 93 Mich. 535, 53 N. W. 821, holding knowledge by insurer's agent of true condition of applicant's title to property insured estops company from asserting misrepresentation; *Lord v. National Protective Soc.* 129 Mich. 341, 88 N. W. 876, holding benefit society estopped by acceptance and retention of past-due assessments from claiming forfeiture; *Hilt v. Metropolitan L. Ins. Co.* 110 Mich. 523, 68 N. W. 300, holding acceptance of premium by agent with knowledge of insured's ill health, valid waiver of condition in policy against physical defects of insured; *German Ins. Co. v. Shader (Neb.)* 60 L. R. A. 922, 93 N. W. 972, holding condition requiring payment of premium before attachment of risk waived by company not repudiating extension of credit by agent; *Maupin v. Scottish Union & Nat. Ins. Co.* 53 W. Va. 575, 45 S. E. 1003 (dissenting opinion), majority holding oral evidence of waiver by agent of "Iron Safe Clause" in policy inadmissible.

Cited in footnotes to *Home Ins. Co. v. Hancock*, 52 L. R. A. 665, which holds statement that life tenant has fee-simple title to insured property does not avoid policy where agent knew facts; *Sternaman v. Metropolitan L. Ins. Co.* 57 L. R. A. 319, which denies insurer's right to rely on warranty by applicant that answers properly recorded, where medical examiner knew otherwise.

18 L. R. A. 486, *PIERCE v. JOHNSON*, 93 Mich. 125, 53 N. W. 16.

Followed on same state of facts in *Ripon Knitting Works v. Johnson*, 93 Mich. 129, 53 N. W. 17.

Fraud as basis for attachment.

Cited in note (30 L. R. A. 474) on what intent to defraud will sustain attachment.

18 L. R. A. 487, *BLOOMINGTON v. LATHAM*, 142 Ill. 462, 32 N. E. 506.

Local improvements.

Cited in *Chicago & A. R. Co. v. Joliet*, 153 Ill. 653, 39 N. E. 1077, holding it not necessary, upon levying assessment by special taxation, to ascertain benefits to property taxed by jury as in eminent domain proceedings; *Hawes v. Chicago*, 158 Ill. 659, 30 L. R. A. 227, 42 N. E. 373, holding ordinance compelling substitution of cement walk in place of plank walk in front of vacant 20-acre lot unreasonable.

Eminent domain.

Cited in *Leopold v. Chicago*, 150 Ill. 576, 37 N. E. 892, holding, in condemning portion of private lands for public use, damage occasioned by such taking cannot be offset by supposed special benefits accruing to land remaining; *Payne v. South Springfield*, 161 Ill. 293, 44 N. E. 105, holding assessment of cost of condemning

private property upon property not in fact benefited thereby violative of constitutional right.

Cited in note (18 L. R. A. 544) on protection of private rights from interference by public.

Distinguished in *Waggeman v. North Peoria*, 155 Ill. 547, 40 N. E. 485, holding it not violative of constitutional right in condemnation proceedings to offset special benefits against damages.

18 L. R. A. 491, *HEYWOOD v. FULMER*, 158 Ind. 658, 32 N. E. 574.

Distinction between lease, license, and contract of sale.

Cited in *Lacey v. Newcomb*, 95 Iowa, 296, 63 N. W. 704, holding lessor entitled to lien for rent, under agreement granting exclusive right to mine coal.

Cited in footnotes to *Genet v. Delaware & H. Canal Co.* 19 L. R. A. 127, which holds no sale of coal in place under agreement in form of lease; *Hutchins v. Durham*, 32 L. R. A. 706, which holds occupant of market stall licensee and not lessee; *Paul v. Cragnas*, 47 L. R. A. 540, which holds instrument leasing for year undivided interest in mine, to be worked on royalty basis, lease and not mere license; *Reynolds v. Van Beuren*, 42 L. R. A. 129, which holds grant of privilege to use roof of building for advertising purposes, mere license, and not lease.

18 L. R. A. 496, *REED v. EQUITABLE F. & M. INS. CO.* 17 R. I. 785, 24 Atl. 833.

Notice of prior or other insurance.

Cited in *Fireman's Fund Ins. Co. v. Norwood*, 16 C. C. A. 139, 32 U. S. App. 490, 69 Fed. 74, holding insurer estopped to deny liability after loss, on policy issued by general agent having knowledge of insured's intention to secure other and additional insurance; *Spalding v. New Hampshire F. Ins. Co.* 71 N. H. 443, 52 Atl. 858, holding insurer estopped to deny liability on policy issued with knowledge of prior insurance.

Avoidance of prior policy by subsequent policy.

Cited in footnote to *Sweeting v. Mutual F. Ins. Co.* 32 L. R. A. 570, which holds earlier insurance policy not avoided by subsequent insurance, invalid because of former policy.

Notice to insurance agent.

Cited in *Leonard v. New England Mut. L. Ins. Co.* 22 R. I. 521, 48 Atl. 808, holding notice to agent writing application after insurance no notice to insurer sufficient to create estoppel; *O'Rourke v. John Hancock Mut. L. Ins. Co.* 23 R. I. 459, 57 L. R. A. 499, 91 Am. St. Rep. 643, 50 Atl. 834, holding statement by solicitor of insurer to applicant as to materiality of facts brought to his attention not binding on insurer.

Authority of agent.

Cited in *Bryan v. National L. Ins. Asso.* 21 R. I. 152, 42 Atl. 513, denying authority of agent, other than "regular" or general agent, to extend time for payment of premium.

18 L. R. A. 498, *SAVINGS BANK v. AUTHIER*, 52 Minn. 98, 53 N. W. 812.

Erroneous or defective service.

Cited in *Slingluff v. Gainer*, 49 W. Va. 10, 37 S. E. 771, holding decree based on process served upon wrong person, of no effect.

Cited in footnote to *Treftz v. Stahl*, 18 L. R. A. 500, which holds defective service of notice of motion to place case on short-cause calendar by leaving with occupant of office waived by permitting trial without objection.

18 L. R. A. 500, *TREFTZ v. STAHL*, 46 Ill. App. 462.

Motion to set aside judgment.

Cited in *Hahn v. Gates*, 67 Ill. App. 598, holding affidavit on which motion to set aside judgment is based should state facts, not conclusions; *Grosvenor v. Doyle*, 50 Ill. App. 49, holding neglect of defendant in default to give notice to set aside default judgment estops him to contest final decree.

Short-cause calendar.

Cited in *Auburn Cycle Co. v. Foote*, 69 Ill. App. 647, holding irregularities in service of notice of motion to strike cause waived where adverse party files affidavit; *Johnston v. Brown*, 51 Ill. App. 551, holding failure of litigant to take prompt advantage of irregularities in service of notice to place cause on short-cause calendar deemed waiver; *McGuire v. Gilbert*, 99 Ill. App. 518; *Belinski v. Brand*, 76 Ill. App. 407; *Union Book Co. v. Robinson*, 105 Ill. App. 237,—holding objection to cause being on short-cause calendar should be made in trial court, at once upon service of notice; *Freund v. Huylers*, 102 Ill. App. 487, holding long delay in making motion to strike cause from short-cause calendar waiver of alleged irregularities; *Wheatley, B. & Co. v. Chicago Trust & Sav. Bank*, 64 Ill. App. 615, holding irregularities incident to preparation for trial of cause which is upon short-cause calendar waived by failure of parties to move for removal of cause from calendar until day of trial.

18 L. R. A. 502, *STATE v. INDIANA & I. S. R. CO.* 133 Ind. 69, 32 N. E. 817.

Followed without discussion in *Pennsylvania Co. v. State*, 142 Ind. 434, 41 N. E. 937; *State v. Pennsylvania Co.* 133 Ind. 700, 32 N. E. 822.

Construction of penal statutes.

Cited in *Terre Haute & I. R. Co. v. State*, 13 Ind. App. 531, 41 N. E. 952, holding statute requiring railroads to post information on blackboards, concerning arrival of trains at stations where "there is a telegraph office," not violated for failure to post such information at night, when no operator on duty; *Louisville & N. R. Co. v. Com.* 102 Ky. 310, 53 L. R. A. 152, 43 S. W. 458, holding statute requiring stations and ticket offices to be open thirty minutes before departure of trains not applicable to night trains at stations not kept open; *Gustavel v. State*, 153 Ind. 617, 54 N. E. 123, construing clause in statute forbidding taking of fish, except with hook and line, during certain season "in any of the waters of this state," to mean "any of the other waters," where preceding clause forbade any taking by any means in "any of the streams" of the state.

State regulation of railroads.

Cited in *State v. Kentucky & I. Bridge Co.* 136 Ind. 198, 35 N. E. 991, holding statute requiring railroad companies to place blackboards in stations on which to write time of arrival of trains not applicable to company operating trains on schedule less than time required in statute for posting notice of train arrivals; *State v. Cleveland, C. C. & St. L. R. Co.* 157 Ind. 291, 61 N. E. 669, holding penalty imposed on railroad company under blackboard law applies to failure to maintain blackboard, and not to variance from prescribed dimensions.

Judicial notice.

Approved in Louisville, N. A. & C. R. Co. v. Heck, 151 Ind. 312, 50 N. E. 988; Missouri, K. & T. R. Co. v. Elliott, 42 C. C. A. 199, 102 Fed. 107; Youree v. Vicksburg, S. & P. R. Co. 110 La. 795, 34 So. 779,—holding that court will take judicial notice of use of telegraph to control movement of trains.

Penalties.

Cited in Southern Exp. Co. v. Com. 92 Va. 64, 41 L. R. A. 438, 22 S. E. 809, holding recovery of penalty in nature of fine or forfeiture for violating statutory duty not violation of constitutional provision pertaining to fines assessed for crimes; Western U. Teleg. Co. v. Ferguson, 157 Ind. 40, 60 N. E. 679, holding statute providing for individual recovery of penalty for failure to send telegraphic message constitutional; Adams Exp. Co. v. State, 161 Ind. 343, 67 N. E. 1033, upholding constitutionality of act providing penalty for unjust discrimination by express companies.

Prosecuting attorney's interest in penalties.

Cited in State *ex rel.* Goodman v. Halter, 149 Ind. 300, 47 N. E. 665, holding statute giving prosecuting attorney interest in penalty constitutional.

Statutory restriction of contracts.

Cited in Gulf, C. & S. F. R. Co. v. Eddins, 7 Tex. Civ. App. 127, 26 S. W. 161, holding state statute imposing restraints upon power to contract by carriers not unlawful regulation of interstate commerce.

Cited in note (21 L. R. A. 790) on constitutionality of statutes restricting contracts and business.

18 L. R. A. 509, BOYCE v. UNION P. R. CO. 8 Utah, 353, 31 Pac. 450.

Negligent maintenance of bathing resorts.

Cited in footnotes to Brotherton v. Manhattan Beach Improv. Co. 33 L. R. A. 598, which requires keeper of bathing resort to take proper precautions for safety of bathers; McGraw v. District of Columbia, 25 L. R. A. 691, which holds municipality not responsible for safety of bathing beach which it is required to maintain.

18 L. R. A. 510, SOUTHERN P. R. CO. v. FERRIS, 93 Cal. 263, 28 Pac. 828.

Effect of public user of private way.

Cited in footnote to Stickley v. Sodus Twp. 59 L. R. A. 287, which holds private way, built for private gain from highway to private wharf, and maintained by private enterprise, does not become public by user without objection.

User as acceptance.

Cited in footnote to Downend v. Kansas City, 51 L. R. A. 170, which holds mere user of land as street not acceptance rendering city liable for failure to keep in repair.

18 L. R. A. 512, FULLER & F. CO. v. McHENRY, 83 Wis. 573, 53 N. W. 896.

Married woman's contracts.

Cited in Emerson-Talcott Co. v. Knapp, 90 Wis. 35, 62 N. W. 945, holding wife's contract as surety on husband's note void; Haggett v. Hurley, 91 Me. 557, 41 L. R. A. 367, 40 Atl. 561, holding wife cannot become partner of her husband and so

contract in reference thereto as to bind her separate estate; *Gaynor v. Blewett*, 86 Wis. 401, 57 N. W. 44, holding contractual power of married woman limited to engagements convenient to use or enjoyment of her separate estate; *Hoaglin v. Henderson*, 119 Iowa, 725, 81 L. R. A. 758, footnote p. 756, 97 Am. St. Rep. 335, 94 N. W. 247, holding statutory power conferred upon married women to contract with reference to separate property not inclusive of power to contract partnership relation with husband; *Mayers v. Kaiser*, 85 Wis. 394, 21 L. R. A. 632, 39 Am. St. Rep. 849, 55 N. W. 688, holding wife incapable of entering into partnership with husband; *Kriz v. Peege*, 119 Wis. 115, 95 N. W. 108, holding married woman without separate estate bound by lease signed by husband and herself.

Cited in footnotes to *Haggett v. Hurley*, 41 L. R. A. 362, which denies married woman's power to form partnership with husband; *Vail v. Winterstein*, 18 L. R. A. 515, which holds married woman may enter firm in which husband not a partner.

Action against married woman.

Cited in *Gallagher v. Mjelde*, 98 Wis. 513, 74 N. W. 340, holding, in any action against married woman other than one affecting individual estate, husband must be joined.

Assignments.

Cited in *Northern Nat. Bank v. Weed*, 86 Wis. 216, 56 N. W. 634, holding voluntary assignment under form of bill of sale void as creating preference; *Collins v. Corwith*, 94 Wis. 523, 69 N. W. 349, holding transaction by which two creditors take debtor's property to pay themselves, with reversion to debtor if any property left, is in effect a voluntary assignment; *Strong v. Kalk*, 91 Wis. 32, 51 Am. St. Rep. 863, 64 N. W. 295, holding chattel mortgages given to certain creditors an assignment; *Duryea v. Muse*, 117 Wis. 404, 94 N. W. 365, holding statute requiring general assignee to file bond not suspended by passage of Federal bankruptcy act.

Cited in note (37 L. R. A. 366) on whether preference by mortgage or sale is assignment for creditors.

18 L. R. A. 515, *VAIL v. WINTERSTEIN*, 94 Mich. 230, 34 Am. St. Rep. 334, 53 N. W. 932.

Husband and wife as business partners.

Cited in footnotes to *Hoaglin v. Henderson*, 61 L. R. A. 756, which sustains wife's right to enter into partnership agreement with husband; *Fuller & F. Co. v. McHenry*, 18 L. R. A. 512, which denies wife's right to become husband's partner.

Distinguished in *Haggett v. Hurley*, 91 Me. 557, 41 L. R. A. 367, footnote p. 362, 40 Atl. 561, holding married woman legally incapable of transacting business in partnership with husband.

18 L. R. A. 519, *BUTCHER v. WEST VIRGINIA & P. R. CO.* 37 W. Va. 180, 16 S. E. 457.

Contributory negligence.

Cited in *Fisher v. West Virginia & P. R. Co.* 42 W. Va. 192, 33 L. R. A. 73, 24 S. E. 570, holding intoxicated passenger obstinately going upon platform steps, contrary to request of conductor, guilty of contributory negligence; *Woodell v.*

West Virginia Improv. Co. 38 W. Va. 46, 17 S. E. 386, holding contributory negligence matter of defense, where not appearing by plaintiff's showing, which may be proved under general issue.

Cited in notes (21 L. R. A. 724) on denial of liability for negligence in failing to take precautions required by statute on ground that they would have been insufficient to prevent injury; (40 L. R. A. 134) on intoxication as affecting negligence.

— At railroad crossings.

Cited in footnotes to *Passman v. West Jersey & S. R. Co.* 61 L. R. A. 609, which holds cutting of train on side track at highway crossing not invitation to cross without using ordinary precaution; *Keenan v. Union Traction Co.* 58 L. R. A. 217, which holds failure to look for train when within 35 feet of track, negligence; *Western & A. R. Co. v. Ferguson*, 54 L. R. A. 803, which holds failure to look when within 30 feet of track not prevent recovery.

18 L. R. A. 524, *WINNEY v. SANDWICH MFG. CO.* 86 Iowa, 608, 53 N. W. 421.
Service of process on foreign corporation.

Cited in *Moffitt v. Chicago Chronicle Co.* 107 Iowa, 412, 78 N. W. 45, holding service of process upon local agent of foreign corporation valid to give local court jurisdiction over defendant.

Cited in note (23 L. R. A. 495) on who may be served with process in suit against foreign corporation.

Pleading of statute of limitation by foreign corporation.

Cited in *Burns v. White Swan Min. Co.* 35 Or. 308, 57 Pac. 637, holding statute of limitation may be pleaded by foreign corporation having agent in state where sued.

Cited in footnotes to *Turcott v. Yazoo & M. Valley R. Co.* 40 L. R. A. 768, which sustains right of foreign corporation not complying with statutory requirements to plead statute of limitations; *Williams v. Metropolitan Street R. Co.* 64 L. R. A. 794, which denies right of foreign corporation to avail itself of statute of limitations.

Cited in note (19 L. R. A. 224) on who or what is included in term "persons" within meaning of statute of limitations.

Distinguished in *Smyth v. Peters Shoe Co.* 111 Iowa, 390, 82 N. W. 898, holding foreign corporation may plead statute of limitations of state of domicile in action against it in state where suit is brought.

Interest.

Cited in *Frick v. Kabaker*, 116 Iowa, 511, 90 N. W. 498, holding instruction to allow interest not claimed in petition erroneous.

18 L. R. A. 527, *LITTLE ROCK & FT. S. R. CO. v. CRAVENS*, 57 Ark. 112, 38 Am. St. Rep. 230, 20 S. W. 803.

Contract limiting carrier's liability.

Cited in *Pacific Exp. Co. v. Wallace*, 60 Ark. 104, 29 S. W. 32, holding carrier not permitted to limit liability by special contract; *St. Louis, I. M. & S. R. Co. v. Spann*, 57 Ark. 135, 20 S. W. 914, holding carrier not permitted to limit liability against negligence by special contract; *Illinois C. R. Co. v. Craig*, 102 Tenn. 302, 52 S. W. 164, holding common carrier may limit liability for loss or damage to

freight, provided it affords shipper alternative of shipping with or without such limitation; *Illinois C. R. Co. v. Lancashire Ins. Co.* 79 Miss. 122, 30 So. 43, holding bill of lading exempting carrier from loss by fire invalid, where common-law transportation not offered.

Cited in footnotes to *Tecumseh Mills v. Louisville & N. R. Co.* 49 L. R. A. 557, which holds prohibition against carriers limiting liability inapplicable to contract by domestic corporation in other state for transportation entirely outside of state; *Mears v. New York, N. H. & H. R. Co.* 56 L. R. A. 884, which authorizes carrier to stipulate for exemption from liability for wet; *Ullman v. Chicago & N. W. R. Co.* 56 L. R. A. 246, which sustains carrier's right to secure entire exemption from liability as insurer for loss not due to negligence or misfeasance; *Central R. Co. v. Murphey*, 53 L. R. A. 720, which holds negligent carrier liable for true value, notwithstanding arbitrary preadjustment in bill of lading, assented to by shipper; *Willock v. Pennsylvania R. Co.* 27 L. R. A. 228, which holds carrier not protected against own negligence by requirement that shipper shall insure for carrier's benefit.

Distinguished in *Little Rock & Ft. S. R. Co. v. Odom*, 63 Ark. 331, 38 S. W. 339, and *Kansas City, Ft. S. & M. R. Co. v. Sharp*, 64 Ark. 118, 40 S. W. 781, holding carrier may limit liability by contract where goods shipped are destined to place beyond end of initial carrier's line; *Missouri, K. & T. R. Co. v. Carter*, 9 Tex. Civ. App. 685, 29 S. W. 565, holding carrier accepting goods for transportation under verbal contract without limitation of liability not permitted to impose limitation in written contract executed after acceptance of shipment.

18 L. R. A. 533, *KLINE v. BANK OF TESCOTT*, 50 Kan. 91, 34 Am. St. Rep. 107, 31 Pac. 688.

Extrinsic evidence to explain written instrument.

Cited in *Janes v. Citizens Bank*, 9 Okla. 560, 60 Pac. 290, and *Benham v. Smith*, 53 Kan. 498, 36 Pac. 997, holding extrinsic evidence admissible to show intention of parties to negotiable note executed by officers of corporation; *Gardner v. Cooper*, 9 Kan. App. 592, 58 Pac. 230, and *Shaffer v. Hohenschild*, 2 Kan. App. 520, 43 Pac. 979, holding extrinsic evidence admissible to show that corporate officers signed instrument in official capacity.

Cited in note (20 L. R. A. 705) on admissibility of extrinsic evidence to show who is liable as maker of note.

Descriptio personæ.

Distinguished in *Farmers' Loan & T. Co. v. Essex*, 66 Kan. 102, 71 Pac. 268, holding service upon corporation as individual not binding upon it as trustee.

18 L. R. A. 535, *WELSH v. TAYLOR*, 134 N. Y. 450, 47 N. Y. S. R. 301, 31 N. E. 896.

Extinction or abandonment of easement.

Cited in *Nicklas v. Keller*, 9 App. Div. 220, 41 N. Y. Supp. 172, holding easement in street created by deed of conveyance of lot abutting thereon not extinguished by abandonment of such street as public highway; *Weaver v. Getz*, 16 Pa. Super. Ct. 421, 18 Lanc. L. Rev. 230, holding right in wagon road acquired by deed as appurtenant to land conveyed not affected by failure of grantee to use; *Woodside v. Ciceroni*, 35 C. C. A. 183, 93 Fed. 7, holding easement to enter and prospect for mining being created by deed, mere failure to exercise right will not ex-

tinguish it; *Haight v. Littlefield*, 147 N. Y. 344, 41 N. E. 696, Affirming 71 Hun, 290, 24 N. Y. Supp. 1097, holding right of easement in highway not extinguished by digging of ditch across, or erection of fences thereon, even with knowledge of grantee.

— **Mere nonuser.**

Cited in *Suydam v. Dunton*, 84 Hun, 509, 32 N. Y. Supp. 333, holding cessor to use, coupled with clear intention to abandon, an effective extinguishment of easement; *Lambert v. Huber*, 22 Misc. 466, 50 N. Y. Supp. 793, holding right to easement in alley not lost by nonuser merely; *Kerrigan v. Backus*, 69 App. Div. 335, 74 N. Y. Supp. 906, holding easement acquired by deed as appurtenant to land conveyed not lost by nonuser by grantee; *Weed v. McKeg*, 79 App. Div. 221, 79 N. Y. Supp. 807, holding mere nonuser does not create abandonment; *Marshall v. Wenninger*, 20 Misc. 529, 46 N. Y. Supp. 670; *Valentine v. Schreiber*, 3 App. Div. 241, 38 N. Y. Supp. 417; *Conabeer v. New York C. & H. R. R. Co.* 156 N. Y. 484, 51 N. E. 402,—holding mere nonuser does not create abandonment of right or title to property created or conveyed by deed; *Andrus v. National Sugar Ref. Co.* 93 App. Div. 378, 87 N. Y. Supp. 671, holding easement by grant not extinguished by nonuser.

Cited in footnote to *Nichols v. Peck*, 40 L. R. A. 81, which holds original barway not abandoned by using other for eleven years after former rendered impassable by lowering of highway.

Effect of acquiescence in erection of impediment.

Cited in *Weed v. McKeg*, 37 Misc. 110, 74 N. Y. Supp. 250, holding owner of lot having easement in alley in common with others estopped to complain of erection and maintenance of gate at entrance thereto, when such was done with his consent and long acquiescence; *Boyd v. Hunt*, 102 Tenn. 504, 52 S. W. 131, holding erection and maintenance of gate at entrance to alley, coupled with nonuse, by dominant estate not abandonment of easement; *Johnson v. Stitt*, 21 R. I. 433, 44 Atl. 513, holding erection of iron fence across way, even with silent acquiescence, not sufficient evidence of nonuser to constitute abandonment.

Rights of owners of dominant and servient tenements.

Cited in *Smith v. Cornell University*, 21 Misc. 225, 79 N. Y. S. R. 640, 45 N. Y. Supp. 640, holding trespass not maintainable against owner of dominant estate for using water, right to which was created by deed of conveyance, excepting that right out of servient estate; *Knabe v. Levelle*, 23 N. Y. Supp. 821, holding conveyance of easement in alley forming boundary line between two lots gives to each owner thereof equal rights therein; *Sebald v. Mulholland*, 6 Misc. 354, 26 N. Y. Supp. 913, holding equity will refuse to interfere with maintenance of building wall erected contrary to party-wall agreement, but with acquiescence of adjoining owner; *Mattes v. Frankel*, 157 N. Y. 611, 68 Am. St. Rep. 804, 52 N. E. 585 (dissenting opinion), majority holding grantor estopped by declarations from denying right of way over his land to grantee.

18 L. R. A. 543, *FORSTER v. SCOTT*, 136 N. Y. 577, 49 N. Y. S. R. 699, 32 N. E. 976.

What constitutes an encumbrance.

Cited in *Ray v. Adams*, 44 App. Div. 175, 60 N. Y. Supp. 663, holding covenants against erection and maintenance of nuisances to be encumbrances on title suffi-

cient to relieve execution purchaser having no knowledge of same, from completing purchase; *Koezly v. Koezly*, 31 Misc. 400, 65 N. Y. Supp. 613, holding encumbrance to be any right in or burden upon land depreciative of its value; *Turner v. Walker*, 40 Misc. 381, 82 N. Y. Supp. 340, holding right of way reserved for railroad, an encumbrance upon land.

— **Filing map as encumbrance.**

Cited in *German-American Real Estate Title Guarantee Co. v. Meyers*, 32 App. Div. 43, 52 N. Y. Supp. 449, holding statute creating encumbrance upon lands by filing map indicating proposed streets unconstitutional; *People v. Adirondack R. Co.* 160 N. Y. 243, 54 N. E. 689, Reversing 39 App. Div. 49, 56 N. Y. Supp. 869, holding filing of map indicating lands to be taken under power of eminent domain, with no provision for compensation, creates no valid encumbrance; *Singer v. New York*, 47 App. Div. 45, 62 N. Y. Supp. 347, holding filing of map indicating proposed street not an encumbrance upon title to property indicated; *New York C. & H. R. R. Co. v. Haffen*, 90 Hun, 261, 35 N. Y. Supp. 806, holding filing of map showing proposed street does not create cloud on title, precluding vendee from completing contract of purchases.

Compensation for private property taken for public use.

Cited in *Re New York*, 24 App. Div. 11, 49 N. Y. Supp. 119, holding owner of land appropriation of which is authorized by statute entitled to receive value of building erected after passage of act, but before final appropriation; *Pape v. New York & H. R. Co.* 74 App. Div. 188, 77 N. Y. Supp. 725, holding deprivation of use and free enjoyment of one's property is taking property within constitutional sense requiring compensation to be made therefor; *New York C. & H. R. R. Co. v. State*, 37 App. Div. 63, 55 N. Y. Supp. 685, holding that knowledge by owner of land of location of flow line of proposed reservoir and that work is being done in construction of dam does not prevent owner's recovery for injury by subsequent flooding; *Bauman v. Ross*, 167 U. S. 597, 42 L. ed. 291, 17 Sup. Ct. Rep. 966, holding act of Congress March 2, 1893, requiring recording of map of all lands and streets in District of Columbia, does not entitle landowners to compensation for property taken for public use; *Edwards v. Bruorton*, 184 Mass. 532, 69 N. E. 328, holding provision in statute denying compensation for injuries by change of grade in certain cases unconstitutional; *Sadlier v. New York*, 40 Misc. 83, 81 N. Y. Supp. 308, holding owner entitled to compensation for flooding of roof with water and other matter from public bridge.

Cited in footnote to *Shanfelter v. Baltimore*, 27 L. R. A. 648, which denies right of action for damages from ordinance selecting courthouse site and authorizing its condemnation.

Assessment of land condemned as confiscation.

Cited in footnote to *Bloomington v. Latham*, 18 L. R. A. 487, which holds assessment on landowner for land condemned confiscation.

Maintenance of nuisance by public.

Cited in footnote to *Morton v. New York*, 22 L. R. A. 241, which holds city has no right to build pumping station on own land, rendering uninhabitable adjoining buildings.

Construction and validity of statutes.

Cited in *People ex rel. Rodgers v. Coler*, 56 App. Div. 108, 67 N. Y. Supp. 701, and *Swiehard v. Michels*, 81 Hun, 330, Affirming 8 Misc. 573, 29 N. Y. Supp.

777, holding statute providing for sewer construction to be construed with reference to its practical effect and operation within constitutional limit; *People v. Hawkins*, 157 N. Y. 8, 42 L. R. A. 494, 68 Am. St. Rep. 736, 51 N. E. 257, **Affirming** 10 Misc. 67, 31 N. Y. Supp. 115, holding that to determine constitutionality of legislative act, plain, reasonable effect, object, and operation thereof must be considered; *Kobbe v. New Brighton*, 20 Misc. 478, 45 N. Y. Supp. 777, holding defective erection and offensive operation of cremator of village garbage, offal, etc., deprivation of constitutional right of neighboring property owners; *Barry v. Port Jervis*, 64 App. Div. 271, 72 N. Y. Supp. 104, holding provision of village charter requiring forty-eight hours' notice of injuries received from defective highways to be served on village clerk unconstitutional as depriving person injured of property right, without due process of law; *Buffalo v. Hill*, 79 App. Div. 408, 79 N. Y. Supp. 449, upholding constitutionality of ordinance requiring dealers to obtain license for sale of meats outside public markets; *New York Sanitary Utilization Co. v. Public Health Department*, 32 Misc. 582, 67 N. Y. Supp. 324, holding statute requiring discontinuance and removal of garbage-rendering plant unconstitutional attempt to exercise police power; *Re Marshall*, 102 Fed. 326, holding game ordinance relative to size and character of gun used in shooting game to be unconstitutional exercise of police powers.

Judicial scrutiny of police regulations.

Cited in *Colon v. Lisk*, 153 N. Y. 197, 60 Am. St. Rep. 609, 47 N. E. 302, holding statute providing for protection of oyster beds, police regulation and therefore subject to judicial scrutiny; *Re Wilshire*, 103 Fed. 622, holding ordinances enacted by municipalities in exercise of police power, subject to judicial scrutiny; *Ex parte Kenneke*, 136 Cal. 531, 89 Am. St. Rep. 177, 69 Pac. 261, dissenting opinion by Van Dyke, J., who holds game statute a police regulation subject to judicial scrutiny.

18 L. R. A. 547, *HERNDON v. IMPERIAL F. INS. CO.* 111 N. C. 384, 16 S. E. 465.

Petition for rehearing.

Cited in *State v. Council*, 129 N. C. 512, 39 S. E. 814, holding petition to rehear will not be granted as matter of right in criminal cause, contrary to court rules; *Blacknall v. Rowland*, 118 N. C. 421, 24 S. E. 1, denying rehearing in action where purchaser of stock recovered on warranty, although he did not examine into truth of representations as he had privilege of doing; *Solomon v. Bates*, 118 N. C. 322, 24 S. E. 746, denying motion to modify opinion as repealing requirement of certificate of counsel indorsed by member of court as preliminary to rehearing.

Rules of practice.

Cited in *Bird v. Gilliam*, 125 N. C. 79, 34 S. E. 196, holding supreme court not subject to rules of practice prescribed by legislature contrary to court rules; *Calvert v. Carstarphen*, 133 N. C. 27, 45 S. E. 353, holding that legislature cannot enact rules of practice and procedure for supreme court.

18 L. R. A. 549, *Re SANDERS*, 4 Inters. Com. Rep. 305, 52 Fed. 802.

State regulations affecting interstate commerce.

Cited in *Re Tinsman*, 95 Fed. 651, holding municipal ordinance requiring soliciting agents of manufacturers to pay license unconstitutional burden on interstate commerce; *People v. Hawkins*, 20 App. Div. 497, 47 N. Y. Supp. 56, holding stat-

ute requiring labeling of all convict-made goods before offering for sale unconstitutional burden on commerce; *Louisiana v. Lagarde*, 60 Fed. 191, holding state statute regulating labeling and sale of manufactured fertilizers unconstitutional interference with interstate commerce.

18 L. R. A. 553, *KUEHN v. MILWAUKEE*, 83 Wis. 583, 53 N. W. 912.

Private remedies for public nuisances.

Cited in footnotes to *Griffith v. Holman*, 54 L. R. A. 178, which denies private individual's right to abate public nuisance consisting of fence across navigable stream; *South Carolina S. B. Co. v. Wilmington, C. & A. R. Co.* 33 L. R. A. 542, which denies steamboat owner's right of action for obstructing navigation of river; *Farmers' Co-operative Mfg. Co. v. Albemarle & R. R. Co.* 29 L. R. A. 700, which authorizes private action for public nuisance by one having common misfortune with class of persons, but not with entire public.

Right to fish.

Cited in note (60 L. R. A. 513, 525) on right to fish.

18 L. R. A. 556, *NORMAN v. KENTUCKY BD. OF MANAGERS*, 93 Ky. 537, 20 S. W. 901.

Appropriation of funds for public purposes.

Cited in *Minneapolis v. Janney*, 86 Minn. 119, 90 N. W. 312, holding industrial exposition of such public use and benefit as to authorize expenditure of public funds in support thereof; *Shelby County v. Tennessee Centennial Exposition Co.* 96 Tenn. 662, 33 L. R. A. 719, footnote p. 717, 36 S. W. 694, holding appropriation of public funds for purpose of exhibiting resources of county to be for public purpose; *State ex rel. Douglas County v. Cornell*, 53 Neb. 563, 39 L. R. A. 516, footnote p. 513, 68 Am. St. Rep. 629, 74 N. W. 59, holding appropriation of public moneys for industrial and agricultural exposition to be for public use; *House of Reform v. Lexington*, 112 Ky. 178, 65 S. W. 350, upholding power of city to make appropriation to secure location near by, of state house of reform.

Board of managers as agents of state.

Cited in *Gross v. Kentucky Bd. of Managers*, 105 Ky. 849, 43 L. R. A. 705, 49 S. W. 458 (dissenting opinion by Paynter, J.), who holds state board of exposition managers to be agents of state in providing exhibit for public benefit.

Observance of constitutional requirements for passage of law.

Cited in *Glenn v. Wray*, 126 N. C. 734, 36 S. E. 167, holding statutes and amendments thereto pertaining to public revenue and expenditure must be passed by legislature in manner provided in Constitution; *Cohn v. Kingsley*, 5 Idaho. 441, 38 L. R. A. 84, 49 Pac. 985, holding it competent for court to examine journals of both branches of legislature to ascertain whether law was constitutionally enacted.

Cited in note (23 L. R. A. 344, 348) on conclusiveness of enrolled bill.

Judicial notice.

Distinguished in *Hall v. Com.* 94 Ky. 326, 22 S. W. 333, holding judicial notice will be taken of election of circuit judges who are public officers.

Presumption as to constitutionality of legislative action.

Cited in *Lafferty v. Huffman*, 99 Ky. 83, 32 L. R. A. 204, 35 S. W. 123, and L. R. A. AC.—VOL. III.—12.

Owensboro & N. R. Co. v. Barclay, 102 Ky. 20, 43 S. W. 177, holding bill properly authenticated by presiding officers of legislature and signed by governor not subject to impeachment by reference to journals of legislature; Union Bank v. Oxford, 119 N. C. 214, 34 L. R. A. 489, 25 S. E. 966, holding presumption of constitutionality of legislative enactment impeachable by reference to journal of legislative bodies.

Unconstitutionality as defense.

Cited in note (47 L. R. A. 516) on unconstitutionality of statute as defense against mandamus to compel its enforcement.

18 L. R. A. 567, PARKER v. STATE, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119.

Judicial questions.

Cited in Denney v. State. 144 Ind. 509, 31 L. R. A. 729, 42 N. E. 929, holding constitutionality of apportionment legislation being judicial question, court has jurisdiction to determine controversy; Fesler v. Brayton, 145 Ind. 90, 32 L. R. A. 583, 44 N. E. 37 (dissenting opinion by Monks, J.), who holds constitutionality of apportionment act passed by state legislature judicial question; State *ex rel.* Morris v. Wrightson, 56 N. J. L. 188, 22 L. R. A. 550, footnote p. 548, 28 Atl. 56, holding constitutionality of act of legislature providing for election of members of assembly to be subject to judicial inquiry.

Cited in footnotes to Norwalk Street R. Co.'s Appeal, 39 L. R. A. 794, which holds approval and adoption or modification of plan for street railway not a judicial power; Covington v. Buffett, 47 L. R. A. 622, which denies court's jurisdiction to determine existence of vacancy in office of senator; Fletcher v. Tuttle, 25 L. R. A. 143, which denies right to enjoin giving of election notices, on ground that apportionment unconstitutional.

Judicial notice.

Cited in Legler v. Paine, 147 Ind. 193, 45 N. E. 604, holding court will take judicial notice of whether legislature has complied with constitutional provision requiring regulation of salaries of county officers by general law.

Apportionment acts.

Cited in Fesler v. Brayton, 145 Ind. 72, 32 L. R. A. 579, 44 N. E. 37, as holding apportionment act of 1885 unconstitutional.

— Discretion under.

Cited in footnote to People *ex rel.* Baird v. Broom, 20 L. R. A. 81, which requires discretion of supervisors in dividing county into assembly districts to be honest and fair.

De facto officer.

Cited in Bradford v. Frankfort, St. L. & T. R. Co. 142 Ind. 392, 40 N. E. 741, holding persons elected to office under unconstitutional act are *de facto* officers with colorable authority to act; Roberts v. Hill, 137 Ind. 218, 36 N. E. 843, holding failure to file election certificate as required by statute, rendering elected officer *de facto* officer, does not make his acts in office *ipso facto* void.

Cited in note (21 L. R. A. 142) on *de facto* offices and officers under unconstitutional statutes.

Collateral attack on title of de facto officer.

Cited in State *ex rel.* Bishop v. Crowe, 150 Ind. 462, 50 N. E. 471, holding title

of person to office of township trustee, being *de facto*, not open to question in collateral proceeding; *Segal v. Krag-Reynolds Co.* 21 Ind. App. 209, 51 N. E. 959, holding right of one occupying office of notary public, and validity of acts done in discharge of that office, cannot be questioned in collateral proceeding; *Grim v. Adkins*, 21 Ind. App. 108, 51 N. E. 494, holding office of justice of peace being public one, right of one exercising duties thereof cannot be questioned in action of replevin.

Determination of constitutionality of statute.

Cited in *Henderson v. State*, 137 Ind. 557, 24 L. R. A. 473, 36 N. E. 257; *Harmon v. Madison County*, 153 Ind. 76, 54 N. E. 105; *State ex rel. Winnie v. Stoddard*, 25 Nev. 460, 51 L. R. A. 232, 62 Pac. 237; *Vickery v. Hendricks County*, 134 Ind. 555, 32 N. E. 880,—holding court justified in refusing to pass upon constitutionality of statute when not necessary to pass upon merits of controversy; *People ex rel. Woodyatt v. Thompson*, 155 Ill. 465, 40 N. E. 307, holding court will refuse to declare legislative act unconstitutional, except in very clear case of violation; *State v. Atkinson*, 139 Ind. 429, 39 N. E. 51, holding court will not assume to decide constitutionality of liquor law when not essential to disposition of cause upon its merits; *Deniston v. Terry*, 141 Ind. 682, 41 N. E. 143, to statement that court will not, as rule, pass upon constitutionality of statute if cause may be decided upon its merit without such decision.

***Amicus curiæ* not real party in interest.**

Cited in *Boyd v. Brazil Block Coal Co.* 152 Ind. 544, 49 N. E. 797, holding *amicus curiæ* has not such real interest as to invoke jurisdiction of court.

Rehearing.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Hays*, 17 Ind. App. 277, 46 N. E. 597, holding court precluded from granting rehearing in cause after lapse of sixty days and certification of judgment; *State ex rel. Taylor v. Mount*, 151 Ind. 694, 51 N. E. 417, holding petition for rehearing will be denied when questions in litigation become settled, and parties litigant are no longer interested.

Power of court to correct its own record.

Cited in *Thompson v. Connecticut Mut. L. Ins. Co.* 139 Ind. 355, 38 N. E. 796, recognizing power of court to correct its own record to conform to truth of its findings.

18 L. R. A. 582, *CROSS v. WEST VIRGINIA C. & P. R. CO.* 37 W. Va. 342, 16 S. E. 587.

Amendment of corporate charter.

Cited in footnote to *Maynard ex rel. Dusenbury v. Looker*, 56 L. R. A. 947, which sustains power to change terms of office of directors by amending charter.

Nonresident stockholders.

Cited in note (24 L. R. A. 253) on right of nonresidents to become stockholders in corporations.

18 L. R. A. 586, *ELLIOT v. HALL*, 2 Idaho, 1142, 35 Am. St. Rep. 285, 31 Pac. 796.

Exemption of wages from garnishment.

Cited in footnotes to *Kirkman v. Bird*, 58 L. R. A. 670, which sustains, as to prior obligations, statute exempting wages for sixty days preceding levy; *Rustad*

v. Bishop, 50 L. R. A. 168, which denies right to hold back successive exempt wages by successive garnishments and reach same by new garnishment after exemption period expires.

18 L. R. A. 588, *NEER v. COWHICK*, 4 Wyo. 40, 31 Pac. 862.

18 L. R. A. 590, *EICHENLAUB v. ST. JOSEPH*, 113 Mo. 395, 21 S. W. 8.

Ratification of municipal contract.

Cited in *Kolkmeier v. Jefferson*, 75 Mo. App. 683, holding contract made to grade city's streets without legislative sanction can be ratified only by ordinance duly passed and signed by mayor; *Unionville v. Martin*, 95 Mo. App. 37, 68 S. W. 605, holding unauthorized contract of municipality is not ratified by simple resolution of board of aldermen without concurrence of mayor.

Necessity of ordinance.

Cited in *State ex rel. Carthage v. Cowgill & H. Mill. Co.*, 156 Mo. 632, 57 S. W. 1008, holding matters confided to council by city charter may be dealt with by resolution, not necessarily formal ordinance.

Bribery.

Cited in *State v. Butler*, 178 Mo. 340, 77 S. W. 560, holding offer of reward for vote for contract under ordinance, before its approval by mayor, not attempt to bribe.

Validity of legislation restricting business.

Cited in *St. Louis v. Fischer*, 167 Mo. 664, 64 L. R. A. 683, 99 Am. St. Rep. 614, 67 S. W. 872, holding city ordinance prohibiting establishment and maintenance of dairy within city limits, without permission from municipal authorities, not obnoxious to Federal Constitution.

Cited in note (21 L. R. A. 794) on constitutionality of statutes restricting contracts and business.

Issuance of unlawful building permits.

Cited in *Hibbard v. Chicago*, 173 Ill. 97, 40 L. R. A. 623, 50 N. E. 256, holding unlawful issuance of permit to erect awning over street, no estoppel against enforcement of general ordinance.

Abatement of public nuisance.

Cited in *Police Comrs. v. Wagner*, 93 Md. 196, 52 L. R. A. 778, 86 Am. St. Rep. 423, 48 Atl. 455, holding replevin will not lie to recover slot machine seized by police officers under statutory authority; *Lemmon v. Guthrie Center*, 113 Iowa. 39, 86 Am. St. Rep. 361, 84 N. W. 986, holding judicial proceedings not necessary to warrant public officials to remove buildings erected in violation of law.

Cited in note (38 L. R. A. 170) on municipal power over buildings and other structures as nuisances.

18 L. R. A. 594, *Re* ADVISORY OPINION, 31 Fla. 1, 12 So. 114.

19 L. R. A. 596, *THIBAUT v. KEARNEY*, 45 La. Ann. 149, 12 So. 139.

License or privilege tax.

Cited in *Hall v. State*, 39 Fla. 675, 23 So. 119, holding plantation owner main-

taining general store thereon, making sales of supplies to tenants and employees only, required to pay privilege tax.

18 L. R. A. 599, *YARNELL v. KANSAS CITY, FT. S. & M. R. CO.* 113 Mo. 570, 21 S. W. 1.

Variance.

Cited in *E. O. Stanard Mill. Co. v. White Line Central Transit Co.* 122 Mo. 278, 26 S. W. 704, holding evidence that warehouse was unsafe because close by refining establishment inadmissible under allegation merely charging failure to use due care while property was stored in warehouse; *Chitty v. St. Louis, I. M. & S. R. Co.* 148 Mo. 75, 49 S. W. 868, holding recovery not authorized under allegation charging injury by negligent collision, and proof of injury in jumping from car to avoid collision.

Modification of instructions.

Cited in *Feary v. Metropolitan Street R. Co.* 162 Mo. 96, 62 S. W. 452, holding modification of plaintiff's instruction by court, to conform to issue tendered, not reversible error.

Injuries in getting off or on trains.

Cited in *Louisville & N. R. Co. v. Hale*, 102 Ky. 603, 42 L. R. A. 297, 44 S. W. 213, holding carrier not guilty of negligence in starting train before passenger seated after entering train; *Saxton v. Missouri P. R. Co.* 98 Mo. App. 490, 72 S. W. 717, holding mere starting of train before one boarding it to assist departing passenger has had time to alight not negligence.

Cited in notes (21 L. R. A. 354) on injuries in getting on and off railroad trains; (42 L. R. A. 293) on starting car before passenger is seated.

Duty of carrier as to passenger getting on or off train.

Cited in *Hanks v. Chicago & A. R. Co.* 60 Mo. App. 281, holding blind, aged, and infirm or sick passenger entitled to more care and attention in getting on or off train than one without such disability; *Deming v. Chicago, R. I. & P. R. Co.* 80 Mo. App. 156, holding instruction that it is carrier's duty to discharge passenger safely at station platform or other reasonably safe place, erroneous because misleading; *Young v. Missouri P. R. Co.* 93 Mo. App. 273, holding passenger with weak ankle not entitled to assistance in alighting, carrier not having knowledge of infirmity.

Cited in footnote to *Croon v. Chicago, M. & St. P. R. Co.* 18 L. R. A. 602, which holds it negligent to fail to render necessary assistance to feeble person accepted as passenger.

Presumptions.

Cited in *State v. Lackland*, 136 Mo. 33, 37 S. W. 812, holding fact from which presumption arises must be proved; *Spencer v. Farmer's Mut. Ins. Co.* 79 Mo. App. 218, holding presumption of wilful destruction of insured premises cannot be inferred from burning thereof; *Schlereth v. Missouri P. R. Co.* 115 Mo. 110, 21 S. W. 1110 (dissenting opinion by Gantt, J.), who holds verdict ought not to be based upon mere presumption; *Howard v. Missouri P. R. Co.* 173 Mo. 531, 73 S. W. 467, holding mere breaking of handle bar of hand car not proof of negligence; *Hornstein v. United R. Co.* 97 Mo. App. 276, 70 S. W. 1105, holding negligence not to be inferred from mere happening of injury.

Cited in footnote to *Dixon v. Pluns*, 20 L. R. A. 699, which upholds presumption of negligence arising from fall of chisel on sidewalk from scaffold.

Burden of proof.

Cited in footnote to *Anthony v. Mercantile Mut. Acci. Asso.* 26 L. R. A. 406, which throws on insurance company burden of proving that accidental death was from excepted cause.

Risks of employment.

* Distinguished in *Jones v. Kansas City, Ft. S. & M. R. Co.* 178 Mo. 543, 101 Am. St. Rep. 434, 77 S. W. 890, holding risk of cars running loose and unattended on main tracks not assumed by engineer.

Contributory negligence.

Cited in *Bascom v. Wabash R. Co.* 102 Mo. App. 433, 76 S. W. 697, holding carrier not liable for injury to passenger alighting from moving train in broad daylight.

18 L. R. A. 602, *CROOM v. CHICAGO, M. & ST. P. R. CO.* 52 Minn. 296, 33 Am. St. Rep. 557, 53 N. W. 1128.

Duty of carrier to passengers requiring assistance.

Cited in *Newark & S. O. R. Co. v. McCann*, 58 N. J. L. 644, 33 L. R. A. 129, 34 Atl. 1052, holding it duty of carrier to exercise more than ordinary care toward passenger known to be ill; *Burke v. Chicago & N. W. R. Co.* 108 Ill. App. 576, holding carrier liable for negligence in leaving intoxicated passenger at destination in place of danger; *International & G. N. R. Co. v. Gilmer*, 18 Tex. Civ. App. 682, 45 S. W. 1028, holding carrier liable for negligence of conductor while carrying from train passenger unable to walk; *Owens v. Macon & B. R. Co.* (Ga.) 63 L. R. A. 948, 46 S. E. 87, holding carrier entitled to reasonable notice to provide proper means for transportation of insane person.

Cited in footnotes to *Weightman v. Louisville, N. O. & T. R. Co.* 19 L. R. A. 671, which holds carrier liable for carrying sick passenger past destination; *Yarnell v. Kansas City, Ft. S. & M. R. Co.* 18 L. R. A. 599, which holds it no part of employee's duty to assist passengers to enter.

— To accept passenger.

Cited in *Furgason v. Citizens' Street R. Co.* 16 Ind. App. 180, 44 N. E. 936, holding carrier not bound to accept as passenger one whose physical or mental condition renders him unable to take care of himself.

18 L. R. A. 604, *EPHRAIM v. KELLEHER*, 4 Wash. 243, 29 Pac. 985.

Chattel mortgage as affected by provision giving mortgagor possession with power of sale.

Cited in *Benham v. Ham*, 5 Wash. 135, 34 Am. St. Rep. 851, 31 Pac. 459, holding chattel mortgage upon stock of goods, allowing mortgagor to continue in possession to sell goods and apply proceeds to extinguishment of debt secured, valid; *Donohue v. Campbell*, 81 Minn. 109, 83 N. W. 469, holding mortgage on stock of goods not fraudulent in law because it contains no provision requiring mortgagor to pay proceeds from sales of goods left in his possession; *F. Meyer Boot & Shoe Co. v. C. Shenkberg Co.* 11 S. D. 628, 80 N. W. 126, and *Red River Valley Nat. Bank v. Barnes*, 8 N. D. 442, 79 N. W. 880, holding mortgage upon stock of general

merchandise not fraudulent in law because mortgagor retains possession of goods to sell, devoting proceeds thereof to payment of mortgage debt; *Adams v. Dempsey*, 29 Wash. 157, 60 Pac. 738, holding chattel mortgage not constructively fraudulent because mortgagor allowed small portion of proceeds thereof.

Cited in footnote to *Noyes v. Ross*, 47 L. R. A. 400, which sustains mortgage of goods with authority to sell on thirty days' credit and account for proceeds, less living expenses.

Distinguished in *Eckman v. Munnerlyn*, 32 Fla. 376, 37 Am. St. Rep. 109, 13 So. 922, holding chattel mortgage on stock of merchandise containing provision permitting mortgagor to retain possession of goods to sell, fraudulent as against existing creditors, notwithstanding proceeds therefrom are to be devoted to payment of mortgage debt; *Thompson v. Huron Lumber Co.* 4 Wash. 603, 30 Pac. 741, holding mortgage by insolvent corporation, providing for its retention of mortgaged property and indefinite renewal of notes secured, void as device to delay creditors.

Fraudulent execution as question of fact.

Cited in *Adams v. Dempsey*, 22 Wash. 286, 79 Am. St. Rep. 933, 60 Pac. 649, holding question of alleged fraudulent execution of chattel mortgage to secure particular creditor, one of fact.

Right of debtor to pay or secure particular creditors.

Cited in *Viotor v. Glover*, 17 Wash. 42, 40 L. R. A. 301, 48 Pac. 788, holding that debtor may legally pay, or secure, one or more creditors to exclusion of others, even to exhaustion of entire property; *Drake v. Paulhaumus*, 14 C. C. A. 165, 29 U. S. App. 522, 66 Fed. 898, holding conveyance of debtor's property to secure particular bona fide debt not void as preferential assignment; *Furth v. Snell*, 6 Wash. 546, 33 Pac. 830, holding that debtor may, in good faith, dispose of his entire estate to pay portion of debts, even to exclusion of others.

Extension of time of payment of chattel mortgage debt.

Cited in *Sanders v. Main*, 12 Wash. 667, 42 Pac. 122, holding that agreement extending time of payment of chattel mortgage debt does not invalidate mortgage as to unsecured creditors.

Efficacy of mortgage on chattels to be made or acquired.

Cited in note (18 L. R. A. 298) on efficacy of mortgage on chattels to be manufactured or acquired as independent articles, and not as increase or fruits of existing property.

18 L. R. A. 627, *LAWSON v. CONAWAY*, 37 W. Va. 159, 38 Am. St. Rep. 17, 16 S. E. 564.

Duty of physician to patient and degree of skill required.

Cited in *Dashiell v. Griffith*, 84 Md. 381, 35 Atl. 1094, holding that upon establishment of relation of physician and patient duty rests on physician to continue attendance upon patient so long as is reasonably necessary; *Whitesell v. Hill*, 101 Iowa. 637, 37 L. R. A. 839, 70 N. W. 750, holding it duty of physician or surgeon to possess and exercise that degree of care, skill, and knowledge ordinarily possessed and exercised by physicians and surgeons in similar localities; *Tompkins v. Pacific Mnt. L. Ins. Co.* 53 W. Va. 491, 62 L. R. A. 495, 97 Am. St. Rep. 1006, 44 S. E. 439, holding insurance company liable for negligence of its physician in replacing plaster cast after examining injury to policy holder.

Cited in note (37 L. R. A. 830) on degree of care and skill which physician or surgeon must exercise.

Physician's right to determine frequency of visits.

Cited in note (51 L. R. A. 298) on physician's right to determine frequency of visits to patient.

Recovery by physician as bar to action for malpractice.

Cited in *Gates v. Newman*, 18 Ind. App. 419, 46 N. E. 654 (dissenting opinion by Black, J.), who holds that judgment by default against patient in favor of physician for services does not estop patient from prosecuting cross action for malpractice; *Jordahl v. Berry*, 72 Minn. 121, 45 L. R. A. 545, 71 Am. St. Rep. 469, 75 N. W. 10, and *Sale v. Eichberg*, 105 Tenn. 343, 52 L. R. A. 897, 59 S. W. 1020, holding judgment by default in favor of physician for services rendered to patient not a bar to action by patient against physician for malpractice, unless defense was made to first action by patient.

Cited in note (45 L. R. A. 544) on recovery by physician as bar to action for malpractice.

18 L. R. A. 634, *McCLAIN v. DAVIS*, 37 W. Va. 330, 16 S. E. 629.

Entry of judgments.

Cited, but not passed upon, in *Griffin v. Haught*, 45 W. Va. 464, 31 S. E. 957, and *Richmond v. Henderson*, 48 W. Va. 396, 37 S. E. 653, holding that judgment of justice of peace cannot be entered more than one day after rendition of verdict: *Marstill v. Ward*, 52 W. Va. 84, 43 S. E. 178, holding entry of judgment by court enforceable by mandamus.

Cited in note (20 L. R. A. 147) on entry of judgment *nunc pro tunc*.

18 L. R. A. 639, *Ex parte PLESSY*, 45 La. Ann. 80, 11 So. 948.

Civil rights — Statutes authorizing separation of races.

Cited in *Anderson v. Louisville & N. R. Co.* 4 Inters. Com. Rep. 766, 62 Fed. 50, holding it to be within power of state to enact statute requiring carriers to furnish, and passengers of different races to occupy, separate compartments or cars: *State v. Pearson*, 110 La. 390, 34 So. 575, upholding constitutionality of act requiring street car companies to furnish separate accommodations for white and colored passengers.

Cited in footnote to *Smith v. State*, 41 L. R. A. 432, which upholds state statute providing for equal, but separate, accommodations for negroes on railroads.

— Rules of carrier requiring separation.

Cited in footnotes to *Chilton v. St. Louis & I. M. R. Co.* 19 L. R. A. 269, which authorizes carrier to exclude colored woman from particular car, when she is given opportunity to ride in car set apart for her own race, and which is equal in accommodations to other; *Bowie v. Birmingham R. & Electric Co.* 50 L. R. A. 632, which sustains rule of street railway company requiring colored and white passengers to occupy different ends of car; *Smith v. Chamberlain*, 19 L. R. A. 710, which authorizes carrier to provide separate waiting rooms for white and colored passengers.

— Right of colored man to compel sale of soda water to him.

Cited in footnote to *Cecil v. Green*, 32 L. R. A. 566, which holds drug store

where soda water, etc., is sold, not place of accommodation and amusement within civil rights act, requiring keeper to sell soda water to colored man.

18 L. R. A. 644, *FRARY v. AMERICAN RUBBER CO.* 52 Minn. 264, 53 N. W. 1156.

Employer's right to discharge servant.

Cited in *Blaine v. Publishers George Knapp & Co.* 140 Mo. 250, 41 S. W. 787, and *Williams v. Kansas City Suburban Belt R. Co.* 85 Mo. App. 110, holding contract for personal service to "satisfaction of employer" gives him absolute right to discharge servant in case of dissatisfaction.

18 L. R. A. 646, *STATE ex rel. RHODES v. SAUNDERS*, 66 N. H. 39, 25 Atl. 588.

Adoption of English common law in United States.

Cited in *Smith v. Furbish*, 68 N. H. 149, 47 L. R. A. 240, 44 Atl. 398, holding that feudal usages of early English common law relative to construction of deeds creating estates tail have no place in our jurisprudence; *Edgerly v. Barker*, 66 N. H. 457, 28 L. R. A. 334, 31 Atl. 900, holding act of Parliament allowing creation of estates tail not part of common law of this country; *Ricker's Petition*, 66 N. H. 226, 24 L. R. A. 748, 29 Atl. 559, holding principles and practice of common law, being unsuited to local conditions, inapplicable to admission of attorneys in New Hampshire.

Right of jury trial.

Cited in *State ex rel. Blanpied v. Currier*, 66 N. H. 622, 19 Atl. 1000, holding question whether building was used as place in which to sell liquors triable by jury; *State v. Griffin*, 66 N. H. 327, 29 Atl. 414, holding constitutional right to jury trial not infringed by law requiring one appealing from sentence of justice of the peace to pay fees of appeal, recognizance, and copies; *State v. Gerry*, 68 N. H. 496, 38 L. R. A. 229, 38 Atl. 272, holding right to jury trial violated by attempt to give police courts concurrent jurisdiction with supreme court in criminal cases where fine does not exceed \$200 nor term of imprisonment one year.

Cited in footnote to *Hall v. Armstrong*, 20 L. R. A. 366, which denies right to jury trial in actions of book account.

— In equity proceedings.

Cited in *Davis v. Auld*, 96 Me. 568, 53 Atl. 118, raising, without deciding, question as to right to jury trial in equity proceeding; *State ex rel. Borthwick v. Harrington*, 69 N. H. 497, 45 Atl. 404, holding verdict upon questions of fact submitted to jury by equity court advisory only.

Jurisdiction of equity to abate nuisance or enjoin abuse of corporate privileges.

Cited in *State v. Strickford*, 70 N. H. 297, 47 Atl. 262, holding that injunction will not issue against liquor nuisance after its abatement; *State ex rel. Hubbard v. Piper*, 70 N. H. 282, 47 Atl. 703, holding that equity cannot enjoin sale of liquors as nuisance on premises other than those described in petition; *State v. O'Leary*, 155 Ind. 532, 52 L. R. A. 303, footnote p. 299, 58 N. E. 703, denying right of state to injunction for suppression of gambling house; *Columbian Athletic Club v. State*, 143 Ind. 108, 28 L. R. A. 731, 52 Am. St. Rep. 407, 40 N. E. 914, holding that equity will enjoin abuse of corporate privileges in conducting prize fights; *State v. Sunapee Dam Co.* 72 N. H. 120, 55 Atl. 899, upholding jurisdiction

of equity to enjoin unreasonable use of right of flowage, on ground of nuisance: Connecticut River Lumber Co. v. Olcott Falls Co. 65 N. H. 290, 13 L. R. A. 830, 21 Atl. 1090, holding bill in equity maintainable by riparian owner to cause removal of dam as nuisance, which interferes with right of floatage.

Cited in note (41 L. R. A. 322, 328, 329) on injunctions by municipalities against nuisances affecting public morals, peace, and good order, and health and safety.

Abatement of nuisance a civil proceeding.

Cited in Rancour's Petition, 66 N. H. 175, 20 Atl. 930, and State *ex rel.* Thorndike v. Collins, 68 N. H. 302, 44 Atl. 495, holding petition for writ of injunction to abate liquor nuisance a civil proceeding.

Amendment of petition for abatement of nuisance.

Cited in State *ex rel.* Thorndike v. Collins, 68 N. H. 46, 36 Atl. 550, holding petition for abatement of liquor nuisance amendable by substitution of names of legal voters as required by statute; State *ex rel.* Hyde v. Lynch, 72 N. H. 185, 55 Atl. 553, upholding jurisdiction of court to substitute county solicitor for superintendent of police, in petition for abatement of liquor nuisance.

18 L. R. A. 657, STATE v. PHIPPS, 50 Kan. 609, 4 Inters. Com. Rep. 297, 34 Am. St. Rep. 152, 31 Pac. 1097.

Who engaged in interstate commerce.

Cited in footnotes to French v. State, 52 L. R. A. 160, which holds agent of non-resident company selling organ taken with him, or taking orders for others to be delivered by him, engaged in interstate commerce; State v. Willingham, 52 L. R. A. 198, which holds as interstate commerce, delivery of portraits and frames by agent previously taking orders for nonresident manufacturer; Croy v. Epperson, 51 L. R. A. 254, which holds one taking orders in own name for articles manufactured in other state, and delivering separate articles to customers, not engaged in interstate commerce; Racine Iron Co. v. McCommons, 51 L. R. A. 134, which holds traveling agent taking orders and distributing contents of original package among customers not engaged in interstate commerce; Smith v. Jackson, 47 L. R. A. 416, which holds agent collecting garments and sending them to laundry outside of state and redelivering to owners not engaged in commerce.

Combinations or contracts in restraint of trade.

Cited in footnotes to Cummings v. Union Blue Stone Co. 52 L. R. A. 262, which holds void, agreement by persons controlling 90 per cent of sale of blue stone, to sell through common agent and maintain agreed prices; John D. Park & Sons Co. v. National Wholesale Druggists' Asso. 62 L. R. A. 632, which upholds validity of agreement between manufacturers of medicines and wholesalers, designed to maintain fixed selling prices; Com. v. Grinstead, 56 L. R. A. 709, which holds agreement not to resell goods at less than specified price not within statute for suppression of conspiracies; Fuqua v. Pabst Brewing Co. 35 L. R. A. 241, which holds contract not to sell any beer except that of one company, which in turn agrees not to sell to any other party in that vicinity, void as in restraint of trade; United States v. E. C. Knight Co. 24 L. R. A. 428, which holds monopoly not involved in control of business of refining and selling sugar; State *ex rel.* Crow v. Armour Packing Co. 61 L. R. A. 464, which holds unlawful combination to fix prices shown by acts of competing dealers, such as selling at fixed rate from which rebates are

given and giving notice of change in prices which always follows; *People v. Sheldon*, 23 L. R. A. 221, which holds combination to prevent competition in prices of coal, unlawful conspiracy; *Hawarden v. Youghiogheny & L. Coal Co.* 55 L. R. A. 828, which sustains retail coal dealer's right to enjoin wholesalers and favored retailers combining to drive other retailers out of business; *Brown v. Jacobs Pharmacy Co.* 57 L. R. A. 548, which sustains right to injunction against combination of merchants to prevent sales to other dealer unless he sells at fixed prices.

Cited in note (64 L. R. A. 705, 722, 723, 726) on illegal trusts under modern anti-trust laws.

— **Contracts to regulate insurance rates.**

Cited in *Queen Ins. Co. v. State*, 86 Tex. 265, 22 L. R. A. 491, footnote p. 483, 24 S. W. 397, holding combination of insurance companies to establish uniform rates of insurance and fix agents' commissions, legal; *Ætna Ins. Co. v. Com.* 106 Ky. 879, 45 L. R. A. 359, 51 S. W. 624, holding contracts regulating insurance rates not within statute prohibiting combinations to regulate, control, and fix price of "any merchandise, manufactured article, or property of any kind."

Cited in footnote to *State v. Lancashire F. Ins. Co.* 45 L. R. A. 348, which holds combination between foreign insurance companies to fix rates of insurance in foreign countries not subject to penalty.

Restrictions on department stores.

Cited in note (48 L. R. A. 261) on legal restrictions on department stores.

Corporate taxation.

Cited in note (60 L. R. A. 646) on corporate taxation and the commerce clause.

Legislative control over foreign corporations.

Cited in *State v. Stone*, 118 Mo. 402, 25 L. R. A. 247, 40 Am. St. Rep. 388, 24 S. W. 164, holding it within constitutional power of state to prescribe conditions upon which foreign insurance companies may transact business within state, and to provide penalties for violation thereof; *Maine Guarantee Co. v. Cox*, 146 Ind. 109, 42 N. E. 915, holding it within legislative province to prescribe conditions upon which foreign corporation may do business within state.

Cited in notes (24 L. R. A. 298) on restrictions on business of foreign insurance companies; (24 L. R. A. 312) on exclusion of foreign corporations as interference with interstate commerce.

18 L. R. A. 663, *JACKSON v. NATIONAL BANK*, 92 Tenn. 154, 36 Am. St. Rep. 81, 20 S. W. 802.

Authority of agent to take, indorse, and collect checks or notes.

Cited in *William Deering & Co. v. Kelso*, 74 Minn. 43, 73 Am. St. Rep. 324, 76 N. W. 792, holding that mere collecting agent has no implied authority to indorse checks in name of principal; *Carolina Nat. Bank v. State*, 60 S. C. 473, 85 Am. St. Rep. 865, 38 S. E. 629, holding that agent cannot bind principal by indorsement of commercial paper, except under express authority; *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 158, 59 L. R. A. 661, 93 Am. St. Rep. 113, 65 N. E. 136, and *T. M. Sinclair & Co. v. Goodell*, 93 Ill. App. 594, holding authority to receive payment in checks in lieu of cash not impliedly authorize agent to indorse and collect checks; *National Bank v. Old Town Bank*, 50 C. C. A. 445, 112 Fed.

727, upholding authority of attorney of legatees to collect checks payable to his clients upon settlement of estate.

Cited in footnote to *Baldwin v. Tucker*, 57 L. R. A. 451, which holds purchaser from agent bound to know latter's lack of authority to take purchase money note payable to himself.

Cited in note (27 L. R. A. 401) on power of agents to indorse negotiable paper.

Payment of check on unauthorized indorsement.

Cited in *Commercial Nat. Bank v. Lincoln Fuel Co.* 67 Ill. App. 168, holding that drawee pays check indorsed without authority, at his peril; *Western U. Teleg. Co. v. Bi-Metallic Bank*, 17 Colo. App. 233, 68 Pac. 115, holding drawee bank liable for payment of check delivered by mistake of maker's agent to one of same name as payee.

18 L. R. A. 668, *PRIOR v. SWARTZ*, 62 Conn. 132, 36 Am. St. Rep. 333, 25 Atl. 398.

Rights of riparian or upland owners in navigable waters.

Cited in *Chamberlain v. Hemingway*, 63 Conn. 8, 22 L. R. A. 48, 38 Am. St. Rep. 330, 27 Atl. 239, holding that owner of uplands bordering on navigable waters has right incident to such ownership to fill in and reclaim submerged lands lying between high and low water marks, so long as navigation of water is not interfered with; *Lane v. New Haven Harbor*, 70 Conn. 694, 40 Atl. 1058, holding right of owner of land bordering upon tide water, to erect and maintain wharf out to navigable channel, subservient to paramount right of public navigation.

Cited in note (40 L. R. A. 604) on right of owner of upland to access to navigable water.

Distinguished in *People v. Mould*, 24 Misc. 292, 52 N. Y. Supp. 1032, holding that owner of land bordering on tide water has no right, as against state, to construct and maintain wharf extending from high-water mark to navigable channel; *Shively v. Bowlby*, 152 U. S. 20, 38 L. ed. 339, 14 Sup. Ct. Rep. 548, holding that grants by Congress of land in territory bordering on navigable waters, convey no title below high-water mark, and do not affect the title of the future state thereto.

18 L. R. A. 670, *LAMPREY v. STATE*, 52 Minn. 181, 38 Am. St. Rep. 541, 53 N. W. 1130.

Property rights in unmeandered waters.

Cited in *Lamprey v. Danz*, 86 Minn. 321, 90 N. W. 578, holding that unmeandered lakes are absolute property of owner of beds, free from all right of state or public therein.

Distinguished in *Albert Lea v. Nielsen*, 80 Minn. 105, 81 Am. St. Rep. 242, 82 N. W. 1104, holding owners of land bordering on unmeandered lake, claiming title by patent issued by government, not estopped to claim damages for overflowing lands by raising of water by maintenance of dam.

Law of state to govern construction of riparian grants.

Cited in *Sapp v. Frazier*, 51 La. Ann. 1725, 72 Am. St. Rep. 493, 26 So. 378, holding that questions concerning riparian rights growing out of land granted from United States, without reservation or restriction, are to be settled by law of state in which land lies.

Rights of upland or riparian owners in lakes and streams.

Cited in *Lamprey v. Mead*, 54 Minn. 298, 40 Am. St. Rep. 328, 55 N. W. 1132,

holding that voidable patent of land bounded by meandered lake can only be avoided by United States in proceeding to which patentee is party; *State v. Lake St. Clair Fishing & Shooting Club*, 127 Mich. 598, 87 N. W. 117, holding rights of riparian owners of land bordering on Great Lakes not cut off by grant by state of submerged lands for private use; *Kirwan v. Murphy*, 28 C. C. A. 351, 49 U. S. App. 658, 83 Fed. 278, holding same rules applicable to construction of rights of riparian owners on lakes as upon streams.

Cited in note (40 L. R. A. 596) on right of owner of upland to access to navigable water.

— **Non-navigable.**

Cited in *Fuller v. Shedd*, 161 Ill. 488, 33 L. R. A. 159, 52 Am. St. Rep. 380, 44 N. E. 286; *Shell v. Matteson*, 81 Minn. 41, 83 N. W. 491; *Security Land & Exploration Co. v. Burns*, 87 Minn. 103, 63 L. R. A. 160, 94 Am. St. Rep. 684, 91 N. W. 304,—holding that riparian owner on non-navigable lake takes title to center thereof; *Olson v. Huntamer*, 6 S. D. 373, 61 N. W. 479, holding that patent in fee simple of land bordering on lake or river carries with it, as appurtenant thereto, title to center of lake or stream; *Sizor v. Logansport*, 151 Ind. 628, 44 L. R. A. 815, 50 N. E. 377, holding that owners of lands bordering on streams not navigable take title to center of stream unless restricted by terms of grant.

Cited in footnotes to *Noyes v. Collins*, 26 L. R. A. 609, which holds non-navigable lake not to belong to riparian owners.

— **Navigable.**

Cited in *Steinbuchel v. Lane*, 59 Kan. 12, 51 Pac. 886, holding patentee of lands bordering on meandered navigable stream not entitled to island separated from main shore by well-defined, navigable channel; *Rood v. Wallace*, 109 Iowa, 8, 79 N. W. 449, holding title in beds of all navigable lakes to be in state in trust for public; *Mendota Club v. Anderson*, 101 Wis. 492, 78 N. W. 185, holding patent issued to convey title to submerged lands of navigable lake or stream void, where title to uplands is in another, by virtue of patent containing no reservation or limitation; *Sanborn v. People's Ice Co.* 82 Minn. 54, 51 L. R. A. 833, 83 Am. St. Rep. 401, 84 N. W. 641, holding riparian owners upon navigable lakes or rivers have no title to lands submerged, nor right superior to common right of all to take ice from waters of lake or river; *Witty v. Nicollet County*, 76 Minn. 288, 79 N. W. 112, holding meandered lakes capable of public use belong to state in its sovereign capacity in trust for public.

Cited in footnote to *Concord Mfg. Co. v. Robertson*, 18 L. R. A. 679, as to abutter's rights in public water and land under same.

Rights of riparian owners to accretions or relictions.

Cited in *Murphy v. Kirwan*, 103 Fed. 110; *Crandall v. Allen*, 118 Mo. 411, 22 L. R. A. 593, 24 S. W. 172; *French Live Stock Co. v. Springer*, 35 Or. 320, 58 Pac. 102,—holding owner of uplands bordering on lake or stream entitled to accretions or relictions formed in front of his land by action of water; *De Lassus v. Faherty*, 164 Mo. 361, 58 L. R. A. 203, 64 S. W. 183, holding that owner of lands bordering on stream does not lose title to accretions separated from main land by change in stream's course, causing separation; *Knudsen v. Omanson*, 10 Utah, 128, 37 Pac. 250, holding patentee of lands bordering on meandered lake entitled to lands formed by reliction of waters; *Hinckley v. Peay*, 22 Utah, 26, 30 Pac. 1012, holding that conveyance of land bordering on meandered lake car-

ries with it right to accretions and relictions between such line and low-water mark.

Cited in note (58 L. R. A. 207) on law of accretion to shore lands.

What waters are navigable.

Cited in note (42 L. R. A. 317, 320, 322) on what waters are navigable.

18 L. R. A. 679, *CONCORD MFG. CO. v. ROBERTSON*, 66 N. H. 1, 25 Atl. 718.

Legislative grant of riparian privileges to private corporation.

Cited in *Winnepiseogee Lake Cotton & Woolen Mfg. Co. v. Gifford*, 67 N. H. 517, 35 Atl. 945, holding right of corporation to use of shore-lands granted in charter practically same as if they owned upland in fee, with appurtenant water right; *State v. Sunapee Dam Co.* 70 N. H. 460, 59 L. R. A. 61, 50 Atl. 108, holding it to be competent for legislature to authorize private corporation to lower level of public lake for manufacturing purposes, although public rights of navigation thereby impaired.

Riparian rights.

Cited in footnotes to *Lamprey v. State*, 18 L. R. A. 670, which holds grant of public lands bordering on non-navigable lakes extends only to water line; *Webb v. Demopolis*, 21 L. R. A. 62, which holds riparian owner's title extends to low-water mark on navigable river.

— As to wharf privileges.

Cited in *Winnepesaukee Camp-Meeting Asso. v. Gordon*, 67 N. H. 99, 29 Atl. 412, holding that abutting landowner has right to erect wharf into lake, subject to restrictions imposed by state; *Shively v. Bowlby*, 152 U. S. 20, 38 L. ed. 339, 14 Sup. Ct. Rep. 548, holding that no title below high-water mark passes by grant by Congress of public land in territory bordering on navigable water; *Cobb v. Lincoln Park*, 202 Ill. 434, 63 L. R. A. 269, 95 Am. St. Rep. 258, 67 N. E. 5, denying right of owner of land bordering on lake to wharf out on submerged land not owned by him.

Jurisdiction of equity to determine rights of littoral proprietors.

Cited in *Percy Summer Club v. Welch*, 66 N. H. 180, 28 Atl. 22, holding injunction will not issue at instance of littoral proprietors to restrain individual from fishing in public pond; *State v. Sunapee Dam Co.* 72 N. H. 116, 55 Atl. 899, upholding jurisdiction of equity to assess damages in action to restrain wrongful use of waters of lake; *Smith v. Furbish*, 68 N. H. 135, 47 L. R. A. 233, 44 Atl. 398, holding abutters right to use of shore-lands for wharf purposes determinable by bill in equity.

Severance of riparian rights from upland.

Cited in note (40 L. R. A. 394) on separation of riparian rights from upland.

Prescriptive rights in public waters.

Cited in *State v. Welch*, 66 N. H. 179, 28 Atl. 21, holding title to bed of ponds in New Hampshire being in state in trust for public, it cannot be acquired by prescription or grant by littoral proprietors.

Right to take or sell ice from navigable or non-navigable waters.

Cited in *Rossmiller v. State*, 114 Wis. 185, 58 L. R. A. 98, footnote p. 93, 91 Am. St. Rep. 910, 89 N. W. 839, sustaining right to take ice from public waters

within state, and holding statute exacting compensation for enjoyment of such waters void.

Cited in footnotes to *Marsh v. McNider*, 20 L. R. A. 334, which authorizes sale by tenant of right to cut ice on running stream; *Sanborn v. People's Ice Co.* 51 L. R. A. 829, which holds taking of ice in large quantities from public lake not exercise of common right in its waters; *Eidemiller Ice Co. v. Guthrie*, 28 L. R. A. 581, which holds right to take ice from pond in non-navigable stream in owner of land, as against owner of pond with right of flowage; *Becker v. Hall*, 56 L. R. A. 573, which holds marking, staking, or cleaning ice not thick enough for harvesting, insufficient appropriation.

What constitutes public pond, and its reasonable use.

Cited in *Dolbeer v. Suncook Waterworks Co.* 72 N. H. 563, 58 Atl. 504, holding natural pond, containing from 15 to 18 acres, public pond.

Cited in footnote to *Auburn v. Union Water-Power Co.* 38 L. R. A. 188, which holds taking of 1/15 of water supply of great pond for city not unreasonable as to owners of mill privileges.

Declarative judgments.

Cited in *Atty. Gen. v. Taggart*, 66 N. H. 373, 25 L. R. A. 618, 29 Atl. 1027, holding that, in construction of boundaries of water ways, declarative judgment may afford complete remedy for settling controversies.

Adoption of English common law in America.

Cited in *State ex rel. Rhodes v. Saunders*, 66 N. H. 73, 18 L. R. A. 650, 25 Atl. 588; *Re Ricker*, 66 N. H. 226, 24 L. R. A. 748, 29 Atl. 559; *Edgerly v. Barker*, 66 N. H. 457, 28 L. R. A. 334, 31 Atl. 900. — holding that only so much of English common law as was conformable to American conditions and republican institutions was adopted by colonists.

18 L. R. A. 695, *GOUVERNEUR v. NATIONAL ICE CO.* 134 N. Y. 355, 30 Am. St. Rep. 669, 47 N. Y. S. R. 601, 31 N. E. 865.

Title to lands under and bordering on waters.

Cited in *Deuterman v. Gainsborg*, 9 App. Div. 153, 41 N. Y. Supp. 185; *Hazleton v. Webster*, 20 App. Div. 183, 46 N. Y. Supp. 922; *Robinson v. Davis*, 47 App. Div. 406, 62 N. Y. Supp. 444. — holding title to land under water of non-navigable lake ordinarily presumed to be in owner of uplands bordering thereon; *Lamprey v. State*, 52 Minn. 194, 18 L. R. A. 676, footnote p. 670, 38 Am. St. Rep. 541, 53 N. W. 1139, holding that grant of public lands bordering on non-navigable lakes extends to center; *Olson v. Huntamer*, 6 S. D. 373, 61 N. W. 479, holding that under common law, grantee of real property contiguous to non-navigable lake takes to center, ratably with other riparian owners; *Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co.* 102 Mich. 236, 25 L. R. A. 818, footnote p. 815, 47 Am. St. Rep. 516, 60 N. W. 681, which holds relative rights of shore owners on small navigable lake dependent on frontage and form of lake; *Re Brookfield*, 78 App. Div. 523, 79 N. Y. Supp. 1022, holding that title to land under non-navigable water presumptively belongs to owner of adjacent lands; *Wilcox v. Bread*, 92 Hun, 11, 37 N. Y. Supp. 867, holding that conveyance of land bordering on non-navigable lake, which describes it as running "to the lake and thence along the same," carries title to center of lake; *Smith v. Furbish*, 68 N. H. 126, 47 L. R. A. 228, 44 Atl. 398, holding that bed

of river between middle of stream and abutting land belongs to owner of latter under exception in deed of piece fronting on river, "12 rods in length on bank of river and extending back far enough to inclose 1 acre;" *Carr v. Moore*, 119 Iowa, 156, 97 Am. St. Rep. 292, 93 N. W. 52, holding that title of abutting owners on meandered waters extends only to high-water mark; *East Fishkill v. Wappinger*, 41 Misc. 428, 84 N. Y. Supp. 1067, raising, but not deciding, question whether words "thence up and along west bank of creek" established town boundary line along the bank.

Cited in footnotes to *Noyes v. Collins*, 26 L. R. A. 609, which holds land under non-navigable lake not to belong to riparian owners, under deed describing land as running to a lake, then by the meandering line of said lake; *Webster v. Harris*, 59 L. R. A. 324, which holds that grant of land bounded by water's edge at low-water mark on lake will not extend title to center; *Concord Mfg. Co. v. Robertson*, 18 L. R. A. 679, as to abutter's rights in public water and land under same; *People v. Silberwood*, 32 L. R. A. 694, which holds fee of land under waters of Lake Erie in state; *Axline v. Shaw*, 28 L. R. A. 391, which holds land below high-water mark in lake does not necessarily pass to grantee of upland; *Fuller v. Shedd*, 33 L. R. A. 146, which holds grant of meandered lake goes only to water's edge.

Cited in note (42 L. R. A. 175) on title to land under water.

Separation of riparian rights from upland.

Cited in note (40 L. R. A. 394) on separation of riparian rights from upland.

Right of access to public waters.

Cited in footnote to *New England Trout & Salmon Club v. Mather*, 33 L. R. A. 569, which denies right of action for mere crossing of uncultivated land to reach public waters for purpose of fishing.

Adoption of common law.

Cited in note (22 L. R. A. 506) on adoption of common law in United States.

18 L. R. A. 702, *CHARTIERS BLOCK COAL CO. v. MELLON*, 152 Pa. 286, 34 Am. St. Rep. 645, 25 Atl. 597.

Right of access to minerals, oils, gas, etc., in subsolls.

Followed, without discussion, in *Mansfield Coal & Coke Co. v. Mellon*, 152 Pa. 303, 25 Atl. 601.

Cited in *Mansfield Coal & Coke Co. v. Royal Gas Co.* 27 Pittsb. L. J. N. S. 73, holding that right to drill for oil or gas exists in owner of surface of soil, notwithstanding substrata of coal belonging to another has to be drilled through.

Ownership and conveyance of minerals.

Cited in *Kirk v. Mattier*, 140 Mo. 31, 41 S. W. 252, holding that owner of fee may grant estate to another in minerals or other products of subsoil; *Williamson v. Jones*, 39 W. Va. 257, 25 L. R. A. 233, 19 S. E. 436, holding petroleum in place among strata of the earth, part of realty; *Murray v. Allred*, 100 Tenn. 119, 39 L. R. A. 253, 66 Am. St. Rep. 740, 43 S. W. 355, holding, in case of ownership of mineral lands, surface may be possessed by one and substrata containing minerals by another; *Williams v. South Penn Oil Co.* 52 W. Va. 187, 60 L. R. A. 798, 43 S. E. 214, holding that owner of land may convey coal underlying surface to one, and surface to another; *Snoddy v. Bolen*, 122 Mo. 487, 24 L. R. A. 511, 24 S. W. 142, holding that minerals reserved upon dedication

for street purposes of soil covering them will pass by owner's conveyance, if no mention of them is made.

Cited in note (25 L. R. A. 225) on nature of property in mineral, oil, or gas.

When injunction will be denied.

Cited in *Keeling v. Pittsburg, V. & C. R. Co.* 205 Pa. 34, 54 Atl. 485, denying injunction to stay elevation of tracks after expenditure of large sums of money by railroad.

18 L. R. A. 709, *Re SWIFT*, 137 N. Y. 77, 50 N. Y. S. R. 91, 32 N. E. 1096.

Validity of inheritance or transfer tax.

Cited in *Re Stanford*, 126 Cal. 116, 45 L. R. A. 789, 58 Pac. 462, sustaining constitutional power of state to enact statute providing for imposition and collection of succession tax; *Callahan v. Woodbridge*, 171 Mass. 597, 51 N. E. 176; *Minot v. Winthrop*, 162 Mass. 119, 26 L. R. A. 262, 38 N. E. 512; *Dixon v. Ricketts*, 26 Utah, 218, 72 Pac. 947; *State v. Alston*, 94 Tenn. 680, 28 L. R. A. 180, 30 S. W. 750,—holding tax on succession or inheritance of property, constitutional; *Ferry v. Campbell*, 110 Iowa, 295, 50 L. R. A. 95, 81 N. W. 604, holding inheritance tax act, which contains no provision for notice to, and hearing of, parties interested in distribution of estate, unconstitutional; *Re Hoyt*, 37 Misc. 722, 76 N. Y. Supp. 504, upholding right of state to exact tax for privilege of bequeathing property; *Plummer v. Coler*, 178 U. S. 131, 44 L. ed. 1006, 20 Sup. Ct. Rep. 829, holding imposition of inheritance tax upon estate consisting chiefly of United States securities, not unconstitutional.

Distinguished in *Black v. State*, 113 Wis. 212, 90 Am. St. Rep. 853, 89 N. W. 522, holding statute authorizing inheritance tax where estate is \$10,000 in value, but not where it is less, beneficiaries being of the same class, void.

What subject to inheritance tax.

Cited in *Frothingham v. Shaw*, 175 Mass. 62, 78 Am. St. Rep. 475, 55 N. E. 623, holding stock and bonds of foreign corporations, mortgage bonds on property outside of state, deposits in foreign banks all of which had been with agents outside of state but which executor in Massachusetts now has in possession, taxable as "property within state;" *Carver's Estate*, 4 Misc. 593, 25 N. Y. Supp. 991, and *Re Sherman*, 153 N. Y. 6, 46 N. E. 1032, holding United States government bonds which pass under will, or intestate laws, subject to transfer tax; *Re Dows*, 167 N. Y. 230, 52 L. R. A. 435, 88 Am. St. Rep. 509, 60 N. E. 439, holding tax on transfers not tax on property so as not to be applicable to funds invested in incorporated companies, liable to taxation on their own stock, or in exempt securities; *Re Harbeck*, 161 N. Y. 218, 55 N. E. 850, Reversing 43 App. Div. 191, 59 N. Y. Supp. 362, holding legacies, right to which became vested long prior to enactment of transfer tax, not taxable; *Re Delano*, 82 App. Div. 151, 81 N. Y. Supp. 762, holding property passing under deed of trust to life beneficiary and then to certain remaindermen, with power in beneficiary to dispose of property among them, not taxable as against one to whom life beneficiary devises, as latter takes under deed and not under will.

— Future estates.

Cited in *Re Curtis*, 142 N. Y. 223, 36 N. E. 887, holding contingent beneficial interest not subject to inheritance tax until contingency is removed and interest liable to become vested; *Re Seaman*, 147 N. Y. 75, 41 N. E. 401, Revers-

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ing 85 Hun. 247, holding inheritance tax being upon right of succession, it is applicable to succession to remainder even though possession thereof does not pass until death of life tenant; *Re Pell*, 171 N. Y. 53, 57 L. R. A. 542, footnote p. 540, 89 Am. St. Rep. 791, 63 N. E. 789, holding vested remainder not subject to transfer tax although remainderman did not come into possession till after passage of act, since such tax would diminish value of vested estate and impair obligation of contract.

Cited in footnote to *People v. McCormick*, 64 L. R. A. 775, which holds that succession tax cannot be imposed on remainder falling to uncertain beneficiaries.

— **Residuary estate.**

Cited in *Re Wolfe*, 89 App. Div. 351, 85 N. Y. Supp. 949, holding renounced legacy falling into residuary estate taxable as if originally bequeathed to residuary legatee.

Distinguished in *Jones's Estate*, 27 Pa. Co. Ct. 140, holding residuary estate not subject to collateral tax under will of "all rest and residue of estate after payment of bequests, taxes, costs, and expenses of whatever kind."

— **Charitable and religious bequests.**

Cited in *Re Kimberly*, 27 App. Div. 474, 50 N. Y. Supp. 586, holding legacy given to charitable hospital exempt from transfer tax.

Cited in footnote to *Re Prime*, 18 L. R. A. 713, which holds legacy to foreign religious corporation subject to succession tax.

— **Bequests to government or municipality.**

Cited in *Cullom's Estate*, 5 Misc. 174, 25 N. Y. Supp. 699; *United States v. Perkins*, 163 U. S. 629, 41 L. ed. 288, 16 Sup. Ct. Rep. 1073; *Re Merriam*, 141 N. Y. 484, 36 N. E. 505, Affirming 73 Hun. 590, 26 N. Y. Supp. 191,— holding gift of personal property to United States subject to inheritance tax; *Re Hamilton*, 148 N. Y. 313, 42 N. E. 717, holding bequests to municipal corporations for purpose of providing ornamental fountain for street, not exempt from collateral inheritance tax.

— **Property outside of state.**

Cited in *Re Dingman*, 66 App. Div. 230, 72 N. Y. Supp. 694, holding property owned by one who resided and died in New York, but located in another state, subject to transfer tax; *Re Corning*, 3 Misc. 163, 23 N. Y. Supp. 285, holding testator's whole estate subject to inheritance tax, although three fourths of it consisted of notes, bonds, and mortgages upon lands in another state and which testator's agents in such state had in their hands at time of his death.

Distinguished in *Re Handley*, 181 Pa. 345, 40 W. N. C. 306, 37 Atl. 587, holding proceeds from sale of real property situated in state foreign to domicile of decedent subject to inheritance tax.

— **Property of nonresident.**

Cited in *Re Bronson*, 150 N. Y. 6, 34 L. R. A. 241, 55 Am. St. Rep. 632, 44 N. E. 707, Modifying 1 App. Div. 548, 37 N. Y. Supp. 476, holding that bonds of domestic corporation which nonresident owner holds not "property within the state" subject to transfer tax; *Re Houdayer*, 3 App. Div. 478, 38 N. Y. Supp. 323, holding individual deposit of nonresident in his name as trustee in loan and trust company, not taxable; *Re Embury*, 19 App. Div. 214, 79 N. Y. S. R. 884, 45 N. Y. Supp. 881, denying power of surrogate's court to impose collateral inheritance tax upon bank stock and deposits in banks in New York and belong-

ing to estate of nonresident decedent, and which were removed by executors from state after passage of act; *Re Phipps*, 77 Hun, 327, 28 N. Y. Supp. 330, holding debts due nonresident decedent from resident, not subject to inheritance tax; *Re Whiting*, 2 App. Div. 601, 38 N. Y. Supp. 131 (dissenting opinion), majority holding inheritance tax applicable to bonds of foreign corporations owned by nonresident, and being actually within state at time of death of owner.

Distinguished in *Re James*, 144 N. Y. 12, 38 N. E. 961, 43 Am. St. Rep. 725, Affirming 77 Hun, 213, 28 N. Y. Supp. 351, holding certificates of stock and bonds of foreign corporations, owned by nonresident decedent, though deposited here at time of death, not to be included in appraisal of estate to determine collateral inheritance tax.

— **Gifts inter vivos.**

Cited in *Re Spaulding*, 22 Misc. 423, 50 N. Y. Supp. 398, Affirmed in 49 App. Div. 550, 63 N. Y. Supp. 694, holding bona fide gifts *inter vivos* not subject to inheritance tax after death of donor; *Re Edgerton*, 35 App. Div. 130, 54 N. Y. Supp. 700, holding absolute gift *inter vivos*, not made in contemplation of death of donor, not subject to transfer tax.

— **Assessment of inheritance or transfer tax.**

Cited in *Re Hoffman*, 143 N. Y. 330, 38 N. E. 311, holding transfer tax applicable to aggregate value of all property transferred, not to separate value of each several transfer; *Re Sutton*, 3 App. Div. 210, 38 N. Y. Supp. 277, and *Re Bartow*, 30 Misc. 30, 62 N. Y. Supp. 1000, holding that transfer tax should be assessed upon property on farm in which testator left it and before equitable conversion.

— **Deductions before assessment.**

Cited in *Re Gihon*, 169 N. Y. 447, 62 N. E. 561, and *Re Irish*, 28 Misc. 650, 60 N. Y. Supp. 30, holding that Federal war revenue tax being upon succession, and not on property, it should not be deducted before passing on value of estate for purpose of imposing inheritance tax; *Re Kennedy*, 20 Misc. 532, 46 N. Y. Supp. 906, holding authorizing deduction of commissions of foreign executor before assessing inheritance tax; *Millward's Estate*, 6 Misc. 426, 1 Power, 587, 27 N. Y. Supp. 286, holding debts of deceased, funeral expense and expense of administration, not to be deducted from value of deceased's estate before levy of inheritance tax.

— **Power of surrogate as to descent of property.**

Cited in *Re Ullmann*, 137 N. Y. 408, 33 N. E. 480, upholding power of surrogate to determine whether property of deceased person passes under will or descends by laws of intestacy, for purposes of taxation.

— **What chargeable with testator's debts.**

Cited in *Deyo v. Morss*, 30 App. Div. 60, 51 N. Y. Supp. 785, holding proceeds of sale by devisee of real property situate outside of state of testator's domicile not chargeable with latter's debts.

— **Taxation of corporations.**

Cited in *Binghamton Trust Co. v. Binghamton*, 72 App. Div. 345, 76 N. Y. Supp. 517, holding that courts should adopt such construction of law taxing trust companies as will avoid double taxation; *People ex rel. Metropolitan Street R. Co. v. State Tax Comrs.* 79 App. Div. 195, 80 N. Y. Supp. 85 (concurring opin-

ion), on point that franchise tax against corporations is not a tax but a charge by the state on the right to do business therein; *People ex rel. Delaware & H. Canal Co. v. Barker*, 23 Misc. 190, 51 N. Y. Supp. 1105, holding real estate held by railroad company outside of state not subject to tax; *People ex rel. Kursheedt Mfg. Co. v. Feitner*, 32 Misc. 85, 66 N. Y. Supp. 179, holding funds deposited in English bank by domestic corporation to defray expenses incurred abroad, not taxable.

18 L. R. A. 713, *Re PRIME*, 136 N. Y. 347, 49 N. Y. S. R. 658, 32 N. E. 1091.

Repeals or amendments of statute, and their effect.

Cited in *Guaranty Trust Co. v. Troy Steel Co.* 33 Misc. 487, 68 N. Y. Supp. 915, and *Re Connellan*, 25 Misc. 597, 56 N. Y. Supp. 157, holding that amendment of former statute "so as to read as follows," repeals by implication omitted and inconsistent provisions of former law; *Ottman v. Hoffman*, 7 Misc. 717, 28 N. Y. Supp. 28, holding act providing that former act shall be amended "so as to read as follows," substituted in place of it so as to repeal it; *Bank of the Metropolis v. Faber*, 150 N. Y. 206, 44 N. E. 779, Affirming 1 App. Div. 346, 37 N. Y. Supp. 423, holding statute relating to liability of directors of corporation for failure to file report, not repealed by amendment "so as to read as follows;" *Koons v. Cluggish*, 8 Ind. App. 238, 34 N. E. 651, holding repeal of former act by implication not a repeal so as to affect a duty which had accrued under prior law; *McAvoy v. New York*, 52 App. Div. 488, 65 N. Y. Supp. 274, holding no change made in law by an amendment in which there is a mere change in phraseology or in the arrangement or division of sections of the former law; *Re Embury*, 20 Misc. 78, 45 N. Y. Supp. 821, holding successive transfer tax acts continuation each of the other; *Stevenson Brewing Co. v. Eastern Brewing Co.* 22 App. Div. 525, 48 N. Y. Supp. 89, holding chattel mortgage, filed before passage of act requiring filing of statement in order to continue mortgage, invalidated by failure to file statement required by that act; *New York v. Union R. Co.* 31 Misc. 454, 64 N. Y. Supp. 483, holding amendment of ordinance in same language as original a continuation of same, preserving all rights available thereunder; *Ely v. Azoy*, 39 Misc. 671, 80 N. Y. Supp. 620, holding former acts not repealed so as to defeat remedy or abate proceedings properly begun by re-enactment in same or equivalent words; *Re Brundage*, 31 App. Div. 353, 52 N. Y. Supp. 362, holding assessment and collection of inheritance tax not prevented by re-enactment of transfer tax act with nearly identical provisions, after death of person whose estate is sought to be taxed; *Stone v. Broome County*, 166 N. Y. 91, 59 N. E. 708, and *Thacher v. Steuben County*, 21 Misc. 276, 47 N. Y. Supp. 124, holding act repealing act entitling towns to demand contribution from counties where expenses for bridges in one year exceeded one sixth of 1 per cent, not retroactive so as to destroy town's right as to bridges built or repaired before its passage; *Wirt v. Allegany County*, 90 Hun. 210, 35 N. Y. Supp. 887, holding right of town under statute to compel county to contribute toward support of bridges lost by repeal of such statute four days before submission of controversy to supervisors; *People v. England*, 91 Hun. 153, 36 N. Y. Supp. 534, holding amendment of statute making bribery of voter a misdemeanor by changing the punishment, not a repeal of original section as to past offenses; *Shayne v. Evening Post Pub. Co.* 56 App. Div. 438, 67 N. Y. Supp. 937 (dissenting opinion), majority holding provision of Laws 1848.

against dissolution of corporation impairing any remedy or liability against it, not preserved by saving clause in general corporation law repealing entire act of 1848; *Allison v. Welde*, 172 N. Y. 431, 65 N. E. 263, holding provisions of law relating to commissioner of jurors in New York city repealing prior law, and which substantially re-enact prior law, construed as continuation of such prior law; *Re Swift*, 137 N. Y. 88, 18 L. R. A. 713, 32 N. E. 1096, raising, without deciding, question as to effect of amendatory provision of inheritance tax law upon prior statute.

Distinguished in *People v. Wilmerding*, 136 N. Y. 374, 32 N. E. 1099, holding original act not revived by repeal of amendatory act amending and re-enacting the former act so as to read as prescribed in the amendatory act.

State statutes as affecting foreign corporations.

Approved in *Vanderpoel v. Gorman*, 140 N. Y. 575, 24 L. R. A. 552, 56 N. Y. S. R. 509, 37 Am. St. Rep. 601, 35 N. E. 932, Reversing 3 Misc. 61, 22 N. Y. Supp. 541, holding prohibition of New York statutes against assignment by domestic corporation in contemplation of insolvency, no bar to such assignment by foreign corporation having property in state, when such act valid in state where corporation organized; *Re Hulbert Bros.* 38 App. Div. 330, 57 N. Y. Supp. 38, upholding general assignment by foreign corporation for creditors with preferences, though such assignment by domestic corporation is prohibited; *National Mut. Bldg. & L. Asso. v. Pinkston*, 79 Miss. 483, 30 So. 692, holding exception in favor of loan associations in statute fixing maximum rate of interest chargeable, confined to domestic associations.

Cited in *Re Lampson*, 22 Misc. 212, 49 N. Y. Supp. 576, holding foreign educational corporation not subject to provision that no devise or bequest to a corporation shall be valid unless made two months before testator's death.

Cited in notes (24 L. R. A. 289) on recognition or exclusion of foreign corporations; (60 L. R. A. 91) on corporate taxation in the United States as to exemptions of foreign corporations.

Distinguished in *Fowler v. Bell*, 90 Tex. 160, 39 L. R. A. 257, 59 Am. St. Rep. 788, 37 S. W. 1058, holding that validity of chattel mortgage executed by insolvent foreign corporation in state creating it, to secure a creditor residing therein must be determined by laws of state where property is situated.

Collateral inheritance tax.

Cited in *Re Althouse*, 63 App. Div. 256, 71 N. Y. Supp. 445, holding tenant's leasehold interest in land, personal property subject to transfer tax, though buildings erected by and reserved to him are assessed against him as land; *Re Huntington*, 62 App. Div. 99, 70 N. Y. Supp. 853, holding corporations exempt from general tax, not exempt, under amendment to tax law, from payment of transfer tax.

Distinguished in *Re Kimberly*. 27 App. Div. 475, 50 N. Y. Supp. 586, holding legacy to domestic charitable hospital exempt from transfer tax.

— Bequest to foreign religious or educational corporation.

Approved in *Re Balleis*, 144 N. Y. 133, 38 N. E. 1007, Affirming 78 Hun, 276, 29 N. Y. Supp. 261; *Re Smith*, 77 Hun, 135, 28 N. Y. Supp. 476; *Re Fayerweather*, 31 Abb. N. C. 288, 62 N. Y. S. R. 74, 30 N. Y. Supp. 273; *Re Taylor*, 80 Hun, 590, 30 N. Y. Supp. 582; *James's Estate*, 6 Misc. 207, 1 Power, 604, 27 N. Y. Supp. 288,—holding legacy to foreign religious corporation subject to inheritance

tax; *Humphreys v. State*, 70 Ohio St. 81, 65 L. R. A. 781, 101 Am. St. Rep. 888, 70 N. E. 957, holding foreign boards, societies, and auxiliaries, organized for charitable purposes, not exempt from inheritance tax, although some of their work is carried on within the state; *Minot v. Winthrop*, 162 Mass. 126, 26 L. R. A. 265, 38 N. E. 512, holding charitable, educational, or religious society of other state not exempt from succession tax; *Re Wolfe*, 23 Misc. 440, 52 N. Y. Supp. 415, holding foreign religious corporation subject to transfer tax, notwithstanding statutory provision enabling it to take by devise and hold property within the state.

— **Bequest to United States.**

Approved in *United States v. Perkins*, 163 U. S. 630, 41 L. ed. 289, 16 Sup. Ct. Rep. 1073; *Re Merriam*, 141 N. Y. 484, 36 N. E. 505; *Cullom's Estate*, 5 Misc. 176, 25 N. Y. Supp. 699. — holding bequest to United States not exempt from payment of inheritance tax.

Power of surrogate as to descent of property.

Approved in *Re Ullmann*, 137 N. Y. 408, 33 N. E. 480, upholding power of surrogate to determine whether decedent's property passes under will or descends by laws of intestacy, for purpose of taxation.

18 L. R. A. 721, *STATE ex rel. LAW v. SAXON*, 30 Fla. 668, 32 Am. St. Rep. 46, 12 So. 218.

Elections as affected by failure to comply literally with statute.

Cited in *Stackpole v. Hallahan*, 16 Mont. 56, 28 L. R. A. 508, 40 Pac. 80, holding bona fide election not invalid because certificate of nomination of successful candidate did not show that he had previously been selected to fill vacancy; *Lynip v. Buckner*, 22 Nev. 439, 30 L. R. A. 357, 41 Pac. 762, holding that ballots from which inspectors have unintentionally omitted to take strip-containing numbers, will not be rejected as containing "distinguishing mark;" *State ex rel. Crawford v. Norris*, 37 Neb. 313, 55 N. W. 1086, holding that ballot prepared contrary to directory provision of election law should not, in absence of fraud of election officers, vitiate vote of elector.

What constitutes "distinguishing mark."

Cited in footnote to *Sego v. Stoddard*, 22 L. R. A. 468, as to what constitutes a "distinguishing mark" on ballot.

Governor's power of appointment.

Cited in *State v. Murphy*, 32 Fla. 143, 13 So. 705, holding governor's power to fill vacancies not limited by constitutional provision that old officers shall hold over until successors are duly qualified.

18 L. R. A. 729, *CLEVELAND, C. C. & ST. L. R. CO. v. BACKUS*, 133 Ind. 513, 33 N. E. 421.

Followed without discussion in *Louisville, E. & St. L. R. Co. v. West*, 138 Ind. 696, 37 N. E. 1013, and *Baltimore & O. & C. R. Co. v. Sawvel*, 138 Ind. 697, 37 N. E. 1013.

Constitutionality of statute creating state board of tax commissioners.

Cited in *Evansville & T. H. R. Co. v. West*, 139 Ind. 256, 37 N. E. 1009, and

Indianapolis & V. R. Co. v. Backus, 133 Ind. 613, 33 N. E. 443, holding state statute constitutional which creates state board of tax commissioners.

Jurisdiction of state board of tax commissioners.

Cited in State Tax Comrs. v. Halliday, 150 Ind. 253, 42 L. R. A. 839, 49 N. E. 14 (dissenting opinion), majority holding it not within jurisdictional power of state tax commissioners to include paid-up or nonforfeitable and partly paid-up life insurance policies in list of taxable property.

Distinguished in Cummings v. Stark, 138 Ind. 98, 34 N. E. 444, holding state board of tax commissioners without original jurisdiction to revise individual tax lists other than "railroad property."

Statutory construction.

Cited in Harris v. State, 96 Tenn. 569, 34 S. W. 1017, holding it duty of court so to construe tax law as to effectuate legislative purpose by giving effect to all its parts and render its operation uniform; Edward C. Jones Co. v. Perry, 26 Ind. App. 563, 57 N. E. 583, and Johnson v. Schloesser, 146 Ind. 518, 36 L. R. A. 63, 58 Am. St. Rep. 367, 45 N. E. 702, holding that such construction should be given to statute as will render effective all its parts without violating legislative intention.

Equal protection, and due process, of law.

Cited in Yazoo & M. Valley R. Co. v. Adams, 77 Miss. 779, 25 So. 355, holding railroad not denied equal protection of law when all railroads are accorded same notice and opportunity for hearing relative to tax assessments; Newton v. Roper, 150 Ind. 632, 50 N. E. 749, holding that due process of law is secured to property owners under tax laws when notice of time, place, and tribunal to make assessments is given; People v. Hasbrouck, 11 Utah, 306, 39 Pac. 918, holding that due process of law is secured when statute provides uniform rule and uniform process for ascertaining qualifications of those engaged or desirous of engaging in practice of medicine and surgery; Carroll v. Alsop, 107 Tenn. 278, 64 S. W. 193, holding notice in general law regulating assessment and collection of taxes sufficient to constitute due process of law so far as individual citizen is concerned; Bowlin v. Cochran, 161 Ind. 488, 69 N. E. 153, upholding constitutionality of act for taking of property for roads, which requires notice and preserves right to hearing and appeal.

Cited in footnote to Brown v. Markham, 30 L. R. A. 84, which holds valid statute authorizing logger's lien without notice to owner but giving subsequent opportunity to intervene.

Uniform and equal taxation.

Cited in Henderson v. London & L. Ins. Co. 135 Ind. 38, 20 L. R. A. 833, 41 Am. St. Rep. 410, 34 N. E. 565, holding that constitutional uniformity of taxation requires that all persons or property of particular district or class shall be subjected to same rate of assessment; Deniston v. Terry, 141 Ind. 682, 41 N. E. 143, holding paid-up building and loan stock taxable to holders notwithstanding statute assessing the association; Western U. Teleg. Co. v. State, 146 Ind. 61, 44 N. E. 793, holding that rule of uniform and equal taxation is not violated by reason of classification of property for purposes of assessment; State *ex rel.* Lewis v. Smith, 158 Ind. 550, 63 L. R. A. 120, 63 N. E. 25, holding statute authorizing deduction of mortgage indebtedness to extent of \$700 for purposes

of assessment, not in violation of constitutional requirement as to uniformity of taxation.

Cited in footnote to *Knoxville & O. R. Co. v. Harris*, 53 L. R. A. 921, which holds exemption from privilege tax not included in exemption from ad valorem tax.

Validity of assessments.

Cited in *Youngstown Bridge Co. v. Kentucky & I. Bridge Co.* 64 Fed. 442, holding assessment of bridge property, lying in two states, by state board of tax commissioners, not void because of error in including property outside of state.

Situs of property for purposes of taxation.

Cited in *Western U. Teleg. Co. v. Taggart*, 163 U. S. 20, 41 L. ed. 56, 16 Sup. Ct. Rep. 1054, Affirming 141 Ind. 285, 60 L. R. A. 689, 40 N. E. 1051, holding that state tax on that portion of property of interstate telegraph company which is within the state may be made by considering value of whole line as a unit and assessing tax on mileage basis.

Cited in footnotes to *Grigsby Constr. Co. v. Freeman*, 58 L. R. A. 349, which holds contractor's outfit brought into state for use several months in constructing railroad taxable in state; *Union Refrigerator Transit Co. v. Lynch*, 48 L. R. A. 790, which authorizes taxation of cars within state under lease from foreign corporation; *Cumberland & P. R. Co. v. State*, 52 L. R. A. 764, which sustains state tax on proportionate part of gross receipts of interstate railroad within its borders and which corresponds to proportion of mileage within such state; *Hall v. American Refrigerator Transit Co.* 56 L. R. A. 89, which sustains tax on average number of refrigerator cars coming into state in course of interstate business.

Basis of taxation of railroad corporations.

Cited in footnotes to *State v. Virginia & T. R. Co.* 35 L. R. A. 759, which holds earning capacity of railroad main consideration in determining taxable value; *Wells, F. & Co.'s Express v. Crawford County*, 37 L. R. A. 371, which holds assessment at true value of property of interstate express company within state proper mode of taxation.

Corporate taxation.

Cited in notes (60 L. R. A. 341, 344, 346, 356, 368, 373) on constitutional equality in the United States in relation to corporate taxation; (60 L. R. A. 642, 652) on corporate taxation and the commerce clause.

Delegation of legislative or judicial authority.

Cited in *Blue v. Beach*, 155 Ind. 133, 50 L. R. A. 70, 80 Am. St. Rep. 195, 56 N. E. 89, holding power granted to boards of health and school boards to require vaccination of children attending school, not unlawful delegation of legislative authority; *Bellingham Bay Improv. Co. v. New Whatcom*, 20 Wash. 59, 54 Pac. 774, holding statute conferring authority upon city council to determine correctness of tax assessments not unconstitutional as being a delegation of judicial authority.

18 L. R. A. 744, *PATTY v. COLGAN*, 97 Cal. 251, 31 Pac. 1133.

Purposes for which public funds may be used.

Cited in *Taylor v. Mott*, 123 Cal. 500, 56 Pac. 256, holding appropriation of

public funds to pension exempt firemen, unconstitutional; *Powell v. Phelan*, 138 Cal. 275, 71 Pac. 335, holding appropriation of county funds to payment of fees of jurors for services rendered prior to enactment of law, unconstitutional.

Cited in footnotes to *State ex rel. New Richmond v. Davidson*, 58 L. R. A. 739, which sustains appropriation by legislature to pay city debt for burying dead, removing *débris*, and caring for injured and homeless; *Ingram v. Colgan*, 28 L. R. A. 187, which upholds bounty for killing coyotes; *Re Stanford*, 45 L. R. A. 788, which holds statute exempting certain persons from liability for inheritance tax, invalid, under provision against state's making gifts or releasing indebtedness; *Conlin v. San Francisco*, 33 L. R. A. 752, which denies legislative right to direct use of city money to pay claim based on merely moral obligation; *Conlin v. San Francisco*, 21 L. R. A. 474, which holds void, act for relief of street contractor; *Board of Education v. State*, 25 L. R. A. 770, which holds unconstitutional, act authorizing board of education to levy tax to pay claim for which no obligation exists; *Dodge v. Mission Twp.* 54 L. R. A. 242, which holds promotion of construction and operation of sugar mills a private purpose not authorizing taxation; *Pritchard v. Magoun*, 40 L. R. A. 381, which authorizes taxes to aid in building for highway and railway purposes toll bridge owned by private corporation; *Opinion of Justices*, 49 L. R. A. 564, which holds legislative right to appropriate money for widow, heirs, etc., of deceased officer dependent on whether public good will be served; *People ex rel. Einsfeld v. Murray*, 32 L. R. A. 344, which holds valid, excise law giving two thirds of the taxes thereby imposed to the towns and cities in which raised.

18 L. R. A. 745, *CUTHBERT v. CHAUVET*, 136 N. Y. 326, 49 N. Y. S. R. 671, 32 N. E. 1088.

Equitable jurisdiction over trusts and trustees.

Cited in *Glasscock v. Tate*, 107 Tenn. 402, 64 S. W. 715, holding equity court without jurisdiction to render decree dissolving express trust, even with consent of beneficiary; *O'Donoghue v. Boies*, 92 Hun, 8, 37 N. Y. Supp. 961, holding judgment of court ordering partition and sale of trust estate, void, as being in contravention of last will of testator creating said trust; *Oviatt v. Hopkins*, 20 App. Div. 171, 46 N. Y. Supp. 959, holding court without jurisdiction to render judgment compelling trustee of express trust to so act in reference thereto as to cause destruction of trust; *Rochevot v. Rochevot*, 74 App. Div. 590, 77 N. Y. Supp. 788, holding that, notwithstanding assumed power of parties in interest to make agreement terminating trust, court of equity will not compel destruction of trust against protest of trustees or some interested beneficiaries.

Distinguished in *Martin v. Pine*, 79 Hun, 432, 29 N. Y. Supp. 995, denying court's power to dissolve trust before scheme outlined by testator has been accomplished.

Termination of express trusts.

Cited in *Re New York*, 81 App. Div. 33, 81 N. Y. Supp. 32, holding lease by trustee of trust estate for period longer than time fixed for its duration void, as contravening statute of uses and trusts; *Hunt v. Hunt*, 124 Mich. 504, 83 N. W. 371, holding it not to be within power of trustees and their *cestuis que trust* to transform active trust in real property into passive one; *Thorn v. De Breteuil*, 86 App. Div. 424, 83 N. Y. Supp. 849, denying right of beneficiaries to have continuance of testator's business, directed in will, terminated; *Metcalfe v. Union*,

Trust Co. 87 App. Div. 148, 84 N. Y. Supp. 183, denying right of remainder men. by releasing their interests, to terminate trust to pay income of estate to widow for life, or until remarriage.

Distinguished in *Re Heinze*, 20 Misc. 373, 46 N. Y. Supp. 247, holding express-trust in personalty terminated by conveyance of life interest to remainderman; *Gomez v. Gomez*, 81 Hun, 573, 31 N. Y. Supp. 206, holding that death of life beneficiary terminates trust providing that trustees shall convey trust property to person designated, and vests property in remainderman.

Relief to trustee for predecessor's default.

Cited in *Griswold v. Caldwell*, 14 Misc. 303, 35 N. Y. Supp. 1057, holding that court will extend partial relief to substituted trustee for predecessor's default in pleading.

Action by trustee representing diverse interests.

Cited in *Farmers' Loan & T. Co. v. Northern P. R. Co.* 66 Fed. 176, holding that trustee representing various mortgage interests in extensive railroad system should not bring action alone to ascertain various liens, but representative of each interest should be admitted.

18 L. R. A. 750, *JOLIET v. SHUFELT*, 144 Ill. 403, 36 Am. St. Rep. 453, 32 N. E. 969.

Proximate cause of injury.

Cited in *Chicago & E. I. R. Co. v. Mochell*, 96 Ill. App. 183, holding excessive speed of running trains in city contrary to ordinance proximate cause of injury to passenger riding on street car.

Cited in footnotes to *Western R. Co. v. Mutch*, 21 L. R. A. 316, which holds excessive speed not proximate cause of death of boy attempting to catch on train; *Chicago, St. P. M. & O. R. Co. v. Elliott*, 20 L. R. A. 582, as to proximate cause of injury to shipper while stepping from stock car to caboose; *Mueller v. Milwaukee Street R. Co.* 21 L. R. A. 721, which holds sudden stopping of street car in front of funeral procession cause of injury to first carriage by pole of second.

Two causes producing injury.

Cited in *Illinois C. R. Co. v. Johnson*, 95 Ill. App. 59, holding master liable for injuries to servant due to combined negligence of master and fellow servant; *North Chicago Street R. Co. v. Dudgeon*, 184 Ill. 487, 56 N. E. 796, Affirming 83 Ill. App. 533, holding street railway company liable for injuries to servant due to negligence of third party combined with that of company; *Armour v. Golkowska*, 202 Ill. 149, 66 N. E. 1037, holding master liable for injury to servant hit by barrel rolling off unguarded platform, and servant need not show what force put barrel in motion; *Union Street R. Co. v. Stone*, 54 Kan. 98, 37 Pac. 1012, holding that where two causes combine to produce injury, both proximate in nature, one being negligent defect in street, other some accident for which city or injured party is not responsible, city is liable; *Eskildsen v. Seattle*, 29 Wash. 586, 70 Pac. 64, holding city liable for injury to boy run over by cars after catching foot between rail and planking in highway; *Chicago v. McCabe*, 93 Ill. App. 291, holding city liable for hole in street into which wheel of wagon dropped causing driver to fall out, notwithstanding team was apparently unmanageable at time of injury; *Lockport v. Richards*, 81 Ill. App. 536, holding city liable for allowing trap door in walk to get out of repair causing injury to one who fell

into hole, notwithstanding door may have been misplaced by some third party; *Rock Falls v. Wells*, 169 Ill. 227, 48 N. E. 440, Affirming 65 Ill. App. 565, holding city liable for allowing unused car tracks to remain in street thereby preventing plaintiff from crossing to avoid injury from collision with runaway.

Negligence as question for jury.

Cited in *Mt. Vernon v. Cockrum*, 59 Ill. App. 545, holding it to be question for jury whether city was negligent in constructing bridge diagonally across brook and in failing to erect railing.

18 L. R. A. 753, *MALMGREN v. PHINNEY*, 50 Minn. 457, 52 N. W. 915.

Second appeal in 65 Minn. 25, 67 N. W. 649.

Distribution between lien holders.

Followed in *Miller v. Stoddard*, 54 Minn. 490, 56 N. W. 131, giving rule of distribution upon sale of mortgaged property under foreclosure of mechanic's lien

Priority of liens.

Cited in *Walters v. Ward*, 153 Ind. 582, 55 N. E. 735, holding that owner of land covered by mortgage, who sells to one who agreed to pay mortgagee's claim and difference between selling price and such claim, has lien on such difference superior to that of mortgagee against land, where mortgagee secretly released purchaser from payments after latter had delivered possession of land to him; *Thorpe Block Sav. & L. Asso. v. James*, 13 Ind. App. 526, 41 N. E. 978, holding that junior mortgagee given priority by agreement with senior mortgagee waives such priority by subsequently permitting mechanics' liens to be filed.

Holiday law as to matters other than negotiable paper.

Cited in note (19 L. R. A. 319) on how far law of holidays extends to matters other than those relating to negotiable paper.

18 L. R. A. 756, *FOGARTY v. JUNCTION CITY PRESSED BRICK CO.* 50 Kan. 478, 31 Pac. 1052.

Liability for maintenance of nuisance.

Cited in footnotes to *Hauck v. Tide Water Pipe-Line Co.* 20 L. R. A. 642, which holds pipe-line proprietor absolutely liable for escape of oil; *Frost v. Berkeley Phosphate Co.* 26 L. R. A. 693, which holds owner of factory liable for damage by fumes; *Swift v. Broyles*, 58 L. R. A. 390, which sustains right to compensation for discomfort from noxious gases, etc., from chemical works on adjoining premises.

Undertaking as "offensive business."

Cited in footnote to *Rowland v. Miller*, 22 L. R. A. 182, which holds undertaking establishment within restrictive agreement against business "injurious or offensive to neighboring inhabitants."

18 L. R. A. 759, *KOELSCH v. PHILADELPHIA CO.* 152 Pa. 355, 34 Am. St. Rep. 653, 25 Atl. 522.

Care required in dealing with dangerous agencies.

Followed in *Heh v. Consolidated Gas Co.* 201 Pa. 447, 88 Am. St. Rep. 819, 50 Atl. 994, holding that gas, being dangerous agency, one dealing in same re-

quired to exercise more than ordinary care; *Fuchs v. St. Louis*, 133 Mo. 180, 34 L. R. A. 120, 31 S. W. 115, holding blowing up of sewer into which large quantities of petroleum have flowed entitled to consideration in determining whether city exercised proper care; *Anderson v. Standard Gaslight Co.* 17 Misc. 627, 40 N. Y. Supp. 671, holding company liable for losses sustained by reason of failure properly to maintain gas works and use such care in its inspection as dangerous character of agency dealt with demanded; *Denver Consol. Electric Co. v. Lawrence*, 31 Colo. 318, 73 Pac. 39, holding light company liable to one receiving terrific charge of electricity in turning on incandescent lamp; *Coffeyville Min. & Gas Co. v. Carter*, 65 Kan. 568, 70 Pac. 635, holding owner liable for explosion of gas escaping from well and igniting in unknown manner; *Indianapolis Abattoir Co. v. Temperly*, 159 Ind. 654, 95 Am. St. Rep. 330, 64 N. E. 906, holding landlord liable to tenant for injury due to gas escaping from defective pipes.

Cited in note (29 L. R. A. 338) on liability for negligence in escape and explosion of gas.

Duty of gas company as to fittings and inspection.

Cited in *Consolidated Gas Co. v. Crocker*, 82 Md. 123, 31 L. R. A. 788, 33 Atl. 423, holding gas company guilty of negligence for permitting escape of gas from service pipes after having had due notice of such fact, and failing to take necessary and known precautions in preventing pipe line from getting out of order; *Indiana Natural & Illuminating Gas Co. v. Long*, 27 Ind. App. 226, 59 N. E. 410, holding it, not only duty of gas company to furnish safe and adequate facilities for distributing gas, but also to provide proper inspection of same; *Prichard v. Consolidated Gas Co.* 2 Pa. Super. Ct. 182, 39 W. N. C. 30, holding it to be duty necessitated from dangerous character of gas that one dealing in same should use every precaution known in providing and maintaining facilities for handling same; *German-American Ins. Co. v. Standard Gaslight Co.* 34 Misc. 595, 70 N. Y. Supp. 384, holding gas company liable for damage resulting from its employee applying lighted match to gas pipe to locate leak; *Aurora Gaslight Co. v. Bishop*, 81 Ill. App. 501, holding it duty of gas company to guard against injury to its pipes caused by construction of sewer by city; *United Oil Co. v. Roseberry*, 30 Colo. 184, 69 Pac. 588, holding gas company liable for explosion due to negligence of servant in not inspecting pipes upon making connections.

Negligence as question for jury.

Cited in *Paden v. Van Blarcom*, 100 Mo. App. 193, 74 S. W. 124, holding it question for jury whether master was negligent in ordering gas turned on in range without examining valves.

Proximate cause of injury.

Cited in *Stone v. Boston & A. R. Co.* 171 Mass. 542, 41 L. R. A. 798, 51 N. E. 1, holding negligence in storing oil upon station platform and permitting it to remain in violation of statute, not proximate cause of damage by fire started by lighted match dropped upon platform; *Leeds v. New York Teleph. Co.* 178 N. Y. 126, 70 N. E. 219 (dissenting opinion), majority holding failure of telephone company to inspect chimney used as anchor for wire, not proximate cause of injury to traveler struck by bricks caused to fall by boom of derrick striking wire.

Action against joint wrongdoers.

Cited in *Johnson v. Chapman*, 43 W. Va. 641, 28 S. E. 744, holding that one

suffering injury from concurrent negligence of two wrongdoers may maintain joint or separate action against both or either of wrongdoers; *Dutton v. Lansdowne*, 10 Pa. Super. Ct. 210, 7 Del. Co. Rep. 402, 44 W. N. C. 293, holding it not error to join as parties defendant, wrongdoers whose concurrent negligence, though of varying degree, resulted in injury to plaintiff.

18 L. R. A. 761, *COM. v. MATTHEWS*, 152 Pa. 166, 25 Atl. 548.

What acts may be performed on Sunday.

Followed without comment in *Com. v. Suppert*, 152 Pa. 170, 25 Atl. 549.

Cited in *Com. v. Diffenbaugh*, 26 Pa. Co. Ct. 69, 19 Lanc. L. Rev. 22, holding selling of meats on Sunday to be violation of Sunday law; *Com. ex rel. Gottschall v. Newcomet*, 18 Pa. Super. Ct. 510, holding operation of street cars on Sunday not such public nuisance as to subject operators to penalties for violation of Sunday law.

Cited in footnotes to *First M. E. Church v. Donnell*, 46 L. R. A. 858, which sustains subscription to church indebtedness made on Sunday; *State v. McBee*, 60 L. R. A. 638, which holds pumping oil well on Sunday work of necessity, if permanent, material loss and injury would otherwise result; *Arnheiter v. State*, 58 L. R. A. 392, which holds sale of meat by butcher to customers on Sunday not work of necessity or charity.

18 L. R. A. 764, *BIRMINGHAM v. ROCHESTER CITY & B. R. CO.* 137 N. Y. 13, 49 N. Y. S. R. 888, 32 N. E. 995.

Liability of railroad company for negligence of third party.

Cited in *Richmond v. New York C. & H. R. Co.* 8 App. Div. 386, 40 N. Y. Supp. 812, holding railroad company not liable for injuries to brakeman, due to falling of wire which was strung up by third person.

Cited in footnote to *New York, N. H. & H. R. Co. v. Baker*, 50 L. R. A. 201, which denies carrier's liability for injury to passenger through negligent operation of derrick by state board employees in raising grade of railroad bridge.

18 L. R. A. 768, *RAUENSTEIN v. NEW YORK, L. & W. R. CO.* 136 N. Y. 528, 32 N. E. 1047.

Injury to abutter's easement in street.

Cited in footnote to *Lockwood v. Wabash R. Co.* 24 L. R. A. 516, which denies city's power to authorize steam railroad company to locate tracks in narrow highway devoted to wholesale business.

— Right to damages.

Cited in *Re Grade Crossing*, 154 N. Y. 557, 49 N. E. 127, Affirming 6 App. Div. 331, 40 N. Y. Supp. 520, holding that, in absence of statute, no compensation is due to abutting property owners for changing grade of public street; *Colclough v. Milwaukee*, 92 Wis. 186, 65 N. W. 1039, holding change in grade in public highway or street not such an injury or taking of private property as to entitle abutting property owner to compensation; *Brand v. Multnomah County*, 38 Or. 102, 50 L. R. A. 396, 84 Am. St. Rep. 772, 62 Pac. 209, holding change in grade on side or lateral streets made necessary to effectuate crossing over railway on another street is not additional burden or injury to abutting property owner entitling him to compensation therefor; *Fries v. New York & H. R. Co.* 169 N. Y.

277, 62 N. E. 358, holding that rule of *damnum absque injuria* properly applies to case of abutting property owner suffering injury by reason of improvement in public street made under lawful authority.

Cited in footnotes to *Pueblo v. Strait*, 24 L. R. A. 392, which holds abutter entitled to damages on building of viaduct over railroad practically closing access to street; *Spencer v. Metropolitan Street R. Co.* 22 L. R. A. 668, which denies right to construct viaduct in street without compensating abutters.

Distinguished in *Egbert v. Lake Shore & M. S. R. Co.* 6 Ind. App. 357, 33 N. E. 659, holding that change in grade of public street by railroad in order to make convenient crossing, entitles abutting owner to compensation for any injury to property rights in highway.

Condemnation proceedings to destroy easement in street.

Cited in *Ray v. New York Bay Extension R. Co.* 34 App. Div. 5, 53 N. Y. Supp. 1052, holding that plaintiff having an easement in highway, has property right therein which can be extinguished only by condemnation proceedings.

Duty of railroad company carrying highway across tracks.

Cited in *Deming v. Terminal R. Co.* 49 App. Div. 500, 63 N. Y. Supp. 615, holding railroad company employing independent contractor to carry highway across tracks, liable for injury resulting from failure to guard embankment.

18 L. R. A. 771, *VANDEWATER v. NEW YORK & N. E. R. CO.* 135 N. Y. 583, 49 N. Y. S. R. 55, 32 N. E. 636.

Duty of railroad company to give warning at crossings.

Followed on second appeal in 74 Hun, 33, 26 N. Y. Supp. 397, holding it duty of railroad companies to run trains with due care and to give warning upon approaching crossings, either by bells, whistles, or other adequate means.

Cited in *Hickey v. New York C. & H. R. R. Co.* 8 App. Div. 125, 40 N. Y. Supp. 484, holding railroad company bound to give due and reasonable warning on approaching crossing; *Finn v. Delaware, L. & W. R. Co.* 42 App. Div. 527, 59 N. Y. Supp. 771, holding railroad company liable for injuries to child resulting from failure to give signals and to station flagman to guard public against danger at crossing; *Petrie v. New York C. & H. R. R. Co.* 63 App. Div. 476, 71 N. Y. Supp. 866; *Shapter v. Carroll*, 18 App. Div. 390, 46 N. Y. Supp. 202; *Friess v. New York C. & H. R. R. Co.* 67 Hun, 210, 22 N. Y. Supp. 104,—holding that even in absence of statutory requirement of railroads to ring bells and blow whistles at crossing, yet they owe duty to public to give adequate warnings and use due caution in running of trains; *Coulter v. Great Northern R. Co.* 5 N. D. 584, 67 N. W. 1046, holding common-law duty of railroad company not diminished by existence of statute requiring ringing of bell and blowing of whistle upon approaching crossings; *Henavie v. New York C. & H. R. R. Co.* 166 N. Y. 284, 59 N. E. 901, holding railroad company guilty of negligence for operating trains in city without using adequate facilities to warn people at crossings; *Philadelphia & B. C. R. Co. v. Holden*, 93 Md. 423, 49 Atl. 625, holding failure to give signals at public crossing not negligence as to person injured at private crossing where signals could have been heard.

Duty of traveler at crossing.

Cited in footnote to *Passman v. West Jersey & S. R. Co.* 61 L. R. A. 609, which holds cutting of train on side track at highway crossing not invitation to cross without using ordinary precaution.

18 L. R. A. 774, *HOBBS v. STATE*, 133 Ind. 404, 32 N. E. 1019.

Plea in abatement.

Cited in *State v. Katzman*, 161 Ind. 505, 69 N. E. 157, holding that question as to right to prosecute by information may be raised by plea in abatement.

Sufficiency of information or indictment.

Cited in *Musgrave v. State*, 133 Ind. 304, 32 N. E. 885, holding that conspiracy, being a public offense, indictment charging it, is not bad on account of surplusage; *State v. Fidler*, 148 Ind. 222, 47 N. E. 464, and *Koetting v. State*, 88 Wis. 510, 60 N. W. 822, holding indictment not bad for duplicity, though charging conjunctively, commission of acts made criminal disjunctively by statute; *Selby v. State*, 161 Ind. 672, 69 N. E. 463, holding information charging defendant with forging, uttering, etc., a certain forged note, not bad for repugnancy; *Wilson v. State*, 156 Ind. 635, 59 N. E. 380, holding indictment charging accused with presenting false and fraudulent claim not bad for duplicity.

Cruel and unusual punishments.

Cited in *Miller v. State*, 149 Ind. 617, 40 L. R. A. 112, 49 N. E. 894, holding reformatory act providing for parole of persons convicted of crime not unconstitutional on ground of imposing cruel and unusual punishment.

Cited in footnote to *Com. v. Murphy*, 30 L. R. A. 734, which sustains statute imposing imprisonment for life for criminal intimacy with girl under sixteen.

Cited in note (35 L. R. A. 562, 567, 568) on cruel and unusual punishments.

18 L. R. A. 778, *FINNEGAN v. KNIGHTS OF LABOR BLDG. ASSO.* 52 Minn. 239, 38 Am. St. Rep. 552, 53 N. W. 1150.

What is a de facto corporation.

Cited in *Johnson v. Okerstrom*, 70 Minn. 311, 73 N. W. 147, and *Bradley Fertilizer Co. v. South Pub. Co.* 4 Misc. 175, 23 N. Y. Supp. 675, holding that to constitute a *de facto* corporation there must exist valid law, an attempt to organize under such law, and bona fide user of corporate powers conferred by such law; *Gibbs's Estate*, 157 Pa. 69, 22 L. R. A. 281, 27 Atl. 383, holding that *de facto* corporation is an apparent corporate organization, asserted to be a corporation by its member and actually acting as such, but lacking creative fiat of law.

Right to deny existence of de facto corporation.

Cited in *Hause v. Mannheimer*, 67 Minn. 195, 69 N. W. 810, holding that as between *de facto* corporation and stockholder, latter cannot successfully deny corporate existence.

Collateral attack upon de facto corporation.

Cited in *Washington Nat. Bldg. Loan & Invest. Asso. v. Stanley*, 38 Or. 319, 58 L. R. A. 819, 84 Am. St. Rep. 793, 63 Pac. 489, holding that borrowers from loan association, who have accepted stock, cannot defeat its action to foreclose mortgage, on ground that articles of incorporation were not properly acknowledged.

Partnership liability of member or stockholder of de facto corporation.

Cited in *Richards v. Minnesota Sav. Bank*, 75 Minn. 207, 77 N. W. 822, holding that one who deals with *de facto* corporation, as such, cannot charge members or stockholders as partners with debts contracted with corporation; *Doty v. Patterson*, 155 Ind. 66, 56 N. E. 668, holding stockholders of *de facto* corporation not liable as partners to one contracting with corporation.

Cited in footnotes to *Taylor v. Branham*, 39 L. R. A. 362, which holds liable as partners, members of foreign corporation carrying on business in state without being incorporated therein; *Slocum v. Head*, 50 L. R. A. 324, which holds persons attempting to incorporate by filing original articles, instead of copies, entitled to all rights of corporation as to persons dealing with them as such; *Wechselberg v. Flour City Nat. Bank*, 26 L. R. A. 470, which holds liable as partner, negligent signer of recorded articles of incorporation negligently permitting use of name as officer without legal incorporation.

18 L. R. A. 781, *HANCOCK v. McAVOY*, 151 Pa. 460, 31 Am. St. Rep. 774, 25 Atl. 47.

Interest in land sufficient to support ejectment.

Cited in *Mannerback v. Pennsylvania R. Co.* 16 Pa. Super. Ct. 625, holding clause in deed "excepting and forever reserving the graveyard on the lands hereby conveyed, at all times hereafter to enter thereon without hindrance or denial of, . . . his heirs and assigns" an exception sufficient to support action of ejectment; *Fisk v. Brayman*, 21 R. I. 197, 42 Atl. 878, holding action of trespass and ejectment will not lie to recover possession of premises, title to which is claimed through reservation; *Doe ex dem. Stewart v. Garrett* (Ga.) 64 L. R. A. 100, footnote p. 99, 46 S. E. 427, holding interest of purchaser of cemetery lot not sufficient to support ejectment.

Cited in footnotes to *Cahill v. Cahill*, 60 L. R. A. 706, which holds possessory rights only will not sustain ejectment without showing legal title; *Pittsburgh, Ft. W. & C. R. Co. v. Peet*, 19 L. R. A. 467, which authorizes railroad company to maintain ejectment for property condemned.

Ejectment for land in street.

Cited in footnotes to *San Francisco v. Grote*, 36 L. R. A. 502, which holds dedication of street by parol not sufficient to support ejectment by city against fee owner; *San Francisco v. Grote*, 41 L. R. A. 335, which sustains city's right of ejectment for land dedicated for street; *Thomas v. Hunt*, 32 L. R. A. 857, which holds ejectment proper remedy by owner of fee to recover possession of street from one placing permanent obstruction thereon; *Postal Teleg. Cable Co. v. Eaton*, 39 L. R. A. 722, which sustains right to ejectment for removal of telegraph poles placed in highway without compensation to owner; *French v. Robb*, 57 L. R. A. 956, which sustains right of owner of soil in street to maintain ejectment against person wrongfully claiming exclusive possession.

Adverse possession of highway.

Cited in footnote to *Teass v. St. Albans*, 19 L. R. A. 803, which holds title to street obtainable by adverse possession.

Nature of owner's interest in cemetery lots.

Cited in *McWhirter v. Newell*, 200 Ill. 590, 66 N. E. 345, holding that purchaser of lot in public cemetery obtains easement only.

Liability for disinterment of dead bodies.

Cited in note (42 L. R. A. 725) on liability for disinterment of dead bodies and actions relating thereto.

Appeal from order appointing receiver pendente lite.

Cited in *Popp v. Daisy Gold Min. Co.* 22 Utah, 462, 63 Pac. 185, holding or-

der appointing receiver *pendente lite* upon *ex parte* motion, not final from which appeal will lie.

18 L. R. A. 792, DIXON v. CHICAGO & A. R. CO. 109 Mo. 413, 19 S. W. 412.

Who are fellow servants.

Cited in Card v. Eddy, 129 Mo. 516, 36 L. R. A. 808, 28 S. W. 979, holding track hand working in road department and engineer in operating department of same railroad are not fellow servants; Schlereth v. Missouri P. R. Co. 115 Mo. 105, 21 S. W. 1110, holding engineer and track repairer not fellow servants; Church v. Chicago & A. R. Co. 119 Mo. 208, 23 S. W. 1056, holding as on former appeal that quarryman is not fellow servant of those operating train, even though all are engaged in common enterprise; Grattis v. Kansas City, P. & G. R. Co. 153 Mo. 396, 48 L. R. A. 406, 77 Am. St. Rep. 721, 55 S. W. 108, holding engineer, fireman, and conductor of freight train fellow servants within rule exempting master from liability for injury to either due to negligence of others; Parker v. Hannibal & St. J. R. Co. 109 Mo. 412, 18 L. R. A. 817, footnote p. 802, 19 S. W. 1119, on question whether railroad section hands ballasting railroad tracks are fellow servants with train men unloading stone used therefor, each group working under different foreman; Relyea v. Kansas City, Ft. S. & G. R. Co. 112 Mo. 93, 18 L. R. A. 820, footnote p. 817, 20 S. W. 480, which holds brakeman and firemen on different trains fellow servants.

Cited in footnotes to Schroeder v. Flint & P. M. R. Co. 29 L. R. A. 321, which holds boss of gang unloading dirt on railroad fellow servant of member of gang; St. Louis, I. M. & S. R. Co. v. Needham, 25 L. R. A. 833, which holds a conductor of construction train leaving switch open a fellow servant of fireman on passenger train; Union P. R. Co. v. Erickson, 29 L. R. A. 137, which holds section man and fireman not fellow servants; Canadian P. R. Co. v. Johnston, 25 L. R. A. 470, which holds freight conductor and brakeman not fellow servants; Schroeder v. Chicago & A. R. Co. 18 L. R. A. 827, which holds foreman not fellow servant of man under his orders; Russ v. Wabash Western R. Co. 18 L. R. A. 823, which holds foreman of section gang not fellow servant of members of gang.

Cited in note (50 L. R. A. 447, 458) on what servants are deemed to be in same common employment apart from statutes where no questions as to vice principalship arise.

Injury due to act of fellow servant.

Cited in Irmer v. St. Louis Brewing Co. 69 Mo. App. 28, holding negligence of master in failing properly to light trap door not excused because injury resulting to servant was caused by negligence of fellow servant in leaving door open.

Contributory negligence.

Cited in Church v. Chicago & A. R. Co. 119 Mo. 208, 23 S. W. 1056, on second appeal, holding question of contributory negligence one for jury where the facts are in dispute; Evans v. Wabash R. Co. 178 Mo. 514, 77 S. W. 515, holding experienced hand, stepping in front of approaching train, without looking or listening, negligent, as matter of law.

Omission of warning signal.

Cited in Hornstein v. United R. Co. 97 Mo. App. 277, 70 S. W. 1105, holding omission of motorman to sound gong on approaching crossing, negligence.

18 L. R. A. 802, *PARKER v. HANNIBAL & ST. J. R. CO.* 109 Mo. 362, 19 S. W. 1119.

Who are fellow servants.

Cited in *Grattis v. Kansas City, P. & G. R. Co.* 153 Mo. 396, 48 L. R. A. 405, 77 Am. St. Rep. 721, 55 S. W. 108, holding engineer of train and track-repairer not fellow servants. *Schlereth v. Missouri P. R. Co.* 115 Mo. 99, 21 S. W. 1110, holding engineer and track repairer employed by same company not fellow servants within rule exempting master from liability for death of track hand due to negligence of engineer. *Relyea v. Kansas City, Ft. S. & G. R. Co.* 112 Mo. 86, 18 L. R. A. 817, 20 S. W. 480, holding brakeman of one freight train fellow servant of fireman on another train operating on same road under same master; *Zellars v. Missouri Water & Light Co.* 92 Mo. App. 126, holding that servant to whom master delegates performance of personal duty owing by master to other employees, is not fellow servant of such employees; *Hawk v. McLeod Lumber Co.* 166 Mo. 129, 65 S. W. 1022, holding sawyer and deck hand in sawmill fellow servants; *Neal v. Northern P. R. Co.* 57 Minn. 372, 59 N. W. 312, holding lineman engaged in repairing telegraph line and members of road-bed repairing crew, fellow servants; *Card v. Eddy*, 129 Mo. 516, 36 L. R. A. 808, footnote p. 806, 28 S. W. 979, holding fireman and track hand to whom he attempted to deliver weighted message from moving train engaged in same department of service, within rule exempting master from injury inflicted by fellow servant; *Shaw v. Bambrick-Bates Constr. Co.* 102 Mo. App. 672, 77 S. W. 96, holding workman loading stone in box fellow servant of one signalling engineer when to hoist it.

Cited in footnotes to *Schroeder v. Chicago & A. R. Co.* 18 L. R. A. 827, which holds foreman not fellow servant of man under his orders; *Dixon v. Chicago & A. R. Co.* 18 L. R. A. 792, which holds laborer working in quarry of railroad company under direction of foreman not fellow servant of employees operating passenger train; *Relyea v. Kansas City, Ft. S. & G. R. Co.* 18 L. R. A. 817, which holds brakemen and firemen on different trains fellow servants; *Russ v. Wabash Western R. Co.* 18 L. R. A. 823, which holds foreman of section gang not fellow servant of members of gang.

Cited in notes (46 L. R. A. 361) as to when conductor is deemed to be common servant of other railway employees; (50 L. R. A. 419, 448, 450, 452, 454) on what servants are deemed to be in same common employment apart from statutes where no questions as to vice principalship arise.

Distinguished in *Swadley v. Missouri P. R. Co.* 118 Mo. 276, 40 Am. St. Rep. 366, 24 S. W. 140, holding track hand walking along right of way, not fellow servant of crew of train, some cars of which were derailed, causing death of track hand.

Safe appliances.

Cited in *Hogan v. Citizens' R. Co.* 150 Mo. 49, 51 S. W. 473, holding allegation of negligent failure to provide car with fender to prevent its running over children, properly stricken out since company not required to furnish best appliances if those used are reasonably safe.

18 L. R. A. 817, *RELYEA v. KANSAS CITY, FT. S. & G. R. CO.* 112 Mo. 86, 20 S. W. 480.

Who are fellow servants.

Followed in *Sheehan v. Prosser*, 55 Mo. App. 574, holding workman on building receiving lumber hoisted by engine fellow servant of engineer.

Cited in *Hawk v. McLeod Lumber Co.* 166 Mo. 128, 65 S. W. 1022, holding sawyer and deck hand at sawmill to be fellow servants; *Ryan v. McCully*, 123 Mo. 647, 27 S. W. 533, holding bridge laborer and an engineer operating hoisting engine used in constructing bridge, fellow servants.

Cited in note (54 L. R. A. 109) on vice principalship as determined with reference to character of act which caused injury.

Who are not fellow servants.

Cited in footnote to *Russ v. Wabash Western R. Co.* 18 L. R. A. 823, which holds foreman of section gang not fellow servant of members of gang; *Schroeder v. Chicago & A. R. Co.* 18 L. R. A. 827, which holds foreman not fellow servant of man under his orders.

Cited in note (50 L. R. A. 448, 452, 455) on what servants are deemed to be in same common employment apart from statutes where no questions as to vice principalship arise.

Railroad employees as fellow servants.

Cited in *Card v. Eddy*, 129 Mo. 517, 36 L. R. A. 808, 28 S. W. 979, holding fireman and track hand to whom he attempted to deliver weighted message from moving train engaged in same department of service, within rule exempting master from injury inflicted by fellow servant; *Oglesby v. Missouri P. R. Co.* 150 Mo. 180, 51 S. W. 758, separate opinion per Sherwood, J., who holds conductor, engineer, and others of train crew fellow servants of brakeman employed on same train; *Neal v. Northern P. R. Co.* 57 Minn. 373, 59 N. W. 312, concurring opinion, by Cauty, J., who holds fireman on one train to be fellow servant of brakeman on another owned by common master; *Grattis v. Kansas City, P. & G. R. Co.* 153 Mo. 396, 48 L. R. A. 405, 77 Am. St. Rep. 721, 55 S. W. 108, holding fireman and brakeman though employed on different trains fellow servants being engaged in same department of service for common master.

Cited in footnotes to *Dixon v. Chicago & A. R. Co.* 18 L. R. A. 792, which holds laborer working in quarry of railroad company under direction of foreman not fellow servant of employees operating passenger train; *Parker v. Hannibal & St. J. R. Co.* 18 L. R. A. 802, which holds track repairer and members of section gang under different management not fellow servant; *St. Louis, I. M. & S. R. Co. v. Needham*, 25 L. R. A. 833, which holds a conductor of construction train leaving switch open a fellow servant of fireman on passenger train; *Schroeder v. Flint & P. M. R. Co.* 29 L. R. A. 321, which holds boss of gang unloading dirt on railroad fellow servant of member of gang.

Employment of servants.

Cited in note (48 L. R. A. 393) on duty of master as to employment of servants.

Duty of master or his representative to follow up servants.

Cited in *Martin v. Chicago & A. R. Co.* 65 Fed. 386, holding train master not obliged to follow up servants—conductors, brakemen, and engineers,—to see that orders of master are properly executed.

Cited in note (41 L. R. A. 115) on theory that master is bound merely to supervise one to whom he has committed the duty of inspection.

Duty of master to provide rules for servants.

Cited in note (43 L. R. A. 320, 337) on duties of master and servant as to rules promulgated for safe conduct of business.

18 L. R. A. 323, *RUSS v. WABASH WESTERN R. CO.* 112 Mo. 45, 20 S. W. 472.

Who are fellow servants.

Cited in *Donahoe v. Kansas City*, 136 Mo. 670, 38 S. W. 571, holding foreman in charge of gang of men engaged in digging sewer trench not fellow servant of laborer under his charge, though both were engaged in service for municipality; *Haworth v. Kansas City Southern R. Co.* 94 Mo. App. 224, 68 S. W. 111, holding foreman charged with duty of supervising and directing work of track gang not fellow servant because, for a moment, he assists his men in doing particular act; *Keown v. St. Louis R. Co.* 141 Mo. 94, 41 S. W. 926, holding foreman of street railway and grip-man not fellow servants; *Foster v. Missouri P. R. Co.* 115 Mo. 180, 21 S. W. 916, holding roadmaster in charge of gang of laborers engaged in track construction not fellow servants of member of gang; *Bane v. Irwin*, 172 Mo. 317, 72 S. W. 522, holding ground foreman in mine not fellow servant of minor though both have a general superintendent over them.

Cited in footnotes to *Schroeder v. Flint & P. M. R. Co.* 29 L. R. A. 321, which holds boss of gang unloading dirt on railroad fellow servant of member of gang; *Parker v. Hannibal & St. J. R. Co.* 18 L. R. A. 802, which holds track repairer and members of section gang under different management not fellow servants; *Schroeder v. Chicago & A. R. Co.* 18 L. R. A. 827, which holds foreman not fellow servant of man under his orders; *Relyea v. Kansas City, Ft. S. & G. R. Co.* 18 L. R. A. 817, which holds brakeman and firemen on different trains fellow servants; *Dixon v. Chicago & A. R. Co.* 18 L. R. A. 792, which holds laborer working in quarry of railroad company under direction of foreman not fellow servant of employees operating passenger train.

Cited in note (51 L. R. A. 553, 598, 614, 616) on vice principalship considered with reference to superior rank of negligent servant.

Injury inflicted by fellow servant.

Cited in *Card v. Eddy*, 129 Mo. 527, 36 L. R. A. 811, 28 S. W. 979 (dissenting opinion), majority denying railroad company's liability for injury inflicted on employee by another employee who threw weighted message from moving train.

Liability of master for acts of representative.

Approved in *Island Coal Co. v. Swaggerty*, 159 Ind. 668, 65 N. E. 1026, holding master's liability for failure of representative to fully perform delegated duty not confined to negligent orders.

Hypothetical questions.

Cited in *Denver & R. G. R. Co. v. Roller*, 49 L. R. A. 88, 41 C. C. A. 39, 100 Fed. 738, holding not reversible error to permit answers to be made to hypothetical questions based upon facts, existence of which are assumed from evidence already admitted; *Hicks v. Citizens' R. Co.* 124 Mo. 125, 25 L. R. A. 513, 27 S. W. 542, holding hypothetical question propounded to expert witness should be founded upon facts fairly justified by evidence; *Fullerton v. Fordyce*, 144 Mo. 531, 44

S. W. 1053, holding sufficient basis for introduction of opinion evidence of expert witness if facts assumed to exist are justified by evidence already introduced; *Smith v. Chicago & A. R. Co.* 119 Mo. 255, 23 S. W. 784, holding not improper to accept answer of physician, testifying as an expert, to question founded upon facts, assumed from evidence which fairly tends to their proof; *Woodward v. Chicago, M. & St. P. R. Co.* 58 C. C. A. 404, 122 Fed. 68, holding it unnecessary for hypothetical question to state every fact in case; *State v. Dunn*, 179 Mo. 111, 77 S. W. 848, holding that facts tended to be proved by defendant's testimony may be incorporated in hypothetical question.

Waiver of objection to introduction of evidence.

Cited in *Salt Lake City v. Smith*, 43 C. C. A. 650, 104 Fed. 471, holding objection and exception to admission of improper evidence not waived by subsequent introduction of same class of evidence.

Effect of attorney's admission in opening statement.

Cited in *Pratt v. Conway*, 148 Mo. 299, 71 Am. St. Rep. 602, 49 S. W. 1028, holding ownership to note conceded, by admission of counsel in opening statement, cannot be controverted; *Fillingham v. St. Louis Transit Co.* 102 Mo. App. 579, 77 S. W. 314, denying right to nonsuit on admissions in opening statement of counsel.

18 L. R. A. 827, *SCHROEDER v. CHICAGO & A. R. CO.* 108 Mo. 322, 18 S. W. 1094.

Right to have jury pass upon evidence.

Cited in *Lane v. Missouri P. R. Co.* 132 Mo. 32, 33 S. W. 645, holding question of credibility of evidence tending to establish contributory negligence one for jury to determine; *Seehorn v. American Nat. Bank*, 148 Mo. 265, 49 S. W. 886, holding though fact is prima facie established by one having burden of proof, and no evidence is introduced contradictory thereto, defendant is entitled to have jury pass upon evidence; *Clark v. Shrimski*, 77 Mo. App. 172, holding question of credibility of witness testifying to establish guilt of one charged with burglary one for jury to determine; *Adams County Bank v. Hainline*, 67 Mo. App. 488, holding, even in absence of contradictory evidence, party litigant has right to have jury pass upon credibility of evidence; *Horner v. Missouri P. R. Co.* 70 Mo. App. 294, holding question of character of assignment made, one for jury to determine even though there was no contradictory evidence introduced; *Kenney v. Kansas City, P. & G. R. Co.* 79 Mo. 207, holding, though prima facie case is made out against defendant, he is entitled to have jury pass upon credibility of evidence introduced by plaintiff; *Church v. Chicago & A. R. Co.* 119 Mo. 222, 23 S. W. 1056, separate opinion by Barclay, J., who holds even though party having burden of proof introduces evidence establishing fact alleged, credibility of evidence, though uncontradicted, should be submitted to jury.

Fact as basis of instruction.

Cited in *Fahy v. Gordon*, 133 Mo. 425, 34 S. W. 881, holding instruction may properly be based on fact essential to plaintiff's case drawn out by defendant in his evidence and uncontradicted.

Master's liability for negligent injury.

Cited in *Hough v. Grants Pass Power Co.* 41 Or. 541, 69 Pac. 655, holding master not relieved from liability for death of servant resulting from negligence

caused by fellow workman failing to perform duty which master owed personally to servant; *Jackson v. Norfolk & W. R. Co.* 43 W. Va. 401, 46 L. R. A. 356, 27 S. E. 278 (dissenting opinion), as to master's liability for negligence in performance of nonassignable duty; *Flannegan v. Chesapeake & O. R. Co.* 40 W. Va. 440, 52 Am. St. Rep. 896, 21 S. E. 1028, holding master bound to nonassignable duty to establish and enforce proper rules and regulations governing servants, failure of which renders master liable for injuries to servant resulting from such neglect; *Bloyd v. St. Louis & S. F. R. Co.* 58 Ark. 72, 41 Am. St. Rep. 85, 22 S. W. 1089, holding master liable for injuries to servant resulting from negligence of master or vice principal in directing work servant engaged in when injured.

Who are fellow servants.

Cited in *Haney v. Pittsburgh, C. C. & St. L. R. Co.* 38 W. Va. 580, 18 S. E. 748, holding section hand riding on work train and conductor thereof not fellow servants within rule relieving master of both from liability for negligent injury to section hand.

Cited in footnotes to *Dixon v. Chicago & A. R. Co.* 18 L. R. A. 792, which holds laborer working in quarry of railroad company under direction of foreman not fellow servant of employees operating passenger train; *Parker v. Hannibal & St. J. R. Co.* 18 L. R. A. 802, which hold track repairer and members of section gang under different management not fellow servants; *Schroeder v. Flint & P. M. R. Co.* 29 L. R. A. 321, which holds boss of gang unloading dirt on railroad fellow servant of member of gang; *Relyea v. Kansas City, Ft. S. & G. R. Co.* 18 L. R. A. 817, which holds brakemen and firemen on different trains fellow servants; *Russ v. Wabash Western R. Co.* 18 L. R. A. 823, which holds foreman of section gang not fellow servant of members of gang.

Cited in note (51 L. R. A. 546, 553, 591, 615) on vice principalship considered with reference to superior rank of negligent servant.

Injury of servant in obeying master's command.

Cited in note (48 L. R. A. 757, 758, 765) on servant's right of action for injuries received in obeying direct command.

Risks of employment.

Cited in *Nickel v. Columbia Paper Stock Co.* 95 Mo. App. 231, 68 S. W. 955, holding paper assorter not presumed to have assumed extraordinary risk from poisonous waste matter from hospital.

Incurring danger to save life.

Cited in note (49 L. R. A. 715, 718) on voluntarily incurring danger to save life of another person as contributory negligence.

18 L. R. A. 832, *STEVENS v. ST. MARY'S TRAINING SCHOOL*, 144 Ill. 336, 36 Am. St. Rep. 438, 32 N. E. 962.

Judicial interference with legislative or administrative body.

Cited in *Lewis v. Denver City Waterworks Co.* 19 Colo. 239, 41 Am. St. Rep. 248, 34 Pac. 993, holding board of trustees of municipality when acting in legislative capacity, immune from judicial interference; *State ex rel. Rose v. Superior Court*, 105 Wis. 677, 48 L. R. A. 829, 81 N. W. 1046, and *Adams v. Brennan*, 177 Ill. 198, 42 L. R. A. 720, 69 Am. St. Rep. 222, 52 N. E. 314, holding equity has power to restrain unlawful execution of power vested in corporate body created to administer public trust; *Seward v. Liberty*, 142 Ind. 552, 42 N. E. 39, holding

powers of judiciary do not extend to interfering with discretionary powers vested by law in municipal corporations; *Tebbetts v. People*, 31 Colo. 468, 73 Pac. 869, holding court without power to enjoin passage of ordinance on ground that it is impolitic; *Sherburne v. Portsmouth*, 72 N. H. 540, 58 Atl. 38, upholding power of court to enjoin city council from authorizing building of base ball park on common.

Unauthorized acts of public officers.

Cited in *Snyder v. Mt. Pulaski*, 176 Ill. 403, 44 L. R. A. 409, 52 N. E. 62, holding municipality, not estopped from revoking unauthorized act; *Hibbard v. Chicago*, 173 Ill. 99, 40 L. R. A. 623, 50 N. E. 256, holding license to erect permanent awning in street, granted without authority, revocable; *State ex rel. Scott v. Hart*, 144 Ind. 109, 33 L. R. A. 120, 43 N. E. 7, holding unlawful action of county commissioners in leasing rooms to individual for private use, not binding upon county.

18 L. R. A. 838, *STATE v. CALHOUN*, 50 Kan. 523, 34 Am. St. Rep. 141, 32 Pac. 38.

Writ of error coram nobis.

Cited in *Dobbs v. State*, 62 Kan. 109, 61 Pac. 408, holding writ of error *coram nobis* proper remedy by one convicted of crime to secure new trial as against state; *Howard v. State*, 58 Ark. 232, 24 S. W. 8, holding writ of *coram nobis* will not be sustained in favor of one convicted of crime on ground of newly discovered evidence after time for new trial has expired; *Asbell v. State*, 62 Kan. 212, 61 Pac. 690, recognizing right to common-law writ of error *coram nobis* in proper case, but holding it to be supplementary to and not exclusive of Code provision for correction of error in criminal cause; *Collins v. State*, 66 Kan. 202, 60 L. R. A. 574, footnote p. 572, 97 Am. St. Rep. 361, 71 Pac. 251, denying right to writ from inability to prepare record on appeal within statutory period; *Hamlin v. State*, 67 Kan. 727, 74 Pac. 242, holding writ not available because of discovery that jurors swore falsely on their *voir dire*.

Cited in footnote to *Withrow v. Smithson*, 19 L. R. A. 762, which holds writ of error *coram nobis* not proper for reversing judgment against insane person.

— Statute of limitation.

Cited in *Dobbs v. State*, 63 Kan. 326, 65 Pac. 658, holding Statute of Limitations does not run against application for writ of *coram nobis*.

Suit against state.

Distinguished in *Asbell v. State*, 60 Kan. 56, 55 Pac. 338, holding state not subject to summons and suit at instance of individual to set aside verdict and judgment rendered against him in criminal cause.

Privileged communication to attorney.

Cited in footnotes to *Koeber v. Somers*, 52 L. R. A. 512, which holds conversation authorizing attorney to compromise action not privileged; *Bruley v. Garvin*, 48 L. R. A. 839, which holds conversation with attorney in reference to contemplated law suit privileged, although attorney not retained.

18 L. R. A. 845, *MASON v. RICHMOND & D. R. CO.* 111 N. C. 482, 16 S. E. 698.

Obligation of railroad to inspect foreign cars.

Cited in *Leak v. Carolina C. R. Co.* 124 N. C. 457, 32 S. E. 884, holding fact

that defective stirrup was on foreign car, no defense to action for resulting injury.

Cited in note (41 L. R. A. 103, 139) on duty as to inspection of cars and engines.

Duty of master to provide safe appliances.

Cited in *Troxler v. Southern R. Co.* 124 N. C. 191, 44 L. R. A. 314, 70 Am. St. Rep. 580, 32 S. E. 550, holding failure of company to equip cars with automatic couplers negligence *per se*, entitling brakeman to recover for injuries sustained while in act of making coupling; *Greenlee v. Southern R. Co.* 122 N. C. 978, 41 L. R. A. 400, 65 Am. St. Rep. 734, 30 S. E. 115, holding railroad liable for injuries to brakeman due to failure to have cars properly equipped with automatic couplers; *Chesson v. John L. Roper Lumber Co.* 118 N. C. 66, 23 S. E. 925, holding it duty of master to provide safe ways or appliances and to inspect same that dangerous defects may be remedied, saving servants from injury; *Elmore v. Seaboard Air Line R. Co.* 132 N. C. 878, 44 S. E. 620, Reversing on rehearing, 131 N. C. 579, 42 S. E. 989, holding railroad company liable for injury to brakeman using foot to kick bumper in place because of defective coupling appliance; *Williams v. Southern R. Co.* 119 N. C. 749, 26 S. E. 32, holding it question for jury whether master used due diligence to prevent rope used in hoisting logs from slipping.

Obedience to orders.

Cited in *Williams v. Southern R. Co.* 119 N. C. 749, 26 S. E. 32, holding act of servant otherwise negligent not so if done suddenly under command of his master's representative; *Shadd v. Georgia, C. & N. R. Co.* 116 N. C. 970, 21 S. E. 554, holding brakeman entitled to recover for personal injuries received while coupling cars under orders of conductor; *Fleming v. Southern R. Co.* 132 N. C. 719, 44 S. E. 551 (dissenting opinion) as to whether instruction as to waiver of rules of railroad company by conductor and one as to effect of fellow servant law constitute only one instruction.

Cited in notes (48 L. R. A. 760, 765, 766) on servant's right of action for injuries received in obeying direct command; (47 L. R. A. 189) on fact that servant's motive for obedience was fear of dismissal; (24 L. R. A. 660) on disobedience of master's rules as contributory negligence.

Distinguished in *Richmond & D. R. Co. v. Finley*, 12 C. C. A. 598, 25 U. S. App. 16, 63 Fed. 231, holding master not liable for injuries to brakeman received while making coupling of cars in violation of express order of master that brakeman should couple cars with stick, and under no circumstances go between cars when engine is attached.

Judicial notice.

Followed in *Mason v. Richmond & D. R. Co.* 114 N. C. 721, 19 S. E. 362, second appeal, holding court will take judicial notice of relation of conductor and brakeman of train.

Burden of proof.

Cited in note (41 L. R. A. 150) on burden of proving employer's knowledge of danger to which servant was exposed.

Who are fellow servants.

Cited in *Means v. Carolina C. R. Co.* 126 N. C. 429, 35 S. E. 813, holding engineer in charge of train discharging additional duties of conductor not fellow

servant of brakeman; *Ward v. Odell Mfg. Co.* 126 N. C. 954, 36 S. E. 194, holding boy engaged in carrying quills in spinning mill and boss of looms not fellow servants; *Turner v. Goldsboro Lumber Co.* 119 N. C. 397, 26 S. E. 23, holding common laborer and foreman of planing mill not fellow servants; *Purcell v. Southern R. Co.* 119 N. C. 737, 26 S. E. 161, holding conductor in charge of freight train and brakeman not fellow servants; *Lamb v. Littman*, 132 N. C. 980, 44 S. E. 646, holding boss of spinning room not fellow servant of ten-year old boy floor sweeper.

Cited in notes (46 L. R. A. 352) as to when conductor is deemed to be coservant of other railway employees; (51 L. R. A. 551, 618) on vice principalship considered with reference to superior rank of negligent servant.

Distinguished in *Pleasants v. Raleigh & A. Air Line R. Co.* 121 N. C. 496, 61 Am. St. Rep. 674, 28 S. E. 267, holding conductor and engineer of independent trains not fellow servants; *Wright v. Southern R. Co.* 80 Fed. 261, holding conductor and engineer of passenger train fellow servants of track hand riding on hand car with which train collides.

Right to discharge as affecting liability.

Approved in *Bryan v. Southern R. Co.* 128 N. C. 390, 38 S. E. 914, holding master not liable for negligence of "boss" whereby employee whom he had no right to discharge is injured.

Negligence per se.

Cited in *Witsell v. West Asheville & S. S. R. Co.* 120 N. C. 560, 27 S. E. 125, holding it negligence *per se* for carrier to use transportation appliances which ordinary inspection would show to be defective.

Contributory negligence.

Cited in *Russell v. Monroe*, 116 N. C. 728, 47 Am. St. Rep. 823, 21 S. E. 550, holding, in absence of contributory negligence of pedestrian, municipality liable for leaving street in dangerous condition.

18 L. R. A. 850, *BOARD OF EDUCATION v. BLADEN COUNTY*, 111 N. C. 578, 16 S. E. 621.

Poll or highway taxes.

Cited in *Board of Education v. Bladen Comrs.* 113 N. C. 385, 18 S. E. 661, holding unconstitutional, special levy of poll tax for school purposes in excess of constitutional amount.

Cited in note (29 L. R. A. 407) on poll taxes.

Distinguished in *Hornthall v. Washington County*, 126 N. C. 32, 35 S. E. 191, dissenting opinion per Furches, J., majority denying right to recover on contract for repairing public highways of county any sum in excess of tax permitted to be levied.

18 L. R. A. 855, *Re TAYLOR*, 154 Pa. 183, 25 Atl. 1061.

Competency of witness as to gift causa mortis.

Cited in *Conway's Estate*, 18 Lanc. L. Rev. 140, holding one to whom bonds are given as a gift *causa mortis* for the benefit of a certain church is a competent witness.

Equitable assignment.

Cited in *Penn Iron Co. v. Lancaster*, 14 Lanc. L. Rev. 180, holding order drawn

for full amount of particular fund constitutes valid equitable assignment; *Adam's Estate*, 24 Pa. Co. Ct. 447, holding request by depositor just before his death to cashier of bank to take care of note coming due, not an equitable assignment.

Gifts.

Cited in *Conway's Estate*, 18 Lanc. L. Rev. 135, holding delivery of order for bonds made the subject of gift *causa mortis* fully executes gift.

Cited in footnotes to *Picksley v. Starr*, 32 L. R. A. 703, which sustains Christmas gift by check to employee according to habit as against subsequent claim of forgetfulness of increase of salary; *Re Wagoner*, 32 L. R. A. 766, which holds valid, bond with warrant of attorney to be delivered on donor's death.

Cited in note (19 L. R. A. 700) on delivery of bank book to sustain gift of money in bank.

18 L. R. A. 859, *BERNARD v. TAYLOR*, 23 Or. 416, 37 Am. St. Rep. 693, 31 Pac. 968.

Wagering contracts.

Cited in footnotes to *Specht v. Beindorff*, 42 L. R. A. 429, which holds void, note payable if maker elected to certain office; *Hankins v. Ottinger*, 40 L. R. A. 76, which upholds agreement between owners to divide premiums and stake moneys offered by racing associations; *Rich v. State*, 38 L. R. A. 719, which holds putting up money as forfeit on agreement to put up larger sum put up by other party, not bet.

Conspiracy as preventing relief between partners.

Cited in footnotes to *Morrison v. Bennett*, 40 L. R. A. 159, which holds partnership for horse racing on bet with one deceived by partners into believing horse untrained, conspiracy preventing relief between partners.

Validity of illegal contract as between parties.

Approved in *Bradtfeldt v. Cooke*, 27 Or. 199, 50 Am. St. Rep. 701, 40 Pac. 1, holding mortgage made to defraud mortgagor's creditors valid between the parties thereto when there is a consideration to support it.

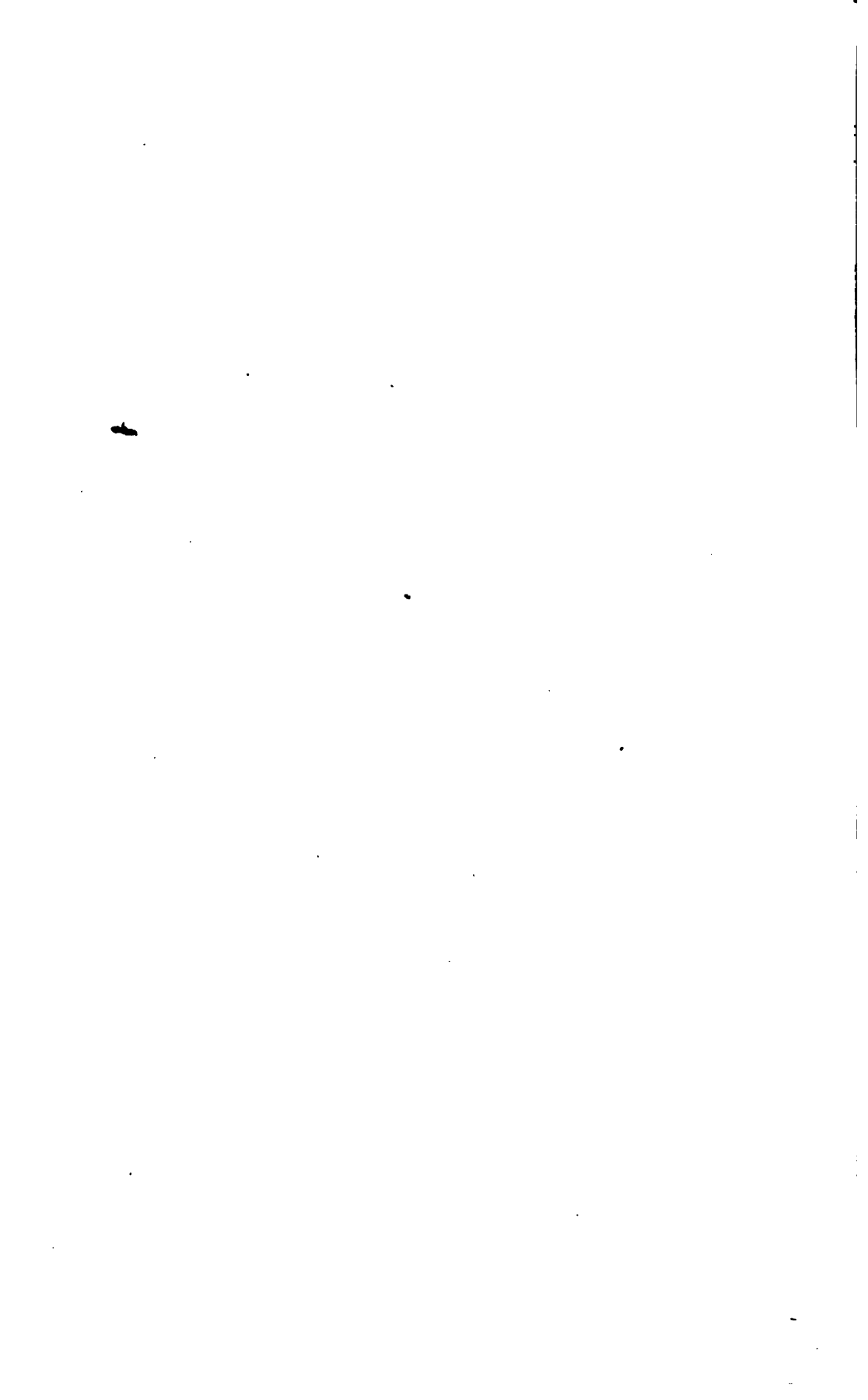
Recovery of money wagered or paid on illegal contract.

Cited in *Snyder v. Nelson*, 101 Ill. App. 622, holding money paid to stakeholder as bet on foot race may be demanded back before race takes place; *Ferguson v. Yunt*, 13 S. D. 124, 82 N. W. 509, holding that money deposited with stakeholder as wager on horse race may be demanded back before race takes place; *Stansfield v. Kunz*, 62 Kan. 801, 64 Pac. 614, holding that illegal contract to sell intoxicating liquor may be rescinded before execution and that money paid thereon may be recovered; *Saunders v. Phelps Co.* 53 S. C. 177, 31 S. E. 54, holding that money paid to broker to be used in gambling in cotton futures may be recovered back before illegal contract is consummated, *Dauler v. Hartley*, 178 Pa. 29, 35 Atl. 857, holding money paid to broker agent to be used in wagering contracts recoverable by principal before execution of contract.

Cited in footnote to *Ullman v. St. Louis Fair Asso.* 56 L. R. A. 606, which denies right to abandon partly executed illegal bookmaking contract for specified period, and recover back *pro rata* amount of money paid.

J







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